

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(
(Metro-North Commuter Railroad Company
(Consolidated Rail Corporation)

Dispute: Claim of Employees:

1. That under the current Agreement, the Consolidated Rail Corporation (Conrail) unjustly dismissed Groundman G. Heady from service effective October 5, 1982.
2. That accordingly, the Metro-North Commuter Railroad Company, be ordered to restore Groundman G. Heady to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service at the applicable Groundman's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, G. Heady, was employed as a Groundman at Mott Haven, New York. His absences on February 18, 22, 25, and March 5, 8, 9, 1982 led to an investigation in which he was charged with, in relation to his past absences, excessive absenteeism.

The investigation was initially scheduled for March 15, 1982. At the investigation it was determined that Claimant was not going to appear, so the investigation was rescheduled for April 2. This date was postponed and the investigation was rescheduled for August 16. This date was again postponed for September 23. Proper notice was sent to Claimant on all of these occasions. On the date of September 23 Claimant once again did not appear. His Organization asked for another postponement which was denied by the Carrier. The hearing was held in absentia and it was established that Claimant had missed the cited dates. Based upon the fact that Claimant had missed a total of 74 days between the first of 1982 and the date of the trial and had missed a total of 142 days in the year of 1981, the Investigating Officer held that the charges had been proved and he dismissed Claimant from the service of Carrier.

Claimant is stated to have failed to comply with Rule 8-1-2 of the Agreement between the Organization and the Carrier. That Rule states:

"An employee unable to report for work or detained from work for any cause must notify his shop or work location as soon as possible."

At the investigation the Supervisor of Claimant testified. After submitting into evidence the work record of Claimant, he spoke to his knowledge of the absences. He stated:

"Q. At this time, have you been notified as to the reason for Mr. Heady's absence?

A. Never called.

Q. Did you have occasion, subsequent to these dates mentioned on the G-250, to question Mr. Heady regarding his absence?

A. I haven't spoken to Mr. Heady in 1982.

Q. Why is that, sir?

A. Never called, never heard from him. We called, and we get no answer."

There can be no doubt that Claimant was in violation of the cited Rule.

Several procedural issues are raised by Claimant. He asserts that his absence at the investigation and subsequent inability to question the witnesses called by the Carrier denied him the right to a fair and impartial investigation guaranteed to him under the terms of the Collective Bargaining Agreement. It is undisputed that he has the right to a fair and impartial investigation which includes the right to be present at the investigation and to examine and cross-examine witnesses. However, a clear distinction must be made of a right and the exercise of that right. Claimant has obviously slept on his rights through several proposed investigations and one actual investigation. The Carrier granted a postponement, without knowledge of the reasons for so doing, on three separate occasions before ultimately holding the investigation.

Justifiable absences, properly documented, must be permitted by the Carrier although much inconvenience may result. However, unjustified absences place the same burdens on the Carrier and need not be condoned without some corrective measures being administered. Some Awards hold that excessive absences of an employee, although supported by medical documentation, need not be tolerated. See for example, P.L.B. No. 1790, Award No. 117. In this instance there is no evidence that Claimant furnished the Carrier any evidence concerning his extensive record of absence.

Investigations held in absentia are the least desirable of all methods of conducting investigation and should only be resorted to when the Carrier has sufficient reason for holding it. Claimant argues that the letter of postponement dated March 29, 1982 negates any reason for holding such an investigation. That letter stated, in pertinent part:

"Your hearing originally scheduled to be held on Monday, March 15, 1982...has again been postponed due to your disability, ..." (emphasis added)

No evidence was developed in the correspondence or the investigation concerning any disability. The mention of disability connotes that the Carrier had some reason to believe that Claimant had some lack of ability to attend the investigation which had been scheduled for March 15. No mention of any disability is made in any subsequent correspondence concerning further postponements. If Claimant had an acceptable reason, physical or otherwise, that would justify continued postponements, it was incumbent upon him to furnish the Investigating Officer or, at a minimum, his representative some evidence to justify further postponement. Some vague reference to a disability in Carrier correspondence cannot be the foundation for continual delay of the investigation.

The Exhibit furnished by the Carrier and introduced by the Supervisor at the investigation showed that from the first of the year, 1982, Claimant had been off numerous days for personal business until February 8. From that time forward, until June 2, the end of the Exhibit, Claimant had been marked off as "sick". Whether he was actually ill is unknown. However, in the face of a formal inquiry into his absences, it was incumbent on him to furnish proof of illness. This he has not done.

The Investigating Officer was faced with the alternative of another postponement or going forth with the investigation without the presence of the Claimant. Nothing in the history of the investigation would suggest that further delay would do anything other than to beget more delay. If the Carrier is compelled to postpone an investigation for no justifiable reason, the timing of the investigation is placed in the hands of the Claimant. Such a result would go against well established principles that vest the timing of an investigation either within the mandates of the Agreement or in the hands of the Carrier. The Investigating Officer was within his rights to proceed in this instance and all rights lost by the Claimant were due to his own neglect.

A certain number of unexcused absences may lead to action by the Carrier far less severe than dismissal. However the pattern of Claimant in missing considerably more days than he works with no assurance that this pattern of conduct is likely to change, exceeds the bounds of tolerability required of a Carrier. There comes a time when an employer is justified in ridding itself of an employee who has demonstrated that he will not or cannot meet the standard established for the work force. In this case that time has come.

The Carrier was justified in holding the investigation in absentia and the charges were proved.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of June 1985.