Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11561
SECOND DIVISION Docket No. 11408
88-2-87-2-44

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

1. That, the Carrier improperly dismissed Machinist V. J. Revers (hereinafter referred to as Claimant) from service on June 30, 1986, due to the alleged violation of Carrier General Rules 604 and 810.

2. That, accordingly, Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired, with compensation for all wage loss.

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, a Machinist, has a service date of September 19, 1977. As a result of charges dated May 29, 1986, hearing eventually held in abstentia on June 24, 1986, and by letter dated June 30, 1986, Claimant was dismissed from service for violation of Carrier's General Rules 604 and 810 in that he failed to protect his employment after being recalled from furlough.

In January 1986, Claimant was recalled to duty from furlough. As a part of the recall, Claimant was required to take a physical examination. As evidenced by memo dated January 29, 1986, from the Carrier's Chief Medical Officer, Claimant passed the physical and was cleared to return to work. However, Claimant did not thereafter report for duty. No action was taken by the Carrier until May 29, 1986, when the instant charges were issued.

With respect to further notification to Claimant after he took the physical, at the Hearing, the General Foreman testified concerning whether the memo from the Chief Medical Officer was sent to Claimant:

> "I don't know if those are sent to the person. Normally they come to us, and I think we telephone them and tell them that you have been 'okayed' to return to work."

With respect to whether Claimant was actually called, the General Foreman testified:

> "MR. GIVENS: Do you know if Vince Revers was ever telephoned to be 'okeyed' back to work?
> MR. FRETWELL: I would assume that he was, but I don't know who called him. Normally, the Assistant Chief Clerk, which at that time would have been Bonnie Buechner, would have been the one who called him and told him; that's standard procedure for her to do this."

On the basis of this record, we find that holding the Hearing in abstentia was not in error. Claimant signed for the May 29, 1986, letter of charges thereby indicating that he was made aware of the allegations in this case. Because Claimant did not sign for the letter until after the initially scheduled Hearing set for June 5, 1986, the Carrier issued a second letter dated June 11, 1986, setting a rescheduled Hearing for June 24, 1986. That letter was sent to Claimant's address and signed for by a Helen Wick on June 16, 1986. Further, on June 19, 1986, the General Foreman went to Claimant's house to personally deliver notification of the Hearing. However, Claimant was not at home. The General Foreman spoke to a woman assumed to be Claimant's wife and told her who he was and that he had a letter for Claimant. Under the circumstances, we are satisfied that the Carrier took sufficient steps under Rule 39 to give Claimant notice of the charges and Hearings. Several notifications were sent to Claimant's last known address and personal delivery was attempted. Claimant did not respond to any of the deliveries. Therefore, proceeding with the Hearing in abstentia when Claimant did not appear on June 24, 1986, was not in error and Claimant's non-appearance at the Hearing must be considered to be at his peril. See e.g., Third Division Award 20768.

The unrefuted record shows that Claimant was recalled from furlough; in accord with the recall took and passed a physical examination and on January 29, 1986, was medically cleared for return to duty. According to the General Foreman's undisputed testimony, to his knowledge, it is standard procedure for the Assistant Chief Clerk to call the employee and notify the employee of the passing of the examinations. Since that evidence was not refuted in the record, we have no choice but to conclude that substantial

evidence exists to find that the procedure was followed in this case. In making this determination, we do not consider the letter of June 18, 1987, from B. Buechner which was attached to the Carrier's submission. That letter was not part of the on-property handling and therefore is not properly before us. Thereafter, Claimant did not report for duty. Therefore, on the basis of the unrefuted record and the evidence properly before us, we are satisfied that the Carrier has established by substantial evidence that Claimant did not report for duty after being notified that he passed his physical examination and therefore did not protect his employment within the meaning of the cited rules.

However, although we find substantial evidence in the record to support the Carrier's conclusion that a rule violation occurred, we believe under the particular circumstances of this case that dismissal was excessive. First, we must again return to the General Foreman's testimony. He could only "assume" that Claimant was contacted after the physical examination in accord with previous practice. He did not know when or under what circumstances such a contact was made. To justify a dismissal in this case, we believe more of a showing concerning the timing and the nature of the contact is necessary. Second, we cannot say that Claimant was disinterested in protecting his employment. The fact that Claimant took the physical examination after being notified of the recall shows the opposite. Considering those factors, we believe that Claimant should be returned to service. By the same token, we do not believe that Claimant should be compensated for time lost. The record is devoid of any evidence of actions taken by Claimant after taking the physical examination to follow up on his recall. Accepting Claimant's position for the sake of argument that he was not contacted, nevertheless, one would expect that after not hearing anything further after taking the physical, Claimant would have done something in terms of inquiry or further follow up concerning his status. This record evidences no such action.

We shall therefore require that Claimant be returned to service with seniority unimpaired but without compensation for time lost.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1988.