

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYEES**

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL 6802) that:

1. Carrier violated current Clerks' Agreement when it refused to permit Yard Clerk J. R. Murphy, Willard, Ohio, to return to Carrier's service following a period of illness, and
2. That Carrier further violated said Agreement when it unjustly dismissed Yard Clerk J. R. Murphy from service, and
3. That Yard Clerk Murphy shall now be paid one day on July 10, 1967 and one day each working day thereafter at the rate of \$24.09 per day plus all subsequent increases applicable to his position until he is restored to service with all rights unimpaired including retroactive payments to the Travelers Insurance Company for that period of time during which no such payments were made.

OPINION OF BOARD: Claimant was employed as a Yard Clerk. On March 1, 1968 he was notified to report at the office of the Terminal Trainmaster at 1:30 P. M., March 7, 1968 for hearing: "To determine your responsibility, if any, for being absent from duty without permission beginning February 23, 1967." Hearing was duly held at which Claimant had representation in accord with Agreement rule. Thereafter Claimant was held to have been guilty of the charge and was dismissed from service with the notice of dismissal reading:

"This is to notify you that because of your having been voluntarily unexplained absence from duty since February 20, 1967 and because of your conduct during that absence, admitted being sentenced to serve time at the Seneca County Jail on charge of contributing, abuse of a child, you are dismissed."

In appealing the dismissal the Petitioner contends that the Agreement was violated by reason of the notice not containing precise charge; that the notice of dismissal was issued by an official other than the hearing officer; and that the Carrier failed to prove the charge.

As to the first contention of Petitioner we find that the notice was adequate in that it informed the Claimant of the time, date and location of the hearing and advised him of the dereliction with which he was charged so that he was aware of the matter to be investigated and enabled to prepare his defense. Additionally, exception to the charge was not taken prior to or at the beginning of the investigation. Awards 17998, 17738, 17241, 16170.

The second contention of Petitioner must likewise be rejected for the reason that nothing in the Agreement provides that the official signing the discipline form must be present at the investigation. Awards 17965, 17532, 17091, 16602, 16347, 14021.

The third contention of Petitioner is that Carrier failed to sustain its burden of proving the charge for which the Claimant was dismissed. We have carefully reviewed the transcript of the hearing and concur with Petitioner that Carrier failed to prove with substantial evidence that Petitioner was guilty of the charge for which he was dismissed.

The transcript and the record indicate conclusively that Claimant has been absent from duty due to illness and that he has been unable to satisfactorily pass medical examination by Carrier doctors. Accordingly, Paragraph 1 of the Claim must be denied.

We do find the Agreement was violated when the Carrier dismissed Claimant from the service without substantial evidence and Paragraph 2 of the Claim will be sustained.

In view of Claimant's illness we cannot restore him to service nor can we allow compensation and other benefits as requested in Paragraph 3 of the Claim. We do, however, order that his record be cleared of the charge and that his name be restored to the seniority roster so that he may return to service at such time as he is qualified by Carrier's Medical Department.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated to the extent indicated in the Opinion.

AWARD

Paragraph 1 of the Claim is denied. Paragraph 2 of the Claim is sustained. Paragraph 3 is denied except to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1970.

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