

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20407
Docket Number MW-20415

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(Missouri-Kansas-Texas Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that :

(1) The suspension of Extra Gang Laborer C. E. Oliver for thirty days for alleged "violation of **portion** of Rule 1 and also portion of paragraph **E** of circular DP-1" was without just and **sufficient** cause and on the basis of unproven charges. (System File 400-174/2579-23)

(2) The claimant's record be cleared and payment for loss of **earnings** be made, all in accordance with Article 23, Rule 6.

OPINION OF BOARD: The Claimant **was** absent from work on Monday, October 16, 1972. Subsequently, a hearing was held on the charge of violating **Rule 1, Rules** for the **Maintenance** of Way and Structures, effective May 1, 1947, which states that: "Employees must not absent themselves from duty without permission." After hearing and findings of guilt, the Claimant was disciplined thirty calendar days actual suspension for an unexcused absence from work.

The **Employees** contend that the Carrier's action was arbitrary, in that the **Claimant's** hearing evidence made a valid defense of **excusable** absence due to **illness**. **Specifically**, the **Employees** rely upon the exception in Rule 4, **Article 7**, of the Agreement, which permits a temporary absence caused by illness without prior permission, so long as the involved employee notifies his foreman or supervisor as soon as practicable. We have no doubt that, where a conflict arises, the exception in the agreement is paramount to the **Rules for Maintenance** of Way and Structures, so the question before us is whether the **Claimant** made a case under the exception.

The Claimant's hearing testimony was that he was ill on **Sunday**, but **tried** to phone his **Foreman** whose number was unlisted; that he was so ill on Monday that he could not phone that day; and that he notified his Foreman of the illness when he **reported for work on Tuesday**. One thrust of the Carrier's case was that the Claimant could have called on Sunday or Monday; the Carrier also noted that the Claimant had received a May 24, 1972 letter warning that disciplinary action would be forthcoming for continued absences without permission. But the critical part of the Carrier's case came from the **Foreman**. He said that when the Claimant reported for work on Tuesday, the Claimant **gave** the fact of being "broke" as the reason for the **Monday** absence and that the Claimant said nothing about having been sick.

On these facts the Carrier determined guilt, obviously resolving adversely the credibility issue which arose between the Claimant and the Foreman on the fact of illness. The official who heard the testimony did not render the decision, however, and the Employees cite Awards for the proposition that this makes the Carrier's action reversible on due process grounds. Award Nos. 13180, 17156, 17901, et al. We agree with the rationale of these Awards to the extent that the hearing officer should resolve the credibility issues in cases involving many witnesses, complex evidence, or other similar elements; we also believe that the better procedure for Carrier to follow would be one which requires the hearing officer to resolve such issues in all instances. However, a great many Board Awards run counter to the Awards cited by the Employees and, in addition, the hearing record here contains the testimony of only two witnesses, the Claimant and the Foreman. We therefore find no basis finding a due process defect in this case. Accordingly, and on the whole record, we conclude that the Carrier's action is supported by substantial evidence and we shall deny the claim.

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

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

The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.