

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. Pauls
Executive Secretary

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