

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24749
Docket Number SG-25138

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (**Brotherhood** of Railroad Signalmen
(Consolidated Rail Corporation

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation:

System Docket 1640

Appeal dismissal of **J. W. Ferneding**

OPINION OF BOARD: On March 6, 1981, carrier notified claimant to attend a hearing on March 19, 1981 on the following charges:

"Charge I. That you made a false entry in your C&S 4 concerning an accident in which Company vehicle **A1602H** was damaged during your tour of duty (**3:30 PM - 11:30 PM**) on February 19, 1981.

Charge II. That you entered false information in the accident **report(s)** which you subsequently filed concerning damage to Company vehicle **A1602H** on February 19, 1981.

Charge III. Your involvement resulting in damage to Company vehicle **A1602H** which occurred during your tour of duty (**3:30PM - 11:30 PM**) on February 19, 1981, as maintainer at Sharon **Yard.**"

Carrier raises a procedural point in challenging the claim as not sufficiently definite to qualify for consideration. It is contended the claim fails to describe the nature of **the** dispute and does not ask for remedy of relief. On consideration of this point the Board recognizes that the claim is simply stated as an appeal of the dismissal of **J. W. Ferneding**. However, there was **no doubt** on either side during the handling of the dispute on the property as to the position of the Brotherhood.

It consistently **insisted** throughout, that **the dismissal** action was excessive, and sought claimant's reinstatement. There was nothing hypothetical, general **or** speculative in its approach to **settlement of** the grievance. If there should **be** any **further** doubt as to the validity of the claim it is **removed** by the fact that during the appeal of the case to the Senior Director, **Labor Relations**, the highest officer of the carrier authorized to handle such disputes, **an** offer of reinstatement was made. **While** such **an** offer does not serve to prejudice carrier position it illustrates that the dispute was progressed on merit during the appeals process and was not rejected on **procedural** grounds.

The hearing date, **originally** set for March 19, 1981, **was** postponed, rescheduled for **April** 23, 1981, and postponed again until May 7, 1981. During that period, Local Chairman McClure made the following request to claimant's Supervisor:

"We would like to request a postponement until Mr. Femeding is able to **return** to work from his illness. At which time you will be notified."

Reply to his request was not made by the Supervisor but, instead was issued **over** the signature of J. R. **Mangus**, Assistant Division **Superintendent**. The reply was dated March 23, 1981 and is quoted in part as follows:

"Your hearing • ** has been postponed, per request of your Local Chairman, T. M. McClure, account of your inability to attend on the date scheduled.

No date and time has been scheduled as of this date. You will be notified of rescheduled date **and** time when you are able to **return** to duty.'

Despite the **above** statement, that hearing would be rescheduled **when** claimant was able to return to duty, such was not done. Instead, Mr. **Mangus** notified claimant on April 16 that the hearing date was reset for May 7. **Mr. Hendershot**, claimant's supervisor testified during the hearing which was held on May 7, that he **knew** of the statement that hearing would be postponed until claimant was able to return to work. Coupled with this is a statement dated **March** 10, 1981 by Michael A. Gureasko, M.D. stating that Mr. Ferneding was under his care **"for** a nervous condition which prevented him from working. At this time I cannot determine when he **will** be ready to resume work."

The hearing was held (in absentia) on May 7 as rescheduled. Claimant was represented by Local **Chairman** McClure. At the outset he objected to holding the hearing in absentia, stating claimant's attorney had called the previous evening requesting a **postponement**. The carrier officer in **charge** **declined** the request and proceeded to hold the hearing in absentia. **Mr. Femeding** was still not working as of the date of the bearing. Carrier dismissal notice was issued on flay 18, 1981.

The claim was handled through the usual appeal **channels** required by law. Claimant's guilt of the charges was admitted by the Organization and appeal was on the grounds dismissal was excessive. During the appeals process which continued until February 1983, no further objection was raised by the union as to the hearing being held in absentia **or** on the matter of **postponements**.

It is noted that **J. R. Walsh**, Senior Director-Labor Relations, by letter of June.28, 1982, acting on appeal by General Chairman **Britcher**, proposed to return claimant to service subject to the following conditions:

- "1. Restoration is to be on a leniency basis, ie., no pay for **lost** time and no further appeal is to be made.
2. The appellant will undergo a thorough return to service physical examination and pass same before being allowed to return to service.
3. The appellant, if he passes the physical examination, will be interviewed by the Superintendent before returning to service.
4. If returned to service, the appellant shall be restricted to jobs **in** which he will be working **with** a **Foreman** or some supervision, but **not** alone."

The above offer was rejected by claimant on the grounds it was unduly harsh and excessive. Accordingly, further appeals on the property were **discontinued** in favor of referring the case to this Division for final determination.

Charges of misrepresentation, falsification of reports and wrongly accusing another employee are serious 'in the extreme and in **normal** cases would justify dismissal without question. There are, however, mitigatidns in **this** case arising out of the manner of the hearings. True, there were a number of postponements but in the final analysis the hearing was held in absentia despite the carrier commitment to postpone the hearing until the claimant was able to return to **work**. At the start of the hearing the representative of the Brotherhood reminded the hearing officer of the commitment and requested another postponement but his request was denied. **For** these reasons we are of the opinion that claimant should be reinstated without pay for time lost, subject to **successfully passing** a physical examination as originally proffered. We are of the opinion **this** approach takes into account the seriousness of claimant's offenses, allows a review of his physical condition and ability to resume wrk and recognizes irregularities in the circumstances under which the hearing was conducted.

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 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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of March, 1984.

