NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26153
THIRD DIVISION Docket Number CL-26336

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9978) that:

(a) Carrier violated the Agreement on November 15, 1983, when it removed L. C. Hargrove from service, and

(b) Carrier shall now reinstate L. C. Hargrove to service with all rights unimpaired and with pay for all time lost, from November 15, 1983, forward."

OPINION OF BOARD: Claimant had a June 29, 1976, seniority date on the Carrier's Colorado Division Station Department Seniority District. Claimant first entered service with the Carrier in August, 1970.

The Investigation Transcript in this matter shows that Claimant requested and was granted a leave of absence for personal business to commence August 19, 1983, and ending September 18, 1983. On September 14, 1983, Claimant contacted Carrier's Pueblo Regional Freight Office Manager, T. W. McCullough, and requested that his leave of absence be extended. The evidence in the record of the Investigation (which Claimant did not attend even after being granted a postponement) shows that McCullough testified that Claimant only asked for an extension of 30 days. The request to extend the leave was granted to October 19, 1983. A standard form was mailed by the Carrier that specifically designated that Claimant's leave of absence expired on October 19, 1983. The form concluded that "[f]ailure to report for duty on or before the date of expiration of leave of absence, unless application for extension shall have been made, will be considered sufficient cause for dismissal."

Claimant did not report for service on October 19, 1983, and was notified of his termination.

As earlier noted, Claimant did not attend the Investigation even after he requested and was granted a postponement. The record reveals that on the day of the Hearing, Claimant's Representative spoke with Claimant on the phone and Claimant asked his Representative to read a statement into the record. The record reveals the following exchange:

"Q. Mr. Drummond, you stated that you had further conversation with Mr. Hargrove this morning?

A. Yes.

Q. And, what did he say to you in this conversation about representing him or about him being present at the investigation?

A. He wanted me, in his absence, to read a statement in his behalf. The statement being, and I would like all references to the subject I, to be considered as Mr. Hargrove, in this statement. He told me, 'When I left Pueblo I signed 3 leave of absence forms. Before the first expired I contacted Mr. McCullough to extend, the leave. I was under the impression Mr. Mcullough's [sic] OK was for a 60 day leave of absence.' And that is the end of the statements that Mr. Hargrove wished me to repeat in his behalf.

Q. Did Mr. Hargrove tell you where he was and why he was not appearing at the investigation?

A. No.

Q. You do not know where he called from when you talked to him this morning?

A. No, I don't."

After the Investigation, Claimant was dismissed from service.

The Organization argues that the removal of Claimant was an arbitrary and capricious act by the Carrier. The Organization first asserts that Rule 24-A of the Controlling Agreement has been violated because Claimant was not given a fair and impartial Hearing due to McCullough's alleged failure to divulge that prior to Claimant's approved leave of absence, he filled out three leave of absence forms, two of which would be used in case more time off was needed. Second, the Organization claims that there was a misunderstanding which led to Claimant inadvertently overstaying the second thirty day leave. Third, the Organization contends that under the circumstances, the discipline rendered (i.e., that of discharge) was unduly harsh especially because Claimant was told by McCullough (thus at the Carrier's behest) to sign blank leave of absence forms in violation of the Carrier's own policy. Therefore, according to the Organization, a sustaining Award is necessary to preserve the integrity of the Agreement.

Putting aside the issue raised by the Carrier concerning whether an Investigation was even required under the self-executing language of Rule 21-C, the real assertion by the Organization, and the issue in this case, is the contention that the action of the Carrier was arbitrary and capricious. Based upon this record, we can not sustain such an argument. If there were mitigating circumstances that existed that could justify setting aside the Carrier's action or reducing the penalty, such as Claimant's contention that he signed three blank leave of absence forms and, in fact requested a 60 day extension on his leave of absence, rather than a 30 day extension as stated by McCullough, Claimant could well have explained those factors at the Hearing which was initially rescheduled at his request. Claimant did not attend the Hearing and indeed offered no explanation as to why he could not attend. In such circumstances, failure to appear at the Hearing was at Claimant's peril. Third Division Award No. 20113. The Organization's argument that Claimant did not receive a fair and impartial Hearing must be rejected. It was not the Carrier's obligation to introduce the Claimant's evidence. Claimant could have avoided the result by simply attending the Hearing and providing his version of the incidents. We find nothing in this record to even suggest that evidence was falsified or purposely withheld or that the Hearing was conducted in a manner that indicates anything other than fairness and impartiality.

However, even if we were to consider the obvious hearsay assertions made by Claimant in his statement read at the Hearing, we would nevertheless be unable to conclude, as the Organization would have us do, that the action of the Carrier was arbitrary and capricious. Based on the record, there is substantial evidence to justify the Carrier's actions. McCullough testified that Claimant asked for and received a 30 day extension on his leave of absence and did not appear for work at the designated time. There is nothing in the record to show that there was an unavoidable delay to warrant overturning the Carrier's decision. Further, according to McCullough, Claimant was sent the standard form which specifically stated that his leave was extended only to October 19, 1983. The conclusionary assertions made in Claimant's statement read into the record that he was under the impression that he had been granted a 60 day extension are simply insufficient, in our Opinion, to overcome the clear and unrebutted evidence offered by the Carrier. Although the Organization raises an issue concerning the address used by the Carrier, a careful review of the record does not demonstrate a denial by the Claimant that he, in fact, received the form giving the exact date on which his leave was to expire.

Whether we may have reached a different result or imposed a lesser penalty upon a de novo review of the facts is irrelevant. In light of the state of the record and the fact that our function in this kind of case is only to determine whether there was substantial evidence in the record before us to justify the Carrier's actions, we are compelled to find that substantial evidence exists and the Carrier's actions were neither arbitrary nor capricious.

The leave of absence provisions of Rule 21-C are clear. "An employe who fails to report for duty at the expiration of the leave of absence shall be considered out of service, except that when failure to report on time is the result of unavoidable delay the leave of absence will be extended to include such delay." On the basis of this record, Claimant clearly did not report on time and no sufficient evidence exists to show an unavoidable delay. The Claim must therefore be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1986.