NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26582
THIRD DIVISION Docket Number MW-26458

Edwin H. Be"", Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor

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

1. The dismissal of Bridge and Building Foreman A. Borsello for alleged violation of Rules 'K', 'I' and 'F' and his alleged involvement 'in circumstances surrounding the disappearance of Company property from the Old Battery House' on September 13, 1983, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File NEC-BhWE-SD-762D).

2. The claimant's record shall be cleared of the charges leveled against him, he shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, a" employee with a service date of August 3, 1977, held the position of B&B Foreman on the Carrier's Baltimore Division. As a result of charges dated September 26, 1983, Trial in absentia ultimately held on November 21, 1983, (after four postponements), and letter dated November 30, 1983, Claimant was dismissed from service. The charges against Claimant relate to September 13, 1983, and allege first, that Claimant was not attending to his duties when he was observed inside the Battery House Building with a Carrier vehicle backed up to the doorway, which vehicle Claimant was Instructed not to operate; second that Claimant was quarrelsome and dishonest when he was ordered to remove the vehicle; third, that Claimant was in violation of safety rules by being in a restricted area without authority or permission; and fourth, Claimant was involved in or responsible for the disappearance of property belonging to the Carrier.

General Manager R. Eyrich testified that on September 13, 1983, at approximately 11:25 A.M., he observed one of the Carrier's trucks operating north of the Battery House. A sign posted on the building stated "Authorized Personnel Only." That building contained a restricted area, in part, due to the storage of dangerous materials. The Carrier also stored copper coils in that building. Eyrich went to investigate. Eyrich found the truck backed up to a doorway and further found Claimant inside a restricted area of the building. Eyrich ordered Claimant to leave and get the truck out of the area. According to Eyrich, Claimant mumbled something about two drums by the door and the" got in the truck and drove off. Eyrich inspected the area and observed no other employees present. Eyrich further testified that he was

concerned about Claimant's presence in the buiiding since nothing in the building belonged to the B&B group and Claimant had no reason to be &here. Eyrich then Found the other door to the building open with the security chains broken and hanging down. Eyrich also noticed a pallet loaded with several copper coils. Eyrich suspected Claimant was involved in a theft of the coils and contacted the Carrier's Security Department. Industrial Engineer C. Pope corroborated Eyrich's account. Eyrich and General Supervisor H. Bailey later inspected the coils and Bailey determined that an inventory was appropriate. According to Bailey, the coils found on that date by the open door were at the opposite end of the building from where they are usually stored. The subsequent inventory showed that coils valued at approximately $32,000 were missing.

Supervisor of Structures R. Cross testified that Claimant worked under his supervision and he gave Claimant no instructions that would place Claimant in the Battery House on September 13, 1983. Further, according to Cross, Claimant had no reason to be there. With respect to the truck driven by Claimant on that date, Cross testified that Claimant was previously informed orally and again in writing by certified letter dated September 1, 1983, (received by Claimant on September 3, 1983) that he was not permitted to operate a Carrier vehicle ("[i]n the future . . . you will not drive company vehicles" [emphasis in original]) and further instructed Claimant that he was not to leave his gang.

Carrier Police Officer S. Stevens testified that on November 3, 1983, Claimant told her that he knew the location of a junk yard where stolen coils from the Battery House were located but he would not divulge the location unless the Carrier dropped the charges against him. Stevens declined the offer.

The Trial in this matter was postponed on four separate occasions. The first scheduled Trial was for October 4, 1983, as a result of charges dated September 26, 1983, which charges were signed for by Claimant on September 27, 1983. By letter dated September 28, 1983, and signed for by Claimant on October 3, 1983, the parties mutually agreed to postpone the Trial until November 2, 1983, with the understanding that the charges, time and location of the Trial would remain the same. In the same fashion, the parties agreed by letter dated October 28, 1983, and signed for by Claimant on the same date, to postpone the matter until November 16, 1983. Again, and in the same fashion, the parties agreed on November 15, 1983, to postpone the matter until November 17, 1983. On November 16, 1983, Claimant's Representative requested another postponement which was agreed to by the Carrier. The matter was then rescheduled to November 21, 1983. A letter memorializing the agreement for the fourth postponement and setting the new Trial date was sent to Claimant by certified mail on November 16, 1983, with a copy to his Representative. Although disputed by the Organization, on November 17, 1983. Claimant's Representative called the Carrier's District Manager, Labor Relations J. Duncan and confirmed the Trial date. The evidence shows that Notice of the November 16, 1983, certified letter was delivered to Claimant's house by the Postal Service. On November 19. 1983, Claimant was observed by Facility Administrator E. Loomis in a local Seven Eleven store. The Trial on November 21, 1983, was held without Claimant's presence, but with the presence of one of Claimant's Representatives.

Procedurally, the Organization argues that Claimant did not have appropriate advance notice of the Trial and that the holding of the Trial in absentia was in error. We must reject the Organization's procedural argument. The Organization's argument is that Claimant did not receive five days actual notice of the Trial date resulting from the fourth postponement and the Carrier therefore violated Rule 71 (the employee "shall be given five (5) days advance notice in writing of the exact charge on which he is to be tried and the time, date and place of the trial"). Under the facts of this case, we do not believe that after all of the prior notices and postponements the Carrier must nevertheless prove that Claimant had five days actual notice of the set Hearing date resulting from the fourth postponement. As a threshold matter, we point out that our ruling in this regard does not concern the notice requirements for initial Hearings set under Rule 71. We are concerned in this matter with postponed Hearings - specifically, postponements requested on an employee's behalf who then later asserts lack of knowledge of the granted postponement. We note that throughout the approximate two month period from the issuance of the charges until the Trial, the charges against Claimant remained the same. Claimant was well aware of those exact allegations against him by the fact of his numerous previous written verifications prior to the last postponement for receipt of the communications concerning the charges and postponements of the Trial, Thus, Claimant cannot contend that he was unable to adequately prepare a defense by reason of the period of time granted for the last postponement. See Second Division Award 8189. Therefore, Claimant had "five (5) days advance notice in writing of the exact charge . . . " within the requirement of Rule 71. Further, with respect to the Trial date, Claimant clearly had five days notice of the original Trial date as contemplated by Rule 71. The fact that Claimant allegedly did not pick up the certified letter officially granting the fourth postponement until after the Hearing commenced does not change the result. See Second Division Award 9185 where, under similar language to that contained in Rule 71, the argument that actual service on the employee must be demonstrated by the Carrier was rejected. Sending the notice to the employee under such circumstances is sufficient "unless there is a positive showing that nondelivery of the notice was not the fault of the employe." Id. The Carrier is not the insurer of Claimant's receipt of this type of notice. See Third Division Awards 21696, 17691, 15007. Here, the record discloses that notification of the certified letter was delivered to Claimant's address but Claimant simply did not pick up the letter from the Post Office although he was available to do so. As in Second Division Award 9185, there is no sufficient showing in this record that nondelivery of the letter was not Claimant's fault. We must take particular note of the fact that the fourth postponement was made on Claimant's behalf. Even if we considered statements made in a subsequent appeal Hearing, that transcript demonstrates that Claimant specifically directed his Organization Representative to "[g]et a postponement for me." Claimant's Representative did so. Yet, Claimant did nothing to follow up on his request. Had Claimant been more diligent, he would have received actual notice of the rescheduled Trial resulting from the fourth postponement. Under the circumstances, Claimant cannot now assert lack of knowledge. We therefore find no violation of Rule 71 and the holding of the Trial in absentia was not in error. Claimant's failure to appear at the Trial was at his own peril. Second Division Awards 9943, 9330.

With respect to the merits, we are satisfied that substantial evidence exists in the record to support the Carrier's determination that discipline should be imposed. First, the record establishes that Claimant was away from his assigned job duties and was driving a company vehicle after specifically being instructed that he was not to do so and further, Claimant was in a restricted area where he had no reason to be. Such evidence sufficiently shows that Claimant was not attending to his duties and that Claimant was found without proper authority or permission near a restricted area as charged by the Carrier. Claimant's explanation, given in a subsequent appeal Hearing, that he was measuring catenary pole foundations as instructed, but was doing so on his lunch break and was also helping another Foreman, does not change the result. Putting aside the issue raised by Carrier that statements made in a subsequent appeal Hearing after Claimant had the opportunity to review the Trial transcript cannot be considered by us (see Third Division Awards 24356, 22812, 20765), such statements by Claimant, even if considered by us, do not defeat the substantial evidence contained in the record from the Carrier's witnesses. Claimant's supervisor Cross testified that Claimant was instructed not to leave his gang and the work Claimant was to perform concerning the pouring of concrete for catenary poles was not to be performed near the Battery House since the catenary pole in that location was inaccessible by truck. According to Cross, Claimant should have been working 1/2 mile from the Battery House. In any event, merely because differing versions of the events may be found in the record does not, without more. require us in our review capacity to credit Claimant's version of the events over that testified to by the Carrier's witnesses.

Second, Claimant was found in an area where the coils were stored, security devices were broken with the coils moved to the area of the broken locks and Claimant further had a truck backed up against the building. Claimant also subsequently admitted knowledge concerning the stolen coils. Our review function is not to redetermine the facts de novo, but is limited to a determination of whether substantial evidence exists in the record to support the Carrier's conclusion that discipline was appropriate. The charge against Claimant concerns his allegedly being involved in or responsible for the disappearance of the coils. We are of the opinion that the evidence in this case concerning the missing coils, although circumstantial concerning this allegation, when taken as a whole nevertheless constitutes sufficient evidence so as to be substantial to support the Carrier's conclusion that Claimant was involved in or was responsible for the disappearance of the Carrier's property. See Third Division Awards 22635, 20781, 7657. Under the circumstances, we cannot say that dismissal was excessive, unreasonable, arbitrary or capricious.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1987.