Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27835
THIRD DIVISION Docket No. MW-27473
89-3-87-3-107

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

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

(1) The dismissal of furloughed employe G. D. Lanning for alleged unauthorized use of Carrier's credit was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File 200-238/ 2579).

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

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, a furloughed employee, was recalled to service in July 1985, but failed the physical examination at Parsons, Kansas, apparently due to a positive drug screening test. Some three (3) months later on November 7, 1985, he gave another specimen for drug screening at a physician's office in Muskogee, Oklahoma. Under circumstances which are not at all clear on this record, the $15.00 charge for screening this specimen was charged to Carrier's account with National Health Laboratories.

Upon receipt of this bill for the test in January 1986, Carrier's Chief Clerk made inquiries and was informed by Claimant that he had gone to the second drug screening test and had the physician bill the test to Carrier on instructions from his BMWE General Chairman. When this information was relayed to Carrier's officials in the Engineering Department, the following notice was sent certified mail, return receipt requested to Claimant under date of January 9, 1986:

"U. S. CERTIFIED MAIL NO. P 239 150 481
RETURN RECEIPT REQUESTED

Mr. George D. Lanning
P. O. Box 1301
Ft. Gibson, Oklahoma 74434

Dear Mr. Lanning:

Please arrange to report to the MKT Downstairs Conference Room, 506 West Chestnut, Denison, Texas, Thursday, January 23, 1986, at 3:00 p.m., for a formal hearing to be held to develop the facts and determine your responsibility, if any, when you allegedly reported to the Company Doctor, W. K. Baker, in Muskogee, Oklahoma on October 29, 1985 stating that you had been instructed to report for a drug screen test which was charged to the Company and was not authorized by a proper Carrier's Officer.

In this formal hearing you will be charged with violation of Missouri-Kansas-Texas Railroad System, Safety, Radio and General Rules for All Employes, Other General Rules 613 (part quoted) effective April 28, 1985, Missouri-Kansas-Texas Railroad Company Rules For The Maintenance of Way and Structures, General Rules H (part quoted) effective January 1, 1981 and Circular DP-3 General Rules I (part quoted) all of which read as follows:

> ...'Unless specifically authorized, employees must not use the credit of the railroad'
> ...

Please be present at the above mentioned time and place. You may have representation and any such witnesses you may desire to appear in your behalf.

Respectfully,

W. R. Green
Division Engineer"

According to evidence of record, Claimant was out of town for the middle two weeks of January 1986. He was still on official furlough status from Carrier and ostensibly was out of town looking for work. He returned and collected his post office box mail on January 27, 1986 and signed the certified mail receipt on that date for the above letter. In the meantime, however, Hearing Officer R. R. Warnke had conducted the hearing in absentia on January 23, 1986. It is noted that Claimant's representative had not been notified of the hearing and neither Claimant nor any BMWE representative appeared at the time appointed on January 23. After waiting for approximately 15 minutes, the Hearing Officer called the first and only Carrier witness (oddly enough this Carrier witness was also the stenographic reporter who prepared the hearing transcript of her own testimony). The substantive hearing record constitutes two (2) questions and answers as follows:

"Q. Mrs. Mitchusson, as Chief Clerk to Division Engineers will you briefly describe your duties.

A. Handle mail and correspondence, invoices, seniority and vacation rosters, employment papers and records, return to work physicals and any other duties as requested by the Division Engineers.

Q. Mrs. Mitchusson, on or about January 2, 1986 could you describe what transpired in regards to Mr. Lanning?

A. I was advised to contact the Company's physician's clerk regarding Mr. Lanning. Colete Boren asked me who authorized Mr. Lanning to go for a return to service drug screen test. Coleta told me Dr. Baker's secretary did not have an 874 form signed by any officer of the MKT Railroad and she being new on the job and Mr. Lanning appearing to know what he was doing, they proceeded to administer the test without the approveal (sic) of any MKT Officer or supervisor. I advised Mrs. Boren I would call Mr. Lanning and ask him on whose authority that he was taking the drug screen test. I then called Mr. Lanning on 1/2/86 at 918-683-6296. He was not at this number and I left word with his mother for him to call me. Mr. Lanning returned my call around 4:30 p.m. on 1/2/86. I ask Mr. Lanning who authorized him to go to Dr. Baker to take a physical. He advised me that John Self told him to go to Muskogee and that he (Lanning) ask Mr. Self why he had to go to Muskogee when he had taken his other physical in July 26, 1985 in Parsons, Kansas. He did not tell me Mr. Self's reply. I ask him if he had documentation that he had had drug counselling or had attended a rehabilitation Center. Mr. Lanning told me that he used to hang around with guys who used drugs when he was not working but that he was not doing that now. Mr. Lanning also stated that he was going to attend a DUI (Driving Under Influence) AAA for three sessions January 20, 1986. I did not tell him that he did or did not pass his physical and that I would do some checking and he could call me on January 3, 1986. I have not heard from Mr. Lanning since January 2, 1986.

A. (sic) Mrs. Mitchusson, Mr. Lanning is charged with using the credit of the MKT Railroad without authority. Do you know if in fact this has occurred.

A. Yes, I have a claim from the National Health Laboratory transaction number 29229761 in the amount of $15.00 and they are requesting that the MKT reimburse them for the test given Mr. Lanning."

Following this hearing in absentia, Carrier found Claimant guilty of unauthorized use of Carrier's credit and terminated him from service. Claimant and the Organization appealed this action on grounds that Claimant had not received a proper, fair and full investigation, the record did not show his guilt of the charge, and, arguendo, the penalty was unreasonably excessive. Our review of the record persuades us that this claim must be sustained.

The Hearing Officer elected to hold the Hearing in absentia, at Carrier's peril, without making any effort whatsoever to ascertain whether Claimant and/or his Organization had received proper notice and opportunity to appear. It is unrebutted that Claimant did not sign for and receive the notice of hearing until four days after the hearing. There is no evidence whatever to support Carrier's bare assertion that Claimant willfully boycotted the hearing, and indeed the evidence available on this record is all to the contrary. There is not even a suggestion, let alone a showing, that Carrier would have been prejudiced in any way by a short delay to ascertain whether Claimant had in fact received notice. In the circumstances here presented, we find ourselves in agreement with the findings of this Board in Third Division Award 13804, as follows:

> "Claimant was not present personally or by representatives of his own choice at the hearing that was held in the matter prior to his dismissal. There is no evidence that he received actual or constructive notice of the hearing, and we are not satisfied, from our analysis of the record, that he wilfully absented himself from the hearing or sought to avoid or obstruct the disciplinary machinery established by the Agreement. Claimant's explanation that he was not reached at his regular home address at Roseville in August because his family was away on vacation and he was in San Francisco seems reasonable and credible...."

> "Notice is an essential element in disciplinary proceedings and to deprive an employe of his position without an opportunity to defend himself is incompatible with elementary principles of fair play. Claimant did not receive the 'fair hearing' to which he was entitled under Rule 38(a). (We are in accord with Awards 4433, 4521, 10739, and others cited by Carrier, but do not find them applicable, on their facts, to the present situation. The discharge of an employe without a hearing is risky procedure, and its validity will depend upon the facts of each case.)"

Finally, even in a legitimate hearing in absentia, the Carrier is not relieved of its burden of proving by substantial probative evidence of record that the charged employee is guilty. Even if, arguendo, the second and third-hand hearsay testimony of Carrier's witness were probative, the evidence is totally insufficient to prove that Claimant knowingly and with specific intent used Carrier's credit without authorization. Indeed, the available evidence is more supportive of mistake than of malice.

Based upon all of the foregoing, we find that Carrier discharged Claimant without a proper hearing and upon insufficient evidence of guilt. It is obvious that Claimant must be returned to the status he held prior to the unjust termination of January 24, 1986. The question of remedial damages, however, is complicated by the fact that Claimant was in furlough status at the time of the discharge and we cannot tell from this record if or when he would have returned to compensated service. We note that Part 2 of the claim seeks compensation for "all wage loss suffered." We shall therefore sustain the claim for reinstatement to furlough status effective January 27, 1986 with compensation, if any, which Claimant would have received thereafter but for the wrongful discharge.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1989.

Serial No. 341

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 27835

DOCKET NO. MW-27473

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: Missouri-Kansas-Texas Railroad Company

On April 13, 1989, we issued Award 27835 reading in pertinent part as follows:

> "...we find that Carrier discharged Claimant without a proper hearing and upon insufficient evidence of guilt. It is obvious that Claimant must be returned to the status he held prior to the unjust termination of January 24, 1986. The question of remedial damages, however, is complicated by the fact that Claimant was in furlough status at the time of the discharge and we cannot tell from this record if or when he would have returned to compensated service. We note that Part 2 of the claim seeks compensation for 'all wage loss suffered.' We shall therefore sustain the claim for reinstatement to furlough status effective January 27, 1986 with compensation, if any, which Claimant would have received thereafter but for the wrongful discharge."

By letter of May 18, 1989, Carrier notified Claimant of the Award and directed him to return to work, extending the date of return at Claimant's request to June 27, 1989. Apparently Claimant did not return or further contact Carrier by June 27, 1989, whereupon Carrier advised him on July 5, 1989, that his seniority rights were forfeited.

In the meantime, by letter of June 6, 1989, Carrier advised the Organization that it needed tax information and other evidence of Claimant's outside compensation in order to compute back pay, if any, due him under the Award. In that connection, Carrier cited and relied upon Article 23, Rule 6 of the Agreement, as follows:

> "Rule 6. If the result of the investigation is not such as to sustain the discipline or dismissal, the records shall be corrected accordingly; and, if the employe has been removed from the service, he shall be restored to his former position or status; if, in the meantime, former position is abolished, he may exercise his seniority; and he will be paid what he would have earned had he not been removed from service; less what he may have been paid for his services in other work, or through unemployment compensation."

The Organization opposed any deduction of outside earnings on grounds that no set off was addressed in claim handling nor mentioned by the Board in our Award. When the matter remained deadlocked, the Organization sought this Board's Interpretation on the following question regarding Award 27835:

> "May the Carrier properly and validly deduct any outside earnings and/or compensation received by the Claimant during the period of his wrongful discharge?

Both sides cited and relied upon numerous Awards which show a split of authority on the threshold question whether post-award disputes over offset for outside earnings is an impermissible reargument of a decided matter or permissible clarification of an ambiguity in the Award which this Board may address in an Interpretation.

Our analysis of these various authorities persuades us that the better reasoned view is that debates over deduction of outside earnings are not new evidence, particularly where, as here, the Agreement language expressly and unambiguously provides for such deductions. Cf. Third Division Award 14162 with PLB 1315-25, PLB 1844-8, Interpretation No. 1 to Second Division Award 8256 and 9264.

Having determined that Carrier may properly invoke Article 23, Rule 6 in computing retroactive compensation under Award 27835, there is no room for doubt that the clear language of that Rule allows Carrier properly and validly to deduct outside earnings and/or compensation earned by Claimant during the period of his wrongful discharge.

Referee Dana E. Eischen sat with the Division as a Member when Award 27835 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.