

The Third Division consisted of the regular members and in addition Referee W. F. Euker when award was rendered.

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 dismissal of Section Laborer J. W. Hall for alleged absence on October 7 and 25, November 4, 11 and 18 and December 6, 1985 and for alleged insubordination on February 5, 1986, was without just and sufficient cause and on the basis of unproven charges (System File 300-216/2579).

(2) The claimant 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.

The dispute confronting the Board in this case consists of two separate disciplinary charges wherein Claimant was found guilty of being absent without permission on certain dates in October, November and December, 1985, and insubordinate on February 5, 1986. The Carrier dismissed Claimant from the service predicated on the results of the disciplinary hearings coupled with his past discipline record. The dispute was handled in the usual manner on the property and is now presented for the Board's consideration.

Sorting through the procedural and evidentiary underbrush, we are able to extract sufficient information to convince us that Carrier has established by substantial evidence Claimant's guilt of the charges concerning his absences from duty. In this connection we have reviewed the testimony taken at the "recessed hearing" as well as the "continued hearing" when both Claimant and his representative were present and Claimant testified. We are satisfied the record shows Claimant failed to comply with Carrier's instructions on the dates indicated.

Concerning the charge of insubordination, which developed from Claimant's refusal to report to the Conference room to answer questions regarding the whereabouts of his Representative, we have some serious problems. The first deals with the Organization's assertion made at the trial that Carrier violated Article 23, Rule 1, when the offense charged under date of February 6, 1986, was not scheduled for trial until February 18, 1986; whereas the Rule states in the case of an employee suspended from service, the trial "will be held within ten (10) days from date suspended," which in this case would have been no later than February 16, 1986. The Carrier responds by pointing out that although Claimant was not permitted to return to work, he was at all times under pay, until he was dismissed on February 20, 1986.

Thus, one of the issues framed for our decision is whether an employee is considered suspended from service under Article 23, Rule 1, when he is under pay? In our opinion, "suspension from service" is an expression commonly used in Railroad contracts to denote the temporary severance of the employment relationship and its emoluments until such time as the condition subsequent (trial) has been completed. For that reason, most contracts, including Article 23, provide that in the event Claimant is found not guilty, he will be compensated for the time held out of service, or if you will, for the time suspended from service. Thus, in our opinion, Claimant was not literally suspended from service under Article 23, Rule 1, consequently, the time limit stated therein, would not be applicable.

Next, we are concerned about the nature of the charge of insubordination in this case. We believe, as the Organization suggests, the Claimant could have reasonably construed the purpose for which he was being invited to the Conference room was to attend a Trial. If that interpretation is credible, he had a perfect right to decline as the Board's decisions referenced in the record attest. There is arguably a play on semantics in this case and we are not disposed to uphold discipline by dismissal because of semantics.

As noted earlier, the Claimant's past record was also considered in meting out the discipline by the Carrier. That record is not commendable. It is our disposition of this dispute that Claimant should be returned to service on a "last chance" basis, with seniority unimpaired, but without compensation; subject to Carrier's requirements for return-to-duty physical examinations.

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 20th day of November 1989.