

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad (formerly the MP):

On behalf of Communications Maintainer D. E. Brumlow, SSN #452-78-1693, dismissed from service February 4, 1988 account being arrested in connection with his conduct on December 14, 1987, unauthorized absence and failing to comply with instructions of Company Officer J. D. Bracken. Carrier file 880250. G. C. File 88-09-G-D."

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.

By notice dated January 19, 1988, Claimant was charged with "...responsibility for your conduct December 14, 1987, in connection with charges of public intoxication, absent from work without proper authority December 14, 15, and January 4, 5, 6, 7, 8 and 9, 1988, not complying with instructions from J.D. Bracken on January 11, 1988, to report to Employee Assistance Counselor for evaluation." Following an investigation held on January 28, 1988, Claimant was found guilty and dismissed from service. Carrier's decision following the investigation was contained in a letter dated February 4, 1988, which provided in relevant part as follows:

"Referring to the disciplinary investigation heard at Union Pacific Railroad office building at Spring, Texas. Held on January 28, 1988 relative to charges on conduct, unauthorized absenteeism, and not complying with instructions.

I have carefully analyzed the transcript and I am of the opinion that more than a sufficient degree of evidence was presented to warrant sustaining the following rule violations: Rule 600, 604, 607, and L as stated in the 'Safety, radio and general rules for all employees' Rev. 4/85.

I am now therefore ordering that you be dismissed from service of the Union Pacific Railroad. You should quickly arrange to return all company property now in your possession."

The gravamen of this dispute is to be found in the facts rather than in the arguments of the parties. A few of those facts must be set forth and reviewed.

Claimant had some serious medical, as well as emotional, problems and had been under treatment by an endocrinologist. In the course of his illness he had taken time off from time to time (with Carrier's permission) to see his physician.

The record of the Investigation reveals that on December 14 and 15, 1987, Claimant did not report for work but called his Supervisor and told him that he was in jail for "public intoxication." There is no evidence in the record of the Investigation which explains the circumstances of Claimant's arrest and incarceration; nor is there any evidence to support the charge of "public intoxication" and no criminal or other charges appeared to be filed against Claimant.

On December 16, 1987, when Claimant returned to work, his Supervisor suggested that he see an Employee Assistance Counselor, which he agreed to do. On December 21, 1987, at the request of the Employee Assistance Counselor, Claimant was granted a thirty day leave of absence. While he was on the leave of absence, he was charged with absence without authority from January 4 through 9, 1988. Without notice to Claimant, his leave of absence was cancelled by memo to his Supervisor dated January 6, 1988. This notice was subsequently amended by memo dated January 20 to withdraw the leave of absence effective December 31, 1987. These actions were taken by Carrier's Medical Director since the Claimant refused to stay in the medical facility recommended by the Employee Assistance Counselor; he had elected instead to remain in treatment with his own physician.

The Carrier's actions with respect to Claimant's leave of absence were bizarre at best. Quite clearly Carrier erred in the entire handling of this matter. Among other things there was no proof of public intoxication and the absence without permission charges were totally unfounded in view of the leave of absence and Carrier's failure to properly notify Claimant of its change of heart (after the fact to boot). It is unnecessary to deal with other Carrier errors relating to the incongruity between the charges and the finding of guilt.

Certain other aspects of this matter related to Claimant's conduct must be noted. First, he was unable to protect his position on December 14 and 15 since he was in jail, regardless of the circumstances for that event. Secondly, he did not conform to the instructions of the Employee Assistance Counselor which had been the basis for granting his leave of absence. From the foregoing, it is clear that Claimant must bear some responsibility for his predicament, regardless of the errors made by the Carrier.

Based on the facts and reasoning above, it must be concluded that the penalty of dismissal was both excessive and unwarranted under the circumstances. The penalty will be reduced to a suspension. Therefore Claimant, subject to clearance by the Employee Assistance Counselor, will be put back to work with seniority and all other rights unimpaired, but without compensation for time lost which will be considered to be a disciplinary suspension.

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 30th day of April 1991.