Award No. 12492
Docket No. CL-14463

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5434) that:

(a) The Carrier violated the provisions of the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 6-A-1, 7-A-1 (d) when it dismissed from service Charles E. Keller, Jr., Clerk, Undercliff Yard, Cincinnati, Ohio, Buckeye Region.

(b) Mr. Keller be returned to service with all rights unimpaired and that he be compensated for all monetary loss sustained commencing July 21, 1962, and continuing until adjusted. (Docket 1343)

OPINION OF BOARD: The Claimant was the incumbent of a regular clerical position at Undercliff Yard, Cincinnati, Ohio, Buckeye Region with a seniority date of May 22, 1956. His regular tour of duty was from 3:59 P. M. to 11:59 P. M.

There is no disagreement between the parties concerning the basic facts involved in this dispute. Between 5:45 P. M. and 6:00 P. M. on July 21, 1962, the Claimant left his position at the property of the Carrier for the alleged purpose of obtaining his lunch. He did not return to the premises until approximately 8:45 P. M., when he advised his supervisor that his absence resulted from difficulties he had encountered with his automobile culminating in its being towed away for the necessary repairs.

The Claimant had not secured permission from anyone prior to leaving the company property and by his own admission made only one attempt to call the Carrier concerning his predicament during his absence.

Upon his return, the Yardmaster gave the Claimant the following note:

"You are held out of service for leaving your job without known cause while on duty 3:59 P. M. to 11:59 P. M., 7-21-62."

Subsequently, the Claimant was notified on July 29, 1962, to appear for trial on August 8, 1962, in connection with the following charge:

"Being absent without permission on your assignment B-71-G July 21, 1962, tour of duty 3:59 P. M. to 11:59 P. M."

Thereafter, on August 20, 1962, the Carrier notified the Claimant that he was dismissed from the service for the offense. His previous service record was taken into consideration by the Carrier in its imposition of the extreme penalty of dismissal.

The points at issue to be determined by this Board are as follows:

1) Was the Claimant guilty of the offense with which charged?

2) Did the Claimant receive a fair and impartial trial?

3) Was the discipline imposed warranted even if the Claimant is guilty?

4) Should the Claimant's record be cleared and he be compensated for all monetary loss sustained?

The pertinent provisions of the current Rules Agreement between the parties are as follows:

RULE 6-A-1

(a) Employes will not be suspended nor dismissed from service without a fair and impartial trial."

"RULE 6-C-1

(a) An employe who is accused of an offense and who is directed to report for a trial therefor, will be given reasonable advance notice in writing of the exact charge for which he is to be tried and the time and place of the trial."

"RULE 7-A-1

(d) When an employe is held out of service in connection with a major offense pending trial and decision, and the decision exonerates the employe so held out of service, the employe will be compensated for the difference between the amount earned while out of service or while otherwise employed and the amount he would have earned had he not been held out of service."

A careful review of the record in this dispute clearly establishes the fact that the Claimant was absent without permission from his job for a period in excess of two and one-half hours. Even though it might have been permissible for him to take his assigned meal period away from the Carrier's premises without prior approval, such action on his part in no way excuses or condones his continued absence after the first twenty minutes. The mere fact that his automobile became inoperative during this period does not relieve him of his responsibilities as an employe. One attempted phone call during this prolonged absence can hardly be termed a diligent effort to communicate with the Carrier.

At the trial, the Claimant admitted that he did not perform his regular dtuies while absent from his work without permission and only offered as an excuse the difficulties he had encountered with his automobile.

Conflicting statements were procured by both parties subsequent to the trial concerning services rendered by third persons to the Claimant in connection with his automobile problems. Inasmuch as no such evidence or argument was presented at the trial and no continuance was requested to obtain same, such statements cannot be considered by this Board in reviewing the investigation concerning the Claimant. (Awards 3322, 3342 and 4976.)

The Organization contends that the offense, if any, committed by the Claimant was not a "major" offense within the meaning of Rule 6-A-1 of the current Rules Agreement and that the Claimant was improperly suspended from service by his supervisor. We find nothing in the record nor in the current Agreement to sustain this contention. Any offense carrying the threat of discharge certainly may not be considered as a "minor" offense. (Awards 10572, 11330 and 11894.) Therefore, the Board finds no error in suspending the Claimant from service after the occurrence of the offense on July 21, 1962.

After careful examination of all the probative evidence, the Board finds that the Claimant was guilty of the offense with which charged.

The second point at issued raised by the Organization is whether or not the Claimant received a fair and impartial trial. The Organization contends that the second charge on which the Claimant was tried and found guilty was neither clear nor specific and too comprehensive in violation of Rule 6-C-1(a). We concur with the general premise that an employe is entitled to notice of the specific charge against him prior to a trial. The Awards cited by the Organization in support of its contention clearly set forth this important condition precedent to a fair and impartial trial. However, in the instant dispute, it is obvious that the Claimant was entirely familiar with the charge against him. The Claimant was neither deceived nor misled by the second charge and he had a full opportunity to prepare his defense. (Awards 4169, 4781 and 4855.) Moreover, under the existing facts and circumstances, there is sound authority to the effect that the Claimant waived any and all defects in the notice. (Award 4239.)

The Board finds no merit in the additional objections raised by the Organization at the trial. There is nothing in the rules specifying who shall conduct trials and there is no evidence of bias or prejudice on the part of the trial officer. (Awards 4316, 4840 and 5026.) Had the Claimant desired to have other witnesses called who had knowledge of the circumstances, he was free to call them. (Award 6067.)

Neither the introduction of testimony obtained by eavesdropping nor the use of notes by a witness prepared by him to refresh his recollection while on the stand, are prejudicial in the instant dispute. The subject matter of the intercepted telephone conversation is not relevant or material to the charge against the Claimant and his own testimony confirms the fact that he did not perform his regular assigned duties on July 21, 1962.

In view of the foregoing, the Board concludes that the Claimant received a fair and impartial trial and that the Carrier was not in violation of Rule 6-C-1(a).

The third point at issue raised by the Organization is that if the Claimant was found guilty, the discipline imposed was excessive and not warranted. In the instant case, the record shows that the Claimant had previously been disciplined for failure to protect his assignment and being absent therefrom without permission. While the Claimant's established guilt of the offense alone might not be considered sufficient to warrant the penalty of dismissal, his guilt of the offense coupled with his previous record, justified the dismissal penalty. (Awards 6171, 7018 and 10308.)

In conclusion, the Board finds that the instant claim is without merit and is denied in its entirety.

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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of May 1964.