Award No. 17240
Docket No. MW-18065

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE WICHITA TERMINAL ASSOCIATION

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

(1) The dismissal of Trackman A. J. Hembree was unjust, improper and on the basis of unproven charges. (System file PR-81593)

(2) Trackman A. J. Hembree be reinstated with all rights unimpaired and compensated for all wage loss in accordance with the provisions of Section 6 of Article VI."

OPINION OF BOARD: This claim arises from the dismissal of A. J. Hembree, Section Laborer on March 4, 1968, for alleged violation of Rules 1, 5, 6, 16, 17, 30 and 37 of General Rules for the Guidance of Employes, issued April 1, 1967.

As a threshold question, Carrier contends that there is a procedural defect in Claimant's processing of controversy which is sufficient to bar the claim from further consideration by this Board. Attention is called to the fact that the ex parte submission of Claimant's Organization is addressed to a dispute between the Brotherhood of Maintenance of Way Employees and "Wichita Union Terminal Railway Company." Claimant was in fact employed by the Wichita Terminal Association, described by the Carrier as completely separate and distinct from the named company and handled as such.

Examination of the record reveals that during the entire time in which this matter was in controversy on the property, all communications from Claimant's Organization to the Carrier were addressed to the appropriate individuals as officials of the Wichita Terminal Association, Claimant's actual employer.

However, Organization's Notice of Intent identified the Carrier as "The Wichita Union Terminal Railway Company." Carrier nevertheless accepted said Notice of Intent from the Executive Secretary, Third Division without challenge, and carried on further correspondence with the Division Executive Secretary, with the continued use by the Division of the erroneous caption on the subject of two requests by the Carrier for extension of time for filling ex parte submission and Carrier subsequently filed an ex parte submission as the Wichita Terminal Association without challenge to the correctness of the respondent named by the Organization. Only when the rebuttal statement of Carrier was presented was the procedural objection first raised.

In all correspondence to this Board, the issue in controversy was repeatedly stated in identical terms by both sides and the subject Claimant clearly specified identically by both parties as were the dates and locales of the events in dispute.

In assessing the substantive consequences, if any, of Organization's error in stating the proper company name of the Respondent, pertinent judicial notice may be taken of the fact that the Atchison, Topeka and Santa Fe Railway is part owner of both the Wichita Terminal Association and the Wichita Union Terminal Railway Company and Organization holds Agreements with all three, the Agreement between the parties, in fact, adopting by reference the amendments, interpretations and rules in the Agreement between the Atchison, Topeka and Santa Fe Railway and the Organization "insofar as rules therein are applicable."

We conclude from these facts that Carrier was fully aware of, and engaged in interchanges with Organization on the property and before this Board, on the circumstances and personnel involved in the question at issue. It therefore cannot be said that Carrier has been misled by this error or was prejudiced in its rights.

It is our opinion that under these circumstances, we will fulfill the purposes of the Agreement and the Act the more faithfully by regarding the Organization's error in identification of the Respondent as not having sufficient consequence to bar from our consideration a claim on which the proper parties have joined issue on a mutually acknowledged surrounding set of facts and on which the parties have come to us because of deadlock between them on said controversy.

We shall therefore disallow the request for dismissal on procedural grounds.

We turn now to the merits of the controversy.

The record supports the Carrier's charges that the Claimant was late for work on December 27, 1967, December 28, 1967 and January 3, 1968.

The record supports also Carrier's charges that Claimant was absent on December 19, 1967 without authority and without notice prior to or on the day of absence and without adequate substantiation of the reason therefor following said absence. The record supports also Carrier's charge that on January 22, 1968, Claimant failed to appear for work without authorization for said absence and without notice of such absence either prior to or on day of absence and without adequate explanation following said absence.

The record also establishes that on January 15, 1968, Claimant did not appear at regular starting time (8 A.M.). Claimant stated at the investigation that he called in that he would be late and that he later reported to the tool house "and the doors were locked and one push car was gone. I looked up the track both ways and I did not see anyone and I turned around and went home." But he also admitted that he made no effort to find out where the crew was working. We find that, if his version of the incident was correct, Claimant was nevertheless derelict in his duty.

The record establishes also that on January 25, 1968, Claimant did not appear for work at regular starting time, but phoned in at about 9 A.M., approximately one hour after starting time that his right arm was hurting him and he was thereupon instructed by his Section Foreman to go to the Company doctor. Claimant said he preferred to go to his own doctor, a Dr. Biermann, and was given permission to do so. When he came in to work on the next day, he stated, in response to inquiry, that he had been to see Dr. Biermann and that the latter had advised him he had arthritis. He was thereupon asked to get a release from said doctor. He came to work on January 29th with a release from a Doctor Keane, said statement giving no reason for the release.

However, in his testimony at the hearing, Claimant stated that he did not see Dr. Biermann on January 25th because he didn't find him in at 1:30 P.M. and made no further effort to see him. On January 31st Claimant's foreman was presented with a physician's statement from Dr. Keane to the effect that Claimant had suffered an injury to his left arm when lifting rail on the job on January 24th.

In consequence of the incidents of January 24th to January 31st, Carrier charges Claimant with violation of General Rule 6 (prompt report of accidents, personal injuries or rule violations), Rule 37 ("full and complete report" to be made "at once" in every case of accident or injury on duty).

It is our conclusion that Carrier's charges have been convincingly sustained concerning the incidents of January 24th to January 31st.

The record as a whole sustains all Carrier's charges. We find also that dismissal of the Claimant was justified and appropriate under all the circumstances established.

We will therefore deny the claim.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1969.

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