

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23588  
Docket Number CL-23766

A. Robert Lowry, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(  
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-9352) that:

(1) Carrier acted in an arbitrary and unjust manner when it dismissed Mr. Louis R. Failla from its service effective September 14, 1979 as the result of an investigation conducted on September 10, 1979.

(2) Carrier shall now be required to restore Mr. Failla to service with all rights and privileges unimpaired and compensate him for all time lost beginning September 2, 1979.

OPINION OF BOARD: The Claimant, Louis R. Failla, employed as a Clerk Messenger, was charged by the Carrier on September 6, 1979, with possession and use of marijuana while on duty on September 2, 1979, and ordered to be present for formal investigation at 9:00 AM, Monday, September 10, 1979. Claimant on the date of receipt of the notice, September 6th, made written request for postponement of the hearing until September 17, 1979, the request contained no reason for postponement. On the same date, September 6th, Carrier denied the request and sent it by certified mail to Claimant's last known address. The record shows Claimant receipted for delivery of the certified letter on September 14, 1979. The formal investigation was held, as scheduled, on Monday September 10, 1979, without the presence of Claimant or his representative. The record shows the hearing officer delaying the investigation ten minutes while a search of the building was made for the Claimant. It then proceeded with the hearing, trying Claimant in absentia. Carrier found Claimant guilty of the charges and on September 14, 1979, formally dismissed him from service.

Rule 24 (c) of the Agreement reads as follows:

"At a reasonable time prior to the investigation the employe is entitled to be apprised of the precise charges and shall have reasonable opportunity to secure the presence of necessary witnesses."

Claimant was charged on September 6th, a Thursday. He made written request for postponement on the same date, Carrier rejected the request on the same date, and the investigation was conducted on Monday, the 10th, in absentia. Claimant had just four days, including Saturday and Sunday, to prepare for the investigation and secure witnesses. The rule clearly obligates Carrier to accord Claimant "reasonable opportunity to secure the presence of necessary witnesses." The Carrier, especially the hearing officer, should have been extra zealous in guarding against the abridgement of any of the procedural rights written into their collective bargaining agreement. The Carrier, since it has within its control the basic judicial due process machinery, must exert every effort to assure Claimant full opportunity to defend himself against charges which can seriously affect his future ability to earn a living. The fact that Claimant made a written request for postponement was sufficient evidence he was not abandoning or waiving his contractual right to a hearing, and the Carrier, especially the hearing officer, should have resolved the question of postponement in favor of Claimant in order to give him an opportunity to prepare his defense and, therefore, comply with the intent of the rule by holding the investigation when Claimant could be present and afforded the right to defend himself.

This reasoning is supported by Referee H. Raymond Cluster in Third Division Award 7173 when he said:

"In this case, where there was a serious doubt that Claimant intended to waive his right to a hearing, Carrier, should have resolved this doubt in his favor, rather than close the door on Claimant's rights despite the uncertainty as to the reason for his absence, and the presence of his representative demanding a postponement of the hearing."

Referee Harold M. Weston further supports, this theory in his Fourth Division Award 1851, reading as follows:

"In our opinion, these proceedings constitute an abuse of due process. Claimant was given four days notice, including Saturday and Sunday, of a hearing that put his position in jeopardy. While the matter of notice may not have been squarely raised on the property and we are making no determination as to the adequacy of that notice, the circumstances are compelling that Claimant should have been given the requested two day postponement. A man's position was at stake and it is not a valid defense, in this factual situation, that Carrier's witnesses should be detained if the hearing were delayed. In a discharge case, every effort should be made to make certain that the employee's rights to representation and to prepare his defense are respected."

This Board, after careful study of the entire record and applicable awards, finds and holds that Carrier failed to accord Claimant a fair and impartial hearing required by the agreement. The claim will be sustained. The Carrier shall reinstate Claimant with all the rights unimpaired and compensate him for time lost, excluding outside earnings.

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 Employee involved in this dispute are respectively Carrier and Employee 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.

DISSENT OF CARRIER MEMBERS  
TO  
AWARD 23588 (CL-23766)  
(Referee Lowry)

Dissent to this Award is necessary because the Majority has again ignored the contract and the facts of record in order to dispense personal preference.

At Page 2 of the Award the Majority states:

"Claimant had just four days, including Saturday and Sunday, to prepare for the investigation and secure witnesses. The rule clearly obligates Carrier to accord Claimant 'reasonable opportunity to secure the presence of necessary witnesses.' The Carrier, especially the hearing officer, should have been extra zealous in guarding against the abridgement of any of the procedural rights written into their collective bargaining agreement....and the Carrier, especially the hearing officer, should have resolved the question of postponement in favor of Claimant in order to give him an opportunity to prepare his defense and, therefore, comply with the intent of the rule by holding the investigation when Claimant could be present and afforded the right to defend himself.

The facts of record substantiate that:

1. Claimant acknowledged receipt of the Hearing Notice at 9:41 A.M., September 6, 1979.
2. On the afternoon of September 6, 1979, Claimant presented at Carrier's offices a note requesting a postponement of the hearing scheduled for September 10, 1979.
3. Carrier, on September 6, 1979, replied to Claimant's request by a certified special delivery letter, denying his request as there was no reason given for such request.
4. The Post Office attempted delivery of the letter on September 7, 1979, but was unable to do so.

5. It was subsequently determined that Claimant did not return to his residence, and did not advise anyone of where he might be reached.

While the Majority pontificates about being "extra zealous" concerning "procedural rights", it simply ignores that the procedural defect relied upon by the Majority in this case was a situation of the Claimant's own creation. Carrier denied Claimant no procedural right.

The Majority further baldly asserts that the "question of postponement" should have been resolved "in favor of Claimant", but does not explain why that should be so. No reason was ever given on the property for the need for the postponement, and absent a reason, there is no mandate that the Carrier must grant any and every postponement request.

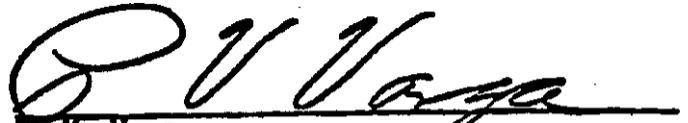
In Award 21696 - Wallace, it was clearly stated:

"It has been held that the Carrier cannot be made an insurer of the receipt of this type notice. Where bona fide efforts are made to deliver the notice but the failure of delivery is due to Claimant's conduct, then it must be concluded the rule requirements have been met. Award 13757 (Coburn). The Employee had the responsibility not to avoid service of the notice. Award 15007 (Wolf)."

Third Division Award 17691 - McGovern:

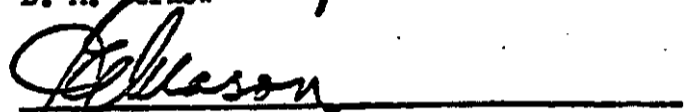
"As we said in Award No. 13941 'There must be a termination to an adversary proceeding and the parties have the responsibility of protection of their respective interests. The situation herein presented is analogous to a party failing to appear at a trial in a civil action set for a day certain; whereupon the Court enters judgement on the pleadings or ex parte evidence. We find, in the light of the facts of record, Carrier did not violate the Agreement in proceeding to decision in absence of Claimant.'"

Like Award 23427, this dispute involved the proven use of an intoxicant - marijuana - while on duty and under pay. Such matters are serious, and must be duly considered. However, like the disposition made in Award 23427, such matters have been ignored in this case. We strongly dissented in that case and we do so in this case.

  
P. V. Varga

  
W. F. Eaker

  
D. M. Lefkowitz

  
J. E. Mason

  
J. R. O'Connell