

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union  
(  
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
(GL-10180) that:

CLAIM NO. 1:

(a) Carrier violated the intent and provisions of the current Clerks' Agreement at Los Angeles, California, when it wrongfully assessed the personal record of Mr. L. H. Martinez twenty (20) demerits, and

(b) Carrier shall now remove the twenty (20) demerits and any reference to the formal investigation held on January 7, 1986, from the personal record of Mr. L. H. Martinez.

CLAIM NO. 2

(a) Carrier violated the rules of the current Clerks' Agreement at Los Angeles, California, when it removed Mr. L. H. Martinez from service as a result of a formal investigation held on January 7, 1986, and

(b) Mr. L. H. Martinez shall now be returned to Carrier service and paid for all loss of wages and benefits commencing on/or about October 15, 1985."

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 employees involved in this dispute are respectively carrier and employees 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.

On January 7, 1986, two Investigations were conducted by the Carrier. Both were conducted by the same Hearing Officer. The morning Investigation (hereinafter Claim No. 1) concerned the Claimant's alleged absence without leave on October 7, 1985. It resulted in the assessment of 20 demerits against the Claimant.

The afternoon Investigation (hereinafter Claim No. 2) concerned charges of absence without leave on October 14, and 15, 1985. The Investigation resulted in Claimant's discharge. Both decisions were made the same day and Claimant's formal notices of both the assessment of 20 demerits and of discharge are dated January 7, 1986. However, the transcripts of the Investigations were not attached to the January 7 letters.

On February 7, 1986, the Organization wrote the Carrier indicating its intent to appeal both disciplinary actions and stating:

"At this time I have not received a copy of the transcript of this proceeding as provided by the rules of the current agreement. Would you please forward this document as soon as possible."

Identical letters were written regarding both Claims.

On February 10, 1986, the Organization received both transcripts under cover of a letter dated February 6. On March 14, 1986, both disciplinary actions were appealed. Rule 47-A (1) requires that Claims be filed "within 60 days from the date of the occurrence on which the claim or grievance is based." The Carrier contends that, since both disciplines were imposed on January 7, 1986, both appeals were untimely. It is the Organization's position that the 60 day period cannot begin to run until the transcript is furnished. Since the Board's jurisdiction depends upon this issue, it will be resolved first.

The issue is whether the time for appeal may properly run against the Organization where the transcript of the Investigation upon which the disciplinary decision was made has not been furnished. In a letter to the Organization dated July 11, 1986, the Carrier denied that the Organization's letter of February 7, 1986, was an actual appeal. It further stated:

"Mr. Moore did not present a defense of any manner in behalf of the principal nor did he format his letter in the style of an appeal claim, i.e., STATEMENT OF CLAIM, STATEMENT OF FACTS, POSITION OF EMPLOYEES, etc. Therefore, his letter of February 7, 1986 was not an appeal of my decision."

What this letter clearly demonstrates is that there is an accepted appeal format under the Agreement that depends upon the Organization's prior receipt of the transcript. Otherwise, it would be impossible for the Organization to comply with the expected format. The Board therefore finds that the Claims are not untimely since the transcript was not sent until February 6, 1986.

Regarding the other procedural issues raised by the Organization, the Board finds that a fair Investigation was conducted on both counts. The letters initiating the Investigations were precise in appraising the Claimant of the charges against him and he had the opportunity to make and did make a full defense. The record shows no partiality nor did the Hearing Officer perform any improper functions. According to the record, he neither initiated the charges nor made the final decision. Both were done by the Carrier's General Manager.

As to the merits of the Claims, the Board turns its attention first to the discharge of the Claimant for excessive absenteeism between January 1 and October 15, 1985, and for being A.W.O.L. on October 14 and 15, 1985. Regarding the latter two dates, Claimant knew he would have to file a leave of absence form by October 12, 1985. His absenteeism record is such that he was well acquainted with the Rules by virtue of prior experience and leave requests. It was his obligation to comply with the Leave Rule, something he did not do.

Claimant's absentee problems go back as far as June 1984 and he was cautioned numerous times after January 1, 1985, that his attendance would have to improve. The record shows that through October 15, 1985, he missed a total of 676 hours, 25 minutes of work time during which he was sick without pay. However, he was also held out of service, although paid, awaiting medical determinations for an additional 14 days. He was absent 48.5 percent of the available work time, based solely on the 676 hours of lost time versus 174 available work days.

It is the conclusion of the Board that not only did Claimant violate the second paragraph of Rule 13 with regard to October 14 and 15, 1985, but that his entire absentee record during 1985 supports a judgment of dismissal. The Carrier has presented numerous Awards in support of the proposition that excessive absenteeism is grounds for termination even though illness is the reason. Commenting upon a 26 percent absenteeism rate during a 7 1/2 month period, the Board stated:

"That number of absences, even though for illness supported by a doctor's statement, is excessive."  
(Award No. 117 of Public Law Board 1790).

Here the Board considers Claimant's 48.5 percent 1985 absentee record excessive and justifying the penalty of dismissal.

Claim No. 1 regarding the alleged unauthorized nature of Claimant's absence on October 7, 1985, is immaterial to the Findings of the Board. Therefore, the Board declines to reach Claim No. 1 on its merits.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.