

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company  
(Former Missouri Pacific Railroad Company)

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

(1) The dismissal of Trackman R. C. Gonzales for alleged violation of 'Item 5, Conditions of Employment, Application for Employment, Form 15021, and General Rules A and B of the Safety, Radio and General Rules for All Employees' was arbitrary, capricious, an abuse of the Carrier's discretion and in violation of the Agreement (Carrier's File 860115).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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.

In May, 1986, the Claimant, a five year employee, was working as a Trackman on Tie Gang 5811. Claimant was involved in an off-duty automobile accident and failed to report for work as scheduled.

On June 10, 1986, the Carrier, by written notice, instructed Claimant to report for formal Investigation concerning this matter in Shreveport, Louisiana on June 24, 1986. Following three successive postponements at the request of the General Chairman, the Investigation was rescheduled for August 12, 1986. On that date, however, Claimant failed to appear. Nevertheless, the Carrier proceeded with the Hearing. Based on evidence adduced at the Hearing the Carrier found that Claimant had failed to protect his assignment in violation of Carrier Rules and suspended him from service for thirty days.

On August 18, 1986, the Carrier next instructed Claimant, by written notification, to report for an Investigation concerning his "alleged failure to report for formal investigation August 12, 1986, at 10:00 a.m. as instructed by D. G. Weger, Trainmaster." This Investigation, held on October 8, 1986, also proceeded in Claimant's absence. The Carrier subsequently informed Claimant that he was dismissed from service for violation of Item 5, Conditions of Employment, Application for Employment, Form 15021, and General Rules A & B of the Safety, Radio and General Rules for all Employees when he failed to report for Investigation as instructed on August 12, 1986.

Although Claimant did not attend the October, 1986, Investigation the record contains a letter he sent to the Carrier on August 22, 1986, wherein he explained that he did not report for the August 12 Hearing for reasons of personal hardship. He stated that he had told the General Chairman's secretary, in the General Chairman's absence, that he would accept any discipline the Carrier assessed based on its findings at the August Hearing. He further explained that he did not have the means to get to Shreveport, a distance of approximately 1400 miles from his home, for either the previous Hearing or the impending Investigation and requested that the Carrier take his circumstances under consideration.

This case raises the question of whether an employee, who has been charged with a possible Rule violation, commits insubordination when he voluntarily absents himself from the disciplinary Hearing. The Carrier argues that the Claimant disobeyed specific instructions to report to the Investigation and that he, in effect, was needed as a witness, since the purpose of the formal Hearing was, as the notice stated, "to develop the facts and place responsibility for your alleged failure to protect your assignment...."

The Board finds that the answer to this question depends on whether the Rules or Agreements between the parties demonstrate that the right of Hearing exists for the benefit of the employee. If a scrutiny of the relevant language reveals this to be the case then it would follow that the employee may waive his right to Hearing concerning disciplinary allegations against him. (E.g., Fourth Division Award 2630 and First Division Award 20479.)

The provision at the heart of the instant controversy is Rule 12, Section 1(a) which provides:

"An employee who has been in service more than sixty (60) days shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation which will be held within a reasonable time."

The Board concludes that this language clearly indicates that the right to Investigation exists for the benefit of the employee. Therefore, when Claimant herein chose not to attend the Hearing he thereby chose not to exercise the benefit provided him by Rule 12, and his failure to appear at the August 12 Hearing did not constitute insubordination.

Finally, it is important to emphasize that although Claimant had the right to absent himself from the Hearing the Carrier had the right to then conduct the Investigation and to assess whatever penalty was justified by the evidence.

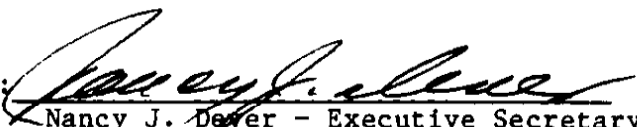
In light of the Board's decision, Claimant's dismissal, which the Carrier ultimately reduced to a nine month suspension, shall be removed from his record. He shall be made whole with respect to his seniority and all other rights and he shall be compensated for all wage loss suffered.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.