Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33216
Docket No. TD-32115
99-3-94-3-493

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

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"This is to request to appeal the discipline assessed G. L. Thompson on G-32, dated October 1, 1993 of dismissal in all capacities."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Appellant, a Train Dispatcher assigned to Carrier's dispatching facility at Green Tree, Pennsylvania, marked off sick on June 29, 1993 "until further notice." When over a month had elapsed without hearing from him, Carrier on August 3, 1993 sent him a Form MD-25, Report on Illness or Injury, by certified mail for completion by his physician, enclosing a stamped, self-addressed envelope for his convenience. Appellant signed for receipt of this document on August 6, 1993.

One month later, after Appellant had failed to provide any medical documentation justifying his continued absence, Carrier on September 9, 1993 mailed him a Form G-250 directing him to attend a disciplinary Hearing involving the following charges:

> "Your failure to comply with written instructions dated August 3, 1993 sent to your certified mail-return receipt, from M. R. Martinez, Assistant Division Transportation Superintendent, and receipted by you on August 6, 1993, in that you did not submit the MD-25 as of the date required.
>
> Your being absent from your assignment as a train dispatcher, Green Tree, PA, without proper authority or permission from June 29, 1993."

At the Organization's request, Appellant's disciplinary Hearing, originally set for September 20, 1993, was rescheduled to September 28, 1993. When Organization representatives reported that Appellant's medical condition prevented him from appearing on that date, Carrier offered to provide taxi service. Appellant rejected that offer, and the Hearing went forward in absentia. Thereafter, the Appellant was dismissed effective October 3, 1993. That action was subsequently modified by Carrier's highest appellate officer, and the Appellant was reinstated to service effective December 22, 1993, with time out of service to be considered as disciplinary suspension.

This claim seeks sick leave pay and related benefits withheld during Appellant's period of suspension between October 3, 1993 and the date of his reinstatement in December. The Organization grounds its claim chiefly on four Carrier actions it maintains constitute fatal procedural errors. The Board reviews those allegations in the order presented.

1. The Organization asserts that Carrier's refusal to postpone the Appellant's September 28, 1993 Hearing as requested was in violation of Rule 18 - DISCIPLINE, HEARINGS, AND APPEALS. The relevant provisions of that Rule are as follows:

> "Section 1. Hearings.
> (d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused. The hearing shall be scheduled to begin within fifteen (15) calendar days from the date the chief Train Dispatcher or other designated

official had knowledge of the employee's involvement in an offense. A hearing may be postponed for a valid reason for a reasonable period of time at the request of the company, the employee or the employee's union representative."

In this instance, the Appellant, having never contacted any Carrier official since leaving work on June 29, had received and ignored clear and unequivocal instructions to have an MD-25 completed by his physician within ten days of August 6. In the absence of any documented reason for doing so, Carrier nonetheless acceded to the Organization's request for a postponement of the September 20 Hearing, resetting it for September 27. Carrier received another request for a continuance, accompanied by further representations that Appellant's medical condition did not allow his attendance at that time. The Hearing was reset for September 28. Carrier's offer to have him driven to the Hearing was rejected, apparently with no reason given.

Rule 18 makes allowance for reasonable latitude in scheduling and rescheduling disciplinary Hearings upon request by either party when supported by valid reasons for doing so. The Board concludes that Carrier's action in declining to further delay Appellant's Hearing, in the absence of any showing of a valid reason for same, did not violate Rule 18.

2. The Organization argues that Carrier's decision to hold a Hearing in Appellant's absence represents a fundamental denial of due process and operates to invalidate the decision reached at that Hearing.

This issue, a subset of issue number 1, invokes well-settled principles familiar to both sides of this dispute. Although never ideal, unless express law or contract terms provide otherwise, the absence of one party is no bar to proceedings under appropriate circumstances if proper notice has been given, and determinations may be made based upon evidence received at such proceedings. That common sensible standard recognizes that if the Rule were otherwise, a party desiring to avoid judgment or change could frustrate the process by simply refusing to appear. There is nothing in the terms of Rule 18 that affords a limitless right of postponement or that precludes Hearings in absentia. Further, there is ample case authority for such proceedings by this Board. See, e.g., Third Division Awards 24945, 31200 and Second Division Award 12452. On the facts of record here, the Board finds no denial of Appellant's Rule 18 rights by Carrier's decision to go forward with the scheduled Hearing in his absence.

3. The Organization contends that Appellant was denied a fair and impartial Hearing by the manner is which his September 18 Hearing was conducted. Rule 18, Section 1. (a) requires that "employees shall not be suspended nor dismissed from service without a fair and impartial hearing." In this case, no compelling evidence has been adduced in support of the Organization's contention, and the Board accordingly rejects this assertion.

4. The Organization argues that Carrier has improperly introduced documentary evidence not exchanged in case handling on the property, i.e., copy of receipt for certified mail allegedly establishing Appellant's August 6, 1993 receipt of the MD-25 mailed to him on August 3. Carrier does not appear to seriously contest this assertion, nor does the Organization appear to contest the fact of receipt. Accordingly, we note as a technical matter that the document itself, not having been produced in case handling on the property, has received no consideration in the Board's examination of the core issues.

The merits of this dispute are not complex. Succinctly stated, Appellant marked off for three months with no indication to anyone of his specific reason or purpose for doing so. He disregarded clear instructions to provide medical evidence for his continued absence from August 6 until one day after his termination, despite the fact that those instructions placed a clear condition on any continuation of his authorized absence. He spent June through September without so much as a telephone call to his employer. Appellant was not charged with falsifying his medical condition to the Carrier, a serious offense in its own right. The charges were job abandonment by failing to justify a long term absence.

The on-property record proves beyond any doubt that the Appellant was disrespectful of his employer's interests, and the cases cited establish with equal clarity that the penalty of dismissal originally imposed was commensurate with the offense. Accordingly, on its merits, this appeal, challenging the Carrier's subsequent modification of that penalty to a disciplinary suspension of approximately three months, must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of April 1999.

LABOR MEMBER'S DISSENT
TO
AWARD 33216, DOCKET TD-32115
(Referee Conway)

The Majority stated the merits this way: "The merits of this dispute are not complex. Succinctly stated, Appellant marked off for three months with no indication to anyone of his specific reason or purpose for doing so." Succinctly stated, the Majority is wrong.

The undisputed facts of this case before the Board are that the Appellant called the designated Carrier person on June 29, 1993 and marked off sick, until further notice. The designated Carrier person accepted the mark off of the Appellant without question. This is not only readily ascertainable from the on-property record, the Majority acknowledges it at the beginning of its decision; "The Appellant, a Train Dispatcher assigned to Carrier's dispatching facility at Green Tree, Pennsylvania, marked off sick on June 29, 1993 'until further notice'". The contradiction is obvious.

In addressing a procedural argument concerning the Carrier's refusal to postpone the hearing, the Majority writes: "The Board concludes that Carrier's actions in declining to further delay Appellant's Hearing, in the absence of any showing of a valid reason for same did not violate Rule 18."

An undisputed fact in this case before the Board is that the hearing was properly postponed at the request of the Organization three times. Each time, the "reason" given by the Organization was that the Appellant was unable to attend due to his medical condition. Given the fact that the Carrier granted the Organization's requests for these three postponements, Appellant's medical condition was a "valid reason". But, the fourth time the Organization requested that the hearing be postponed, for the same "valid reason" -- the Appellant was unable to attend due to his medical condition -- the Carrier refused and held the hearing in Appellant's absence. So, how is it that the Appellant's medical condition is a "valid reason" to postpone the hearing the first three times, but is no longer a "valid reason" on the fourth time?

And then, in an apparent attempt to bolster its conclusion, the Majority writes, "Carrier's offer to have [the Appellant] driven to the Hearing was rejected, apparently with no reason given". This is a curious statement by the Majority given the fact that the request for postponement was not due to the Appellant not having a ride to the hearing, but rather it was his medical condition that prevented him from attending the hearing. One only has to use common sense to realize that because the Appellant's medical condition prevented him from attending the hearing, his medical condition wouldn't improve to allow his attendance just because the Carrier offered him a ride.

Just as curious is the Majority's revelation that, "Appellant was not charged with falsifying his medical condition to the Carrier, a serious offense in its own right". While this is in fact a true statement, what does it have to do with this case? ABSOLUTELY NOTHING, and the Majority's inference of some wrong-doing by the Appellant in this regard is reprehensible.

The Majority concludes by writing, "The on-property record proves beyond any doubt that the Appellant was disrespectful of his employer's interests". The Majority couldn't be more wrong. First, the Appellant was not charged with or found guilty of being "disrespectful of his employer's interests", so even if the on-property record proved he was, which it didn't, it was irrelevant. Secondly, more undisputed facts in this case before the Board, which happened to be presented by the Carrier, are as follows:

- As a result of the hearing, which was held in absentia, the Appellant was dismissed.
- On appeal, the Carrier restored the Appellant to service, with time held out to apply as a suspension.
- When the Appellant was restored to service, he remained on extended sick leave.
- "The Appellant never returned to work (he is currently on disability leave)."

It is clear from these facts that the Appellant's medical condition was such that he was prevented from working and attending the hearing. Just as clear is the irony that the Carrier disciplined the Appellant for, as the Majority incorrectly states it "job abandonment", when he marked off sick until further notice, but then restores him to service only for him to remain on extended sick leave. There is no way "the Appellant was disrespectful of his employer's interest". The reverse is true. The Carrier AND the Majority were disrespectful of Appellant's interest.

I dissent.

Respectfully submitted,

David W. Volz

David W. Volz
Labor Member