

Award No. 5987
Docket No. 5757
2-AT&SF-MA-'70

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Eastern Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current controlling agreement Machinist Marland M. Edgar of Argentine, Kansas, was unjustly dismissed from the service of the AT&SF Railway Company by Certified Mail dated October 27, 1967.

2. That accordingly the carrier be ordered to reinstate this employe to service with all service rights, seniority, all net wage loss, and payment in lieu of all other accrued contractual benefits to which otherwise entitled had he continued to remain in carrier service dating from his improper discharge on October 27, 1967.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement in effect between the AT&SF Railway Co., hereinafter referred to as carrier, and System Federation No. 97, Railway Employees' Department, AFL-CIO, representing among others the International Association of Machinists and Aerospace Workers, parties to this dispute, identified as "Shop Crafts Agreement," effective August 1, 1945, as amended (reprinted January 1, 1957, to include revisions), a copy of which is on file with the Second Division, National Railroad Adjustment Board, and is hereby referred to and made part of this dispute.

Mr. Marland M. Edgar, hereinafter referred to as claimant, was charged in formal investigation held at Argentine, Kansas on October 23, 1967, with being absent from duty from September 28, 1967, without permission in alleged violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2626 Standard, Revised 1966, (a carrier authored, implemented and administered set of rules), and was dismissed from service on October 27, 1967.

Rule 16 of Form 2626 Standard reads as follows:

"Employees must obey instructions from the proper authority in matters pertaining to their respective branches of the service. They must not withhold information, or fail to give all the facts, regarding irregularities, accidents, personal injuries or rule violations.

Employees must report for duty as required and those subject to call for duty will be at their usual calling place, or leave information as to where they may be located. They must not absent themselves from duty, exchange duties or substitute other persons in their places without proper authority."

Claimant worked a 12 P.M. to 8 A.M., Thursday through Monday assignment at time of his dismissal. He had been employed by the carrier for approximately one year and three months at Argentine Shop which is a large mechanical maintenance and overhaul facility employing many hundred mechanics, helpers and apprentices of various shop crafts' classifications on a seven day — three shift operation.

On October 16, 1967, letter was dispatched by Shop Superintendent V. R. Carlson via certified mail to claimant summoning him to appear for formal investigation on October 23, 1967. Claimant did not appear at the hearing and he was tried in absentia. He was advised by certified mail on October 27 of his dismissal from carrier service.

Subsequent to claimant accepting delivery of dismissal from service letter, the letter dated October 16 notifying him to appear for formal investigation on October 23 was returned to the carrier by postal service, indicating incorrect address.

Following his receipt of the October 27 dismissal from service letter, claimant contacted Machinist Local Chairman A. J. Rebar to acquaint him with such development.

Another investigation was scheduled by Mr. V. R. Carlson for November 8, 1967, at which claimant did not appear since he had already been discharged from carrier service on October 27 and was therefore not subject to carrier's instructions or directives. Investigation scheduled for November 8 was nonetheless conducted, following which another dismissal from service notice was mailed to claimant on November 14.

Claim was filed with proper officer of the carrier on the date of November 28, 1967, contending claimant was improperly discharged from service October 27, 1967, and requesting reinstatement to the service with full seniority, service rights, and all other contractual benefits or pay in lieu thereof and that claimant be paid at pro rata rate for all lost time commencing with October 27, 1967. Carrier's officer declined the claim under date of December 11, 1967. Claim was subsequently appealed to all officers of the carrier designated to receive such appeals all of whom have declined to make satisfactory adjustment.

POSITION OF EMPLOYEES: The carrier has striven to imply that Local Chairman A. J. Rebar ask it to conduct another, or second, formal investiga-

tion against the claimant due to fault of the carrier in failing to correctly summon claimant to attend the previously held hearing. Its implication and what was intended by it is quite obvious, indeed. It has endeavored to suggest, or imply, that the second investigation was merely held at the insistence of Mr. Rebar or by the claimant through the local chairman.

Irrespective of the carrier's ploy in this regard it is self evident that it did, in fact, discharge claimant from its service on October 27, 1967, it thereafter making no attempt whatsoever to cancel or annul its October 27 notice of discharge to claimant prior to it embarking on its venture . . . however superfluous and meaningless . . . to hold another investigation on November 8 resulting from the same alleged offense for which claimant was previously discharged from service.

In inquiry to Mr. Rebar concerning carrier implication above noted, he responded as follows:

"July 5, 1968

In reply to your letter of June 29, 1968, file 1-15-11, concerning declination by Vice President O. M. Ramsey in dispute claim on behalf of Machinist M. M. Edgar.

In reference to Mr. Carlson's statement in paragraph 3 on page 2, this is a false statement in all respects. When I was first notified that Mr. Edgar was removed from service, I went to Mr. Carlson's office and stated that the alleged investigation and Mr. Edgar's subsequent removal from service was handled entirely wrong and was not processed according to our agreement. He stated that he had handled the matter correctly and that he was well satisfied. I then left his office and returned to work on the ramp. About 2½ to 3 hours later Mr. Carlson came down on the ramp and told me, 'I think we'll have another investigation on Mr. Edgar.' I figured that Mr. Carlson had talked to someone and realized he had handled this matter wrong. My answer to him was 'it's up to you' and not 'yes' as stated in Mr. Ramsey's letter. Later, after another alleged investigation was held, Mr. Carlson stated that they held another investigation like I wanted and I stated that we did not request that another investigation be held, as he said, but that we were dissatisfied with the way Mr. Edgar was removed from service and that I would write it up as a formal grievance.

Again, I would like to repeat that Mr. Carlson did not ask me if I felt that another investigation was necessary. He told me he was going to have one and I did not say 'yes' as stated to another investigation.

/s/ A. J. Rebar
Local Chairman
Lodge No. 356"

In discussing this phase of the dispute in conference with carrier's O. M. Ramsey at Chicago on September 6, 1968 . . . following which he confirmed his prior declination by letter dated October 3, 1968 . . . he stated that he didn't much care whether or not Mr. Rebar agreed to another investigation and that it was of no consequence or importance to the carrier in

reaching its ultimate decision on the matter. Thus it follows that this ploy by Mr. Carlson can be totally disregarded by this Division during its determination of the overriding issue; i.e., dismissal of claimant without due process.

As a matter of fact, Mr. Ramsey did, in conference on September 6, gratuitously advise Assistant General Chairman M. E. Melvin and other IAofM representatives, including the undersigned, that he believed that claimant was first dismissed from service on October 27, 1967, without first receiving "due process to which he was entitled" as regards notice to appear for formal investigation.

Discipline of employes shall be handled in conformity with provisions of Rule 33½, Shop Crafts Agreement, reading in pertinent part as follows:

"RULE 33½. DISCIPLINE

(a) No employe will be disciplined without first being given an investigation which will be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation. Suspension in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule. An employe involved in a formal investigation may be represented thereat, if he so desires, by the Local Chairman and one member of the Shop Committee.

(b) Prior to the investigation, the employe alleged to be at fault shall be apprised of the charge sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses.

(c) A copy of the transcript of the evidence taken at formal investigation will be furnished the employe, or his representative, provided request therefor is made at the time the investigation is held.

(d) If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal.

* * * * *

Reduced to its essentials and cutting through the maze of semantics, ploys, straw men, and irrelevancies thus far constructed and relied upon by the carrier to support its improper action in this connection, the following and all it connotes is alone controlling as regards determination of instant dispute-claim.

1. Local carrier management acknowledges it sent to an incorrect address notice to claimant to appear for formal investigation scheduled for October 23, 1967.

2. Investigation was held in the absence of proof that claimant received the notice of October 23, 1967 in absentia against claimant and he was summarily removed from service on October 27, 1967.

3. Notice mailed to claimant to appear for formal investigation was subsequently returned to the carrier due to incorrect address; a fault of the carrier, not the claimant. It is a fact, however, that carrier's notice of discharge was sent to him at the correct address, he thereafter being discharged from the service in the strictest sense of the term.

4. Despite lack of action or endeavor to cancel or annul its October 27, 1967 notice of discharge to claimant, the carrier nonetheless mailed another notice of investigation on November 1, to the claimant, such hearing being allegedly conducted on November 8. Another notice of discharge was mailed to claimant, then an ex-employee of the carrier, on November 15, 1967, this despite such notice being inconsequential and superfluous due to prior and controlling notice of discharge mailed to and received by claimant on October 27, 1967.

5. That carrier discharged claimant from its service on October 27, 1967 is uncontestable. Since the carrier undertook no action to annul or cancel such discharge from service, however improper such was, claimant thereupon ceased to be an employee of the carrier and was, after October 27, not required to respond to carrier directives of whatever nature, nor do I believe the carrier now contends otherwise despite its earlier attempt to the contrary.

That claimant was discharged from carrier service in violation of applicable provisions of the controlling agreement as a direct result of error and improper process by local management is overt and manifest. He is accordingly entitled to be restored to carrier service in manner claimed and in conformity with provisions of Rule 33½ (d) cited above.

As a result of carrier's clearly defined violation of applicable provisions of the controlling Shop Crafts' agreement, and since it has declined to resolve this dispute on any basis whatsoever, the Employees have little alternative indeed but to submit same to your Honorable Board for a fair and equitable decision.

CARRIER'S STATEMENT OF FACTS: There is an agreement in effect between the parties hereto identified as "Shop Crafts' Agreement, effective August 1, 1945, (reprinted January 1, 1957)" to include revisions, a copy of which is on file with this Board.

Marland M. Edgar, hereinafter referred to as the claimant, entered the service of this carrier as a machinist at Argentine, Kansas on June 6, 1966. At the time this dispute arose the claimant was assigned as a machinist at Argentine, Kansas, with assigned working hours of 4:00 P. M. to 12:00 P. M., Thursday through Monday, with rest days of Tuesday and Wednesday, rate of pay \$3.0475 per hour.

Claimant was absent without permission September 28, 1967 forward, last working on September 25, 1967, his rest days being September 26 and 27. The claimant did not make any advance arrangements to be absent nor did he interest himself enough to call in and advise his supervisor that he would be unable to report for work. This was in complete disregard of Rule 16 (quoted below) of the General Rules for the Guidance of Employees, Form

2626 Standard, Revised 1966, which claimant had received as evidenced by his signature on the receipt therefor.

"16. Employees must obey instructions from the proper authority in matters pertaining to their respective branches of the service.

They must not withhold information, or fail to give all the facts, regarding irregularities, accidents, personal injuries or rule violations.

Employees must report for duty as required and those subject to call for duty will be at their usual calling place, or leave information as to where they may be located. They must not absent themselves from duty, exchange duties or substitute other persons in their places without proper authority."

A letter dated October 16, 1967, attached by Carrier, was mailed to claimant, by certified mail No. 995619, notifying him to appear for formal investigation in the Superintendent of Shops Office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967. The receipt indicating that he had received this letter was not returned, nor was the letter returned by postal authorities and claimant did not appear for the investigation. The investigation, however, was held as scheduled. Following the investigation, and based upon facts developed therein showing conclusively that Mr. Edgar had been absent from duty without authority since September 28, 1967, it was the decision of the carrier that claimant be removed from service for violation of Rule 16 of the Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966. Claimant was notified accordingly by certified mail No. 995622 in a letter dated October 27, 1967. Claimant received this letter on October 28, 1967.

Shortly after claimant was notified that he was removed from service due to the facts developed at the formal investigation held on October 23, 1967, he contacted his local chairman and advised him that he did not receive a letter notifying him of the formal investigation and felt that he did not have a fair hearing.

It was not until after the letter dated October 27, 1967, was mailed, advising claimant he was removed from service, that the original notification for investigation was returned by postal authorities, indicating incorrect address.

As a result of claimant Edgar contacting his local chairman, after receiving the letter informing him he was removed from service, Local Chairman Rebar went to the office of carrier's superintendent of shops and advised him what the claimant had said. At that time, Local Chairman Rebar advised Superintendent of Shops Carlson that he too did not feel claimant had a proper hearing. Mr. Carlson then asked Mr. Rebar if he felt that another investigation was in order and Mr. Rebar said "yes." Later on that day Mr. Carlson advised Mr. Rebar that the claimant would be granted another investigation.

Letter dated November 1, 1967, was sent to the claimant, by Certified Mail No. 995625, notifying him to appear for formal investigation at 10:00 A. M., November 8, 1967, account being absent from duty since September

28, 1967 without obtaining proper permission, in violation of Rule 16 of the General Rules for the Guidance of Employes, Form 2226 Standard, Revised 1966, which is quoted on page 2 hereof. This letter was delivered to claimant on November 2, 1967, as evidenced by the return receipt. Claimant also failed to appear for this investigation, nor was there any word from him that he was unable to attend.

The second investigation was held as scheduled. The facts developed therein fully supported the charge and the decision was that claimant be removed from service. Following this investigation, claimant was advised by certified letter No. 995628 dated November 14, 1967, which he received November 15, 1967, as evidenced by return receipt, that as a result of the facts brought out in the formal investigation held on November 8, 1967, he was removed from service.

Claim that the claimant be reinstated with full seniority, service rights, all other contractual benefits or pay in lieu thereof, plus pay for all time lost, was initially presented to the carrier's superintendent of shops at Argentine, Kansas, by the local chairman in a letter dated November 28, 1967. That letter and the subsequent exchange of correspondence considered pertinent in the appeal of the claim to succeeding officers of appeal, including the Carrier's Assistant to Vice President and highest officer of appeal, Mr. O. M. Ramsey, is submitted as Carrier's Exhibits H through P. The case was subsequently discussed in conference at Chicago on September 6, 1968, and the carrier's prior decision was affirmed on October 3, 1968.

POSITION OF CARRIER: It is the respondent carrier's position that the employes' claim in the instant dispute is wholly without support under the governing agreement rules and should be denied for the reasons hereinafter set forth.

It is the carrier's further position that the transcripts of the investigations clearly reveal that it was established, beyond the shadow of a doubt, that claimant was absent from duty without permission in violation of Rule 16 of Form 2626 Standard, quoted on page 2 hereof. Claimant had received and acknowledged receipt of Form 2626 Standard. He knew the requirements of Rule 16. He knew it was a deliberate violation of this rule to absent himself from duty without proper authority because twice before he had been disciplined during his comparatively short period of employment (entered service June 6, 1966) **for exactly the same violation**, i.e., absent without permission. On the first occasion, July 14, 1967, his record was charged with ten (10) demerits and for the second infraction August 1, 1967, thirty (30) demerits were assessed. [Page reference relates to original document.]

Apparently realizing the total absence of any other excuse to be offered in behalf of this short-service employe's flagrant disregard for Rule 16, his representatives have attempted, commencing with the local chairman, to becloud the real issue by inferring that a question of procedural defects could turn upon the controversy as to whether or not the local chairman requested or concurred in the holding of the second investigation. The discipline rule, Rule 33½ of the Shop Crafts' Agreement, governed, in this determination — not the argument as to who initiated the further procedure. The fact cannot be disputed that carrier, after it became aware through tardy return of the first notice undelivered account incorrect address, took positive action to, and

did, comply with all the requirements of Rule 33½ with regard to proper notice, right to representation, etc. After the claimant had acknowledged receipt of the notice, investigation was held. The claimant elected not to appear nor did his representative, but full and complete facts were developed which clearly established Mr. Edgar's violation of Rule 16. With this fact established, Carrier then considered claimant's past record which showed two other instances of violation of the same rule wherein Mr. Edgar had waived formal investigation in writing and accepted record discipline. It was upon such findings and consideration, including also its full compliance with all requirements of Rule 33½, that Carrier based its decision to terminate Mr. Edgar's employment and its notice to him was dated November 14, 1967, following investigation held November 8, 1967.

Claimant failed either to attend or to request postponement of the hearing after receiving proper notice thereof. Under such facts, this Board, (as well as other Divisions of the National Railroad Adjustment Board), has said in Award No. 2925:

"There is no substantive evidence that Carrier violated Rule 39 of the agreement. We do not find that the rule makes the presence of the accused mandatory." (Rule 39 was the discipline rule, quite similar to Rule 33½.)

Also, in the Findings of Second Division Award 3834, it was said:

"The hearing in this case was somewhat summary in nature but in view of failure of claimant to appear in person there can be no valid objection to it. * * *."

It is a well-reasoned principle that it is the duty and prerogative of a carrier to require adherence to its rules by its employees, and further, that its employees owe careful obedience to such rules as a condition of continued employment. The claimant here flaunted the rule, not once, but three times, although employed less than two years.

Numerous awards of Second Division, National Railroad Adjustment Board have denied claims for the reinstatement of employees dismissed from the service of their employer for being absent without permission. It is not the carrier's desire to burden your Board with a review of these many awards, but a few of them are cited, as follows:

SECOND DIVISION AWARD 1508 (Referee Parker)

"* * *. Thus it appears that under the express provisions of such rule he was subject to disciplinary action. The penalty actually resulting from the discipline imposed, namely, suspension from service * * * was not, in our opinion, sufficiently severe to warrant this Division in holding the Carrier guilty of abuse of the discretionary powers vested in it in the disposition of discipline cases. * * *."

SECOND DIVISION AWARD 1789 (Referee Wenke)

"We have come to the conclusion that the discipline assessed, when considered in the light of the offense of which claimant has been found guilty and his past service record, is not unreasonable and does not constitute an abuse of discretion on the part of the carrier."

SECOND DIVISION AWARD 1814 (Referee Carter)

"The evidence sustains a finding that these three claimants were not at the place where their instructions required them to be. * * * Carrier clearly had the right to enforce its instructions and compel obedience to its orders which were definite and positive. * * * The action of the Carrier appears to have been motivated by necessity and not by action that could be deemed arbitrary or capricious. We can find no reason for interfering with the action of the Carrier."

It was determined through facts established in the investigation that claimant was guilty of being absent from duty without proper authority in violation of Rule 16. All Divisions of the National Railroad Adjustment Board have consistently held that in determining the measure of discipline to be imposed after rule violation has been established, it not only is proper but essential in the interest of justice for the carrier to take into consideration the employe's past record. The claimant's past record in this case, as already shown hereinabove, proves his disregard for Rule 16 persisted even after two previous instances of record discipline had failed to change his tendency to absent himself from duty without authority. Such flagrant disregard of rules cannot be tolerated. Everything considered, including the short term of service and unsatisfactory record of this individual, the discipline assessed was neither arbitrary, capricious nor out of keeping with the obligation, and prerogative of carrier to maintain discipline. That this prerogative is the carrier's is borne out by numerous Board awards of the several Divisions, some of which are as follows:

FIRST DIVISION AWARD 16343 (Referee Daugherty)

"We cannot find in the record any compelling or probative evidence that the carrier's actions in this case were arbitrary, capricious or unfair. In the absence of such evidence we do not presume to substitute our judgment for that of the carrier."

FIRST DIVISION AWARD 15366 (Referee Rader)

"Reinstatement is exclusively a managerial function under the situation here presented and is not a proper matter for consideration by a review or appellate tribunal."

SECOND DIVISION AWARD 1509 (Referee Parker)

"The facts of record do not make it appear the carrier's action in assessing discipline herein involved was either arbitrary, capricious, or unreasonable. Under such circumstances there is no sound ground for sustaining the claim."

SECOND DIVISION AWARD 1548 (Referee Wenke)

"There was evidence adduced at the hearing which supports the company's finding of guilt and, in view thereof, the company was not capricious, arbitrary or unjust in making its decision."

SECOND DIVISION AWARD 1575 (Referee Daugherty)

". . . the Board will not substitute its judgment for that of the carrier. . . ."

Without prejudice to the position of the carrier that it was justified in dismissing claimant for reasons which are stated hereinabove, carrier desires to state further that if this claim is sustained, and the carrier emphatically asserts that the claim does not merit such a decision, nor does the employe even merit reinstatement, any allowance for wage loss should be less amounts earned in other employment, pursuant to the provisions of Rule 33½, paragraph (d), of the current Shop Crafts' Agreement, reading:

"If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with seniority rights unimpaired, and **compensated for the net wage loss**, if any, resulting from said suspension or dismissal." (Emphasis ours.)

Attention in this connection is also directed to Second Division Awards 1638, 2653, and 2811, Third Division Awards 6074 and 6362, and Fourth Division Award 637.

Particular attention is further directed to Item 2 of the employes' claim reading:

"2. That accordingly the carrier be ordered to reinstate this employe to service with all service rights, seniority, all net wage loss, and payment in lieu of all other accrued contractual benefits to which otherwise entitled had he continued to remain in carrier service dating from his improper discharge on October 27, 1967."

It will be observed that Rule 33½, paragraph (d), which is quoted in the preceding paragraph, provides that if the final decision shall be that an employe has been unjustly suspended or dismissed from the carrier's service, "such employe shall be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal." Neither that rule (Rule 33½) nor any other rule of the Shop Crafts' Agreement contemplates or provides for payment of "and payment in lieu of all other accrued contractual benefits" as requested in Item 2 of the employes' claim quoted hereinabove. See in this connection Second Division Award No. 3883.

Referee Howard Johnson when denying the Employes' claim covered by Second Division Award No. 5049 stated:

"If the claim as made and processed on the property had been that Rule 19 had been violated, it would have been difficult, if not impossible, to determine what Claimant's wage loss would have been. In the case of an employe able and willing to work the regular hours permitted and expected of him under the Agreement, his wage loss would be 40 hours' pay per week; but in view of Claimant's work record, his loss would have been indeterminate."

In conclusion, the Carrier submits that:

- (1) Claimant Edgar was guilty of willfully absenting himself from duty without proper authority in violation of Rule 16 of the General Rules for the Guidance of Employes.

- (2) It has a right to discipline an employe for just cause as it did in this case when evidence adduced at a formal investigation clearly showed that claimant was absent without the proper authority.
- (3) It did not act in an unreasonable, arbitrary, capricious or discriminating manner and did not abuse its discretion in handling this discipline case.
- (4) It fully met the requirements of Rule 33½. Claimant was properly notified to appear, but he elected to ignore the notice and absent himself from the investigation.
- (5) The degree of discipline was reasonably related to the seriousness of the proven offense and to claimant's past record, particularly in view of the fact that claimant had only been in the employment of this Carrier some 15 months, demonstrating in that time an attitude not deserving of leniency and he should not be returned to service under any circumstances.

The carrier, therefore, requests the Board to deny this claim in keeping with its long line of unequivocal decisions on similar cases.

The carrier is uninformed as to the arguments the Petitioner will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required in replying to the Petitioner's ex parte submission.

FINDINGS: The Second 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 employe 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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant entered Carrier's service at Argentine, Kansas, as a Machinist on June 6, 1966, and was so employed at all time material herein.

Claimant last worked September 25, 1967, and was absent without permission beginning September 28, 1967. Prior thereto he had been "off without permission" on two occasions for which discipline was assessed in the total of 40 "Demerits."

Under date of October 16, 1967, Carrier mailed to Claimant, registered mail return receipt requested, the following Notice of Hearing and Charge:

"Please arrange to appear for formal investigation in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your alleg-

edly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966.

You are entitled to representation in accordance with your Agreement if you so desire."

Hearing was held on the appointed day. Claimant did not appear. The hearing proceeded in his absence. Notwithstanding that Carrier's Notice of Hearing and Charge was returned to it on October 23, 1967, because of incorrect address, Carrier proceeded, on the basis of the record made to issue findings of guilt and assessed discipline under date of October 27, 1967:

"As a result of the facts brought out in the formal investigation held in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966, you are hereby removed from the service of this company effective this date."

This document was correctly addressed, mailed to Claimant registered mail return receipt requested and was received by Claimant. The Local Chairman made claim that the findings and discipline assessed were wrongful in that the discipline procedure failed to comply with Rule 33½ which in pertinent part, with emphasis supplied, reads:

"(a) No employe will be disciplined without first being given an investigation which will be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation. Suspension in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule. An employe involved in a formal investigation may be represented thereat, if he so desires, by the Local Chairman and one member of the Shop Committee.

(b) Prior to the investigation, the employe alleged to be at fault shall be apprised of the charge sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses.

(c) A copy of the transcript of the evidence taken at formal investigation will be furnished the employe, or his representative, provided request therefor is made at the time the investigation is held." (Emphasis ours.)

Claimant not having been served with proper notice as required by Rule 33½ (b) the proceedings were voidable *ad initio* and were voided by the Organization's complaint.

Under date of November 1, 1967, Carrier again issued a charge identical to that of October 16, 1967; except, the hearing date was set for November

8, 1967. This charge was received by Claimant on November 2, 1967. Claimant failed to appear at the hearing; nor did he in any way communicate with Carrier relative to the hearing. The hearing proceeded in his absence. Carrier, on November 14, 1967, issued findings and assessment of discipline identical to that of October 27, 1967, which was duly served on Claimant.

On November 28, 1967, Organization filed claim that: (1) Claimant was denied due process and therefore the hearing on November 8, 1967, was improperly conducted in violation of Rule 33½; (2) "since you (Carrier) have already discharged Mr. Edgar (Claimant) from carrier service, he is under no obligation contractually or otherwise, to respond to carrier instructions or directives"; (3) Carrier is contractually obligated to reinstate Claimant with back pay. Elsewhere in the record Organization alleges that Carrier violated the Agreement in that: (1) it failed to supply Organization with copy of the transcripts in both hearings; and (2) the admission into evidence, during the hearing, of Claimant's past discipline record was prejudicial error. The claim was denied at each step of the proceedings on the property.

General Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966 — concerning which Claimant had signed a statement that he had studied and fully understood — reads in material part, with emphasis supplied:

"16. Employees must obey instructions from the proper authority in matters pertaining to their respective branches of service.

They must not withhold information, or fail to give all the facts, regarding irregularities, accidents, personal injuries or rule violations.

Employees must report for duty as required * * *. They must not absent themselves from duty * * * without proper authority."
(Emphasis ours.)

General Rules promulgated by a carrier, unless they contravene the terms of a collective bargaining agreement, are mandatory standards with which an employe agrees to comply, expressly or impliedly, in his employment contract. Failure to comply subjects him to disciplinary action.

The voiding of the first proceedings was not prejudicial as to Claimant. It merely restored the parties to the *status quo* of their relationship which existed prior to the October 27, 1967, baseless dismissal; and, continued thereafter to Claimant's dismissal from service by the findings and assessment of discipline in the November 14, 1967 notice. In the interim period the employer-employee relationship continued and Claimant remained subject to the Rules of the collective bargaining agreement. His Organization's allegation that Claimant was already discharged prior to the second proceedings and was "under no obligation contractually or otherwise, to respond to carrier instructions or directives" is without substance in law or in fact. When Claimant failed to appear at the hearing of November 8, 1967, after having been properly served with notice, he acted at his peril; and, Carrier's proceeding with the hearing in his absence was not a denial of due process.

There being no evidence that Organization requested copies of the transcripts — a condition precedent to contractual requirement — Carrier did not violate Rule 33½ (c), *supra*.

The introduction of Claimant's past record involving disciplinary action against him for absenteeism is not reversible error. While it was not material and relevant evidence in the resolution of the issue as to Claimant's guilt as charged, it was properly introduced for the limited purpose of measurement of reasonable discipline.

We find: (1) Claimant was afforded due process; (2) the finding of guilt as charged is supported by substantial evidence; and (3) the discipline imposed was reasonable. See and compare Third Division Award No. 13127.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September, 1970.

LABOR MEMBERS' DISSENT TO AWARD 5987, DOCKET 5757

The majority is in gross error when they concur with the referee findings in Award 5987.

The record reflects from the very beginning of this instant case that the carrier has committed serious defects in due process under the contract agreement, Rule 33½.

"DISCIPLINE

"(a) No employe will be disciplined without first being given an investigation which will be promptly held, unless such employe shall accept dismissal or other discipline in writing and waive formal investigation. Suspension in proper cases pending a hearing, which shall be promptly held, will not constitute a violation of this rule. An employe involved in a formal investigation may be represented thereat, if he so desires, by the Local Chairman and one member of the Shop Committee.

(b) Prior to the investigation, the employe alleged to be at fault shall be apprised of the charge sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses.

(c) A copy of the transcript of the evidence taken at formal investigation will be furnished the employe, or his representative, provided request therefor is made at the time the investigation is held.

(d) If the final decision shall be that an employe has been unjustly suspended or dismissed from the service, such employe shall

be reinstated with seniority rights unimpaired, and compensated for the net wage loss, if any, resulting from said suspension or dismissal.

(e) When employees are required to report outside of their regular bulletined hours to act as witness for the Company in investigations, they shall receive straight time rates from time reporting at designated location until released.

(f) All conferences between local officials and Local Committees to be held during regular working hours without loss of time to Committeemen.

(g) Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employees.

MEMO No. 1: Paragraph (a) — If an employee involved in a formal investigation desires a representative, such will be the Local Chairman, or his representative, of his craft and one member of the Shop Committee; in the latter event it is desirable, in the interest of avoiding confusion that only the Chairman shall question witnesses. The cooperation of the Committee to that end should be solicited in case issue is taken on this point."

The referee recognized the fact that Machinist Marland M. Edgar, the claimant in this instant dispute, did not receive the registered mail notice of investigation and therefore was not aware that such investigation was to be held on October 23, 1967. When he included in his findings on page 2 of Form 1:

"Under date of October 16, 1967, Carrier mailed to Claimant, registered mail return receipt requested, the following Notice of Hearing and Charge:

'Please arrange to appear for formal investigation in the Superintendent of Shops' office at Argentine, Kansas, at 10:00 A. M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty with securing proper permission from your foreman [sic] to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966.

You are entitled to representation in accordance with your Agreement if you so desire.'

Hearing was held on the appointed day. Claimant did not appear. The hearing proceeded in his absence. Notwithstanding that Carrier's Notice of Hearing and Charge was returned to it on October 23, 1967, because of incorrect address, Carrier proceeded, on the basis of the record made to issue findings of guilt and assessed discipline under date of October 27, 1967:

'As a result of the facts brought out in the formal investigation held in the Superintendent of Shops office at Argentine, Kansas, at 10:00 A.M., Monday, October 23, 1967, to determine the facts concerning your allegedly being absent from duty without securing proper permission from your foreman to do so since September 28, 1967, in violation of Rule 16 of the General Rules for the Guidance of Employees, Form 2626 Standard, Revised 1966, you are hereby removed from the service of this company effective this date.'

This document was correctly addressed, mailed to Claimant registered mail return receipt requested and was received by Claimant. The Local Chairman made claim that the findings and discipline assessed were wrongful in that the discipline procedure failed to comply with Rule 33½ which in pertinent part, reads:"

He then proceeded to fabricate a conclusion of his own, not substantiated by the record, when he stated:

"Claimant not having been served with proper notice as required by Rule 33½(b) the proceedings were voidable *ab initio* and were voided by the Organization's complaint."

We believe that such statement could be only for the purpose of laying a facetious foundation for this defective award.

The record is constructively clear in the fact that the carrier **did not** write to the claimant, or his Union representative, rescinding their original decision of assessed discipline in its highest form (complete dismissal) on October 27, 1967 when the claimant was tried in absentia. The referee does take cognizance of the record when he states:

"Under date of November 1, 1967, Carrier again issued a charge identical to that of October 16, 1967; except, the hearing date was set for November 8, 1967. This charge was received by Claimant on November 2, 1967. Claimant failed to appear at the hearing; nor did he in any way communicate with Carrier relative to the hearing. The hearing proceeded in his absence. Carrier, on November 14, 1967, issued findings and assessment of discipline identical to that of October 27, 1967, which was duly served on Claimant."
(Emphasis ours.)

This is a clear-cut case of additional error, of being denied the very basic principle of a fair and impartial investigation or hearing. These basic principles, even if not spelled out in the Agreement, certainly are implied and flow from the Constitution of the United States as well as the Agreement. Certainly this man was required to be twice jeopardized and as a result paid the supreme penalty that any employer can render upon an employe, that is, complete dismissal, and deprived of future earning power (*res adjudicata*).

The referee then states in pertinent part (p. 4, Form 1):

"The voiding of the first proceedings was not prejudicial as to Claimant. It merely restored the parties to the *status quo* of their

relationship which existed prior to the October 27, 1967, baseless dismissal; and, continued thereafter to Claimant's dismissal from service by the findings and assessment of discipline in the November 14, 1967, notice."

For the majority to subscribe to such naivete is to say, at the very least, a most unprofessional act in the field of arbitration. The record is clear that the investigation, discipline assessed, as well as these improper findings should be declared a nullity.

We dissent.

R. E. Stenzinger
E. H. Wolfe
E. J. McDermott
D. S. Anderson
O. L. Wertz