

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (System Federation No. 45, Railway Employees'
(Department, A. F. of L. - C. I. O.
(Carmen
(
(St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That Carmen J. A. Mance and R. J. McDowell were unjustly dismissed from the service of the St. Louis Southwestern Railway Company on November 7, 1973, in violation of the rules of the controlling agreement.
2. That the St. Louis Southwestern Railway Company be ordered to restore Carmen J. A. Mance and R. J. McDowell to service with seniority rights unimpaired; made whole for all vacation rights; made whole for all health and welfare and insurance benefits; made whole for pension benefits including Railroad Retirement and unemployment insurance; and made whole for any other benefits that they would have earned during the time they were held out of service.

Rule 24 of the controlling agreement reads in pertinent part:

"24-1. No employee shall be disciplined without a fair hearing by a designated officer of the Carrier."

24-4. If it is found that an employee has been unjustly suspended or dismissed from the service such employee shall be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal."

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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

Claimants filed their claim on December 26, 1973 in a letter from the General Chairman addressed to Superintendent R. D. Krebs who replied by letter dated January 16, 1974 in pertinent part:

"Confirming conference held in Assistant Superintendent W. J. Kugler's office on January 15, between you and Mr. Kugler, it is still my position not to reinstate former Carmen J. A. Mance and R. J. McDowell, and your request is respectfully declined, and any further handling will have to be taken up with our Personnel Department at Tyler, Texas."

The Organization maintains that Superintendent Krebs reply did not provide reasons for its disallowance as required by Section 1 (a) of the applicable agreement which provides:

"Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The disputants are in disagreement concerning this. However, the Carrier has raised in the panel discussions before this Board the propriety of considering this issue. Its position is that the issue was not specifically part of the statement of claim, The organization contends that the disputants have already joined issue on this matter and submitted briefs contesting the issue. In effect, it maintains that the parties waived this question long since. We must agree with Carrier in its view that this is a jurisdictional rule of the Board and it may not be waived by the parties. The governing rules are clear enough, it is the application that gives us trouble.

In this case the formal statement of claim relates to the unjust dismissal of Claimants "in violation of the rules of the controlling agreement". It may be that this statement of claim is overly broad. Nevertheless we find that it embraces Section 1(a) of that agreement. By its nature such an issue could only arise after the claim had been formulated and answered in some fashion. If Carrier's strict view is followed in all cases it is difficult to see how such questions could be decided. See Awards 6907 and 6956. Carrier placed reliance upon a line of Awards 2664, 2665, 2666, 2667 and 2668 (Referee Whiting). All of these cases arose out of a strike situation in 1956 and involved unsettled disputes that were in the courts. In all cases the Board held that the claims must be dismissed for failure to comply

with Circular 1. Analysis of the individual cases indicates that a conflict existed between the formal statement of claim and the issue that Petitioner (the Carrier) sought decided. In each the Petitioner sought to have the claim barred under the time-limit rule of Article 5. The claims were as follows: Award 2664 involved violation of Rule 24 requiring other than mechanics to do mechanics work; Award 2665 involved the claim that the vacation agreement was not properly applied; Award 2666 involved a claim dealing with the collective agreements account for not continuing seniority roster for points that were abandoned; Award 2667 involved a claim for violation of Rule 34 requiring employees to submit for examination; and Award 2668 involved a claim for contracting work. It appears the Petitioner in these cases was attempting to clear away an assortment of unresolved issues through application of the time-limit rule involved. We fail to see the application of these Awards to this case. We conclude here the issue is within the contemplation of the statement of claim and the matter was discussed on the property and, therefore, the issue is properly before this Board for consideration.

We must hasten to add that this same spirit of liberality forces the conclusion that Superintendent Kreb's reply to the General Chairman's letter did not violate Section 1(a). We are persuaded that no particular form of language must be used in denying a claim or affording reasons for such denial. We have examined a number of awards to this effect. We cite the Third Division Awards 15686 and 16780 as illustrations of our view.

With respect to the substantive issues here it appears that Claimants absented themselves from duty without proper authority. They were in jail as a consequence of their arrest for criminal acts. The awards of this Division make clear that being in jail as a consequence of ones own misconduct is not an acceptable excuse for absence from work. Further, these Claimants are accused of failing to protect their assignments in that they did not advise the Foreman as early as possible in accordance with the applicable rules. Taking the date most advantageous to Claimants, September 3rd, they admit they were permitted to make telephone calls on that date, three days before they were released on September 6th. Yet they did not call the Foreman. There is ample evidence in support of the view that they could have made telephone calls on earlier dates, and such evidence is not excluded as hearsay. We hold it is sufficient here to rely on the September 3rd date in that Claimants had the opportunity to call the Foreman and inform him of their whereabouts and circumstances and in that way protect their assignment under applicable rules. They did not do so. We conclude the Claimants were afforded a fair and impartial hearing and the facts developed substantiated the charges against them and their dismissal was not arbitrary, capricious nor excessive. We conclude the claim must be denied.

A W A R D

Claim denied.

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Award No. 7015
Docket No. 6864
2-SLSW-CM-'76

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 12th day of March, 1976.