Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 3489
FOURTH DIVISION Docket No. 3432

Referee Joseph A. Sickles

PARTIES TO DISPUTE: Railroad Yardmasters of America

The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmaster J. A. Powell be reinstated immediately to his yardmaster position at Brooklyn Jct., W. Va.

Claim is further made for restoration of all rights coming under the Yardmaster's Agreement both local and National. To include all rights under all or any Insurance Programs and to include all payments to Railroad Retirement and un-employment under Railroad Retirement. All monies and rights are included and claimed for November 10, 1975 and all subsequent days until Mr. J. A. Powell is returned to service as a Yardmaster.

OPINION OF BOARD: On September 30, 1975, Claimant was notified - in accordance with the rules of the Wage Agreement - to report for a hearing "...on the following matter":

"You are charged with being absent during your tour of duty on September 29, 1975."

Subsequent to investigation, Claimant was notified that he was at fault for being "...absent during your tour of duty and observed as a person who was under the influence of alcohol or drugs, September 29, 1975..." (underscoring supplied). Claimant was dismissed from service.

The record is rather extensive in this case, and both parties have submitted lengthy briefs, citing numerous Awards concerning a variety of issues. But, in the final analysis, we return to the issue of variance.

Whether or not the issue of "precise charge" is properly before us, nontheless, when Article 7(a) of the Agreement recites that a hearing will be held, it must be presumed that said hearing is in contemplation of a charge of some asserted dereliction.

We are not here concerned with a question of lesser included offenses - or notice of one issue arguably placing an employee on notice of possible other allegations. Rule G and absence from duty provisions may, on occasions, overlap, but they are separate considerations and each contain their own essential elements.

Our efforts to dismiss the Rule G conclusion from the case and to focus solely upon the finding of absence from duty has been non-productive. Thus, we have no recourse but to sustain the entire claim.

FINDINGS:

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: Nancy J. Dever
Assistant Executive Secretary

LABOR MEMBERS REPLY TO CARRIER MEMBERS DISSENT TO
AWARD NO 3489 (DOCKET NO. 3432) RYA vs. B&O

It would seem that the Dissent is to appease the involved Carrier since it fails to reach the merits of the case, which the Dissenters are well aware of. Moreover, the case was lost in the handling on the property and not by any signatory to the Dissent.

The writer of the Dissent argues, as in his Brief, to such matters as:

> "This evidence, in and of itself, clearly established Claimant's responsibility for the matter under charge, and, as pointed out to the majority in our presentation of this case, when an employe asserts sickness as the basis for absenting himself from an assignment, the burden shifts to the employe to prove that his sickness precluded him from working his assignment." (Original emphasis).

The Dissenter continues:

> "Claimant here submitted not a scintilla of evidence justifying his absence from work on the night of September 29, 1973. If he was, in fact, under some medication which caused him to act in the erratic manner on the night in question which resulted in him deserting his assignment, it was his burden to bring to the hearing evidence of this prescription and a statement or other evidence from a physician establishing that this prescribed medication resulted in his highly abnormal behaviour." and

> "Based on the clear record of this case and the previous decisions of this Board, the charge that Claimant absented himself from his tour of duty on September 29, 1973 was proven by substantial evidence and the Claimant failed to show that he had justifiable reason to be absent." (Our emphasis)

We have no argument with the contentions as quoted above as a time may come when we have a case before us which will fit these same contentions. However, the case in Docket No. 3432, as contended by the Carrier, is not the same matter as is being dissented. The writer of the Dissent is correct as to the charges that: ". . .the charge that Claimant absented himself from his tour of duty on September 29, 1975 . . ."

Included in the discipline notice was the finding by Carrier that:

> ". . .and observed as a person who was under the influence of alcohol or drugs, . . ."

The record and case that the Referee had before him at all times, including the entire handling on the property, was that Claimant was dismissed on a finding for which he was never charged.

That was the issue that was before the Board, argued throughout the handling on the property and defended by Carrier throughout the entire handling. In its Submission to this Division, Carrier, on Page 23, wrote:

> "Contrary to the Organization's position, the Carrier posits that the 'best evidence' is that Petitioner Powell was under the influence of alcohol or drugs on September 29, 1975 and, for that reason, left the property during his tour of duty. ***"
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> * * *
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> "The Carrier avers that the dismissal from service of Petitioner Powell was not an arbitrary, capricious or unreasonable exercise of its discretion in determining the punishment appropriate to the violation of its charges. An employe being under the influence of alcohol or drugs with the resultant absence from service, certainly can not be treated as a 'minor' violation."

And, not satisfied with that argument, Carrier, on Page 24 of that Submission, then advised the Division that:

> "In the consideration of the discipline assessed, your Division has long recognized the Carrier's right to consider the employee's prior record. The instant case constitutes the second time wherein Petitioner Powell has been charged, and subsequently found guilty of the utilization of alcohol and/or drugs." (Our emphasis)

In our Brief to the Referee, we replied to the above statement by Carrier as follows:

> "The lie told to this Division is not a case of inadvertence or unintentional statement. It is an absolute lie, a vicious lie, intended to sway and/or persuade the reader in judgment and adjudication of the dispute herein. Notwithstanding the fact that Petitioner Powell's prior record was never mentioned in the handling on the property 'the instant case' cannot possibly be held to be 'the second time wherein Petitioner Powell has been charged, and subsequently found guilty'. Clearly a charge of 'being absent during your tour of duty' cannot possibly be construed as a second charge of use of drugs and/or alcohol." (Our emphasis)

That was the case and issue before the Board, and the facts therein were those on which the Referee wrote the decision and which the Majority adopted. In the handling on the property, the General Chairman cited over thirty (30) awards dealing with subject of being charged on one matter and disciplined on a totally unrelated matter. In our Brief to the Referee, we cited and gave him copies of ninety-nine (99) awards dealing with the exact same issue. Now, that the Referee followed the long line of precedent, Carrier Members dissent. The Dissent is not on the issue decided, but rather on what they would have liked it to be.

In a parting remark, the Dissenter interjects an opinion on mitigating the Decision, there stating:

> "Further, any compensation due Claimant should be in accordance with Article 7 (d) of the agreement between the parties."

The writer of the Dissent knows full well his limitations in writing dissenting opinions. It is not the time or the place to raise new issues or argue mitigation. Moreover, in the entire handling - on the property, Ex Parte Submission, Rebuttal, Oral Argument, and in Brief - has the issue ever been mentioned as to the request of the claim. As that writer knows well, it is too late to raise the issue.

R. F. O'LEARY
For the Labor Members - Fourth Division

CARRIER MEMBERS DISSENT TO AWARD 3489 (Docket 3432)

Referee Joseph A. Sickles

While we are in disagreement with the findings of the majority in this case in every respect based on the sound arguments presented in Carrier's presentation to this Board, we are in particular disagreement with that part of the of the majority's findings which stated:

> "Our efforts to dismiss the Rule G conclusions from the case and to focus solely upon the finding of absence from duty has been non-productive. Thus, we have no recourse but to sustain the entire claim."

In reaching this erroneous conclusion, the majority apparently totally ignored that the transcript of the hearing had clearly established that claimant was in fact absent from his tour of duty on September 29, 1975. This evidence was completely within the province of the charge lodged against him, which stated:

> "You are charged with being absent during your tour of duty on September 29, 1975."

Clear evidence and testimony of Claimant found at page 2 of the transcript of the hearing establishes this fact:

(on interrogation of Claimant)

"Q. What time did you go home on September 29, 1975?
A. Approximately between 9 and 9:10PM."

Further testimony of claimant and his supervisor established clearly that:

(1). He deserted his assignment and on duty clerical and operating employes without first receiving permission from his supervisor to do so.

(2). His reason for doing so was that he "started getting a headache,... felt like he had an upset stomach and....just got to bad to stay out."

This evidence, in and of itself, clearly established Claimant's responsibility for the matter under charge, and, as pointed out to the majority in our presentation of this case, when an employe asserts sickness as the basis for absenting himself from an assignment, the burden shifts to the employe to prove that his sickness precluded him from working his assignment.

For example, the following decisions were cited to the majority in support of this principle:

Second Division Award 6849:

"Claimant admits that he did not have permission to be absent from work on the afternoon of February 10, 1972. Thus, when he alleges sickness as justification for such absence, it is the opinion of tis Board that he must come forward with evidence to substantiate this allegation. Claimant failed to produce such evidence at the hearing and he is thereby precluded from claiming protection under the emergency provisions of Rule 22."

Second Division Award 7062:

"Moreover, as to Claimant's assertion that he was 'sick', the burden of proof rest squarely with him, as to which he offered no probative evidence whatsoever.

See Awards 3374 (Amrod), 5185 (Harwood), 6457 (Bergman), and 6849 (O'Brien), as well as many others in all Divisions of this Board."

Claimant here submitted not a scintilla of evidence justifying his absence from work on the night of September 29, 1975. If he was, in fact, under some medication which caused him to act in the erratic manner on the night in question which resulted in him deserting his assignment, it was his burden to bring to the hearing evidence of this prescription and a statement or other evidence from a physician establishing that this prescribed medication resulted in his highly abnormal behaviour.

The only data supplied by Claimant in support of his actions was a statement provided by his representative on the appeal of this case (after the hearing had been closed), which indicated that his personal physician had seen claimant on October 2nd and 4th, 1975. These appointments, which occurred several days after the day of the incident under investigation, were in a hospital emergency room, and the Claimant was seen for "neck spasm with severe headache and nausea." Of significance is that (1) this statement should not have any evidentiary value or be considered by the Board since it was not entered into the record of the disciplinary hearing and, (2) the statement did not establish that Claimant was ill and unable to perform his duties on September 29, 1975.

Based on the clear record of this case and the previous decisions of this Board, the charge that Claimant absented himself from his tour of duty on September 29, 1975 was proven by substantial evidence and the Claimant failed to show that he had justifiable reason to be absent.

The findings of the majority make it patently obvious that such points were not given the proper weight or even considered in reaching its decision, and, for this important reason, we dissent.

Further, any compensation due Claimant should be in accordance with Article 7 (d) of the agreement between the parties.

John W. Johnson

W. F. Fuller

W. B. Jones