

The Second Division consisted of the regular members and in addition Referee Francis M. Mulligan when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(Western Pacific Railway Company

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier improperly dismissed Machinist E. J. Wilkinson (hereinafter referred to as Claimant) on February 20, 1981.
2. That the Carrier violated the time limit provisions of Rule 34.
3. That the Carrier be ordered to immediately restore Claimant to service with seniority and service rights unimpaired with compensation for all wage loss from date of dismissal to date of restoration to service.

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.

The Claimant, E. J. Wilkinson, entered Carrier service at the Stockton yard on September 27, 1979 and was dismissed from service following trial on February 20, 1979.

It is the contention of the Organization that an appeal was taken to Carrier's decision of February 20, 1981 on March 9, 1981 which appeal would have been taken within the required 60 days (Rule 34). The appeal was taken according to the Organization's documentation by hand delivering an appeal letter dated March 9, 1981 to W. Gault, Shop Superintendent, Western Pacific Railway Company in Stockton, California. The letter was alleged to be hand delivered by the Local Chairman.

At this point, it is essential to provide each version of the subsequent facts. The events as related by the Organization are that subsequent to March 9, 1981, after the letter was hand delivered to Mr. Gault by Local Chairman, H. L. Hooper, no action was taken by the Carrier. Thereafter, on May 29, 1981, H. L. Hooper wrote to W. Gault stating that since no answer was given to the letter of March 9, 1981, the Carrier was in default. The letter requested that Machinist, E. J. Wilkinson, be restored to service with reinstatement of benefits and compensation for time lost. No action was

taken on the letter of May 29, 1981. Thereafter, on June 16, 1981, the Directing General Chairman, E. B. Kostakis, wrote to L. A. Lambert, Carrier's Labor Relations Officer, requesting that E. J. Wilkinson be restored to service with seniority and service rights unimpaired and compensation for wages lost. The letter advises that Mr. Gault has failed to respond to the March 9, 1981 letter. The remedy request is that the Carrier allow the claim as presented.

Thereafter, on July 17, 1981, W. Gault wrote to H. L. Hooper advising that the Hooper letter of March 9, 1981 and the letter of May 29, 1981 were investigated by him. The letter in effect states that having checked out with all concerned, no one had any knowledge of such letter written by H. L. Hooper on March 9, 1981 as alleged. Accordingly, the Organization is in default for not filing the claim within the time limits prescribed.

Thereafter, on July 20, 1981, H. L. Hooper responded to W. Gault's letter indicating that he had written statements from witnesses who also knew the contents of the letter in question. He further advises that he sent the March 9, 1981 letter to R. W. Mustard, Chief Mechanical Officer, and J. S. Miller, Assistant Chief Mechanical Officer. It was further advised that the matter was being forwarded to the General Chairman Officer for further action. Thereafter, on July 24, 1981, L. A. Lambert, Manager of Labor Relations for Carrier, in response to the Directing General Chairman's June 16, 1980 letter that Carrier's position was that the Carrier had incurred no liability under the time limit rule because, "Mr. Gault's office, as well as Mr. Mustard's office, had both confirmed the fact that they had not received the alleged appeal from Local Chairman Hooper."

On August 7, 1981, the Directing General Chairman responded to Carrier's July 24, 1981 letter advising that the March 9, 1981 letter was hand carried personally by Local Chairman Hooper. In addition, two (2) statements were submitted (one dated July 20, 1981 and one undated). The undated statement is addressed "to whom it may concern". It is handwritten. The body of the text reads as follows: "This is to advise that on March 9, 1981 at approximately 3:00 p.m., I witnessed H. L. Hooper give W. Gault a letter which contents were known to me at the time.

The second statement dated July 20, 1981 addressed "to whom it may concern" appears to be written by Joe W. Reed who lists himself as a Machinist, Local 286, IA of M, Stockton. This letter or statement reads as follows: "I, machinist, J. W. Reed, did observe Machinist Local Chairman Hooper hand Mr. W. Gault a letter on March 9, 1981 about 3:00 p.m. The subject of this letter was to appeal the decision by Western Pacific RR on a formal investigation of Machinist, E. Wilkinson. The idea of losing a letter is not new for Mr. Gault as it has happened at least two other times that I know of."

None of the statements were given under oath.

Thereafter, by letter of August 17, 1981, the Carrier's Manager of Labor Relations wrote to the Directing General Chairman advising that the matter would be part of a scheduled conference on September 11, 1981. On November 10, 1981, the Manager of Labor Relations wrote to the Directing General Chairman advising that a response was still pending on the settlement proposal. On December 28, 1981, the Manager of Labor Relations wrote to the Directing General Chairman advising that after the conference of December 16, 1981.

the decision was made to uphold the termination since leniency was rejected by the Organization. This letter further advises that the absenteeism of Claimant was sufficient to terminate him.

Thereafter, the matter was appealed to the Board.

The Organization is claiming that the Carrier failed to process the claim in a timely manner in violation of the contract and therefore, the Claimant should be returned to work with back pay and full benefits, etc. Carrier's position is that it never received the letter of March 9, 1981 and that the Organization did not process the claim in the usual manner because the Organization wrote directly to the Manager of Labor Relations and bypassed the Chief Mechanical Officer and therefore, committed a jurisdictional defect by so doing.

In the instant matter, the trial was held and decision was made that the Claimant should be terminated and the real issue of credibility arose in the course of processing and documentation. The Board has been asked to judge the credibility of Organization officials and Carrier officials without having seen any party to having examined either under oath. Is the Board in a position to answer the question as to whether or not the letter was hand delivered on March 9, 1981 to the Shop Superintendent? There is no third party evidence in this matter such as postal receipts, signed receipts for the documentation or anything of this nature. Basically, the Organization alleges that the letter was hand delivered and that two (2) employees witnessed the hand delivery. Some months later, statements were written by these employees indicating that the letter was hand delivered. One statement really comes far short of asserting that fact. The statement merely says that the employe making the statement was aware of the contents of the letter when it was handed over.

In addition to the above, it is asserted by the Carrier that the Organization, by going to the Manager of Labor Relations after the Shop Superintendent, bypassed a stage in the procedure. That a jurisdictional error took place, and that the claim should be denied. There is nothing in the record to indicate that the Chief Mechanical Officer is the next stage in the proceeding. In fact, the status of the Chief Mechanical Officer as a second step in the claims handling procedure is alleged to have been established by letter of June 30, 1958 which is not part of the record. It is asserted by the Organization that hand delivery is the usual manner for taking an appeal, but this, as other items herein, is a matter of an assertion in an appeal letter.

Each party has presented its best case in support of the positions taken. Basically, both are claiming that the errors of the other should result in a dismissal of the claim on the part of the Carrier and a reinstatement on the part of the Organization. The issue is not clear cut in this situation. Neither party has really proved its contention. The matter is now before the Board. Rather than pass on the credibility of the Organization and Carrier participants in this matter, an analysis of the claim on its merits is necessary.

The Claimant was terminated for excessive absenteeism. In support of this contention, the Carrier offered testimony that Mr. Wilkinson was off eight (8) hours on November 1, 1980. On this date, he called in at 3:30 and said that he was laying off for personal reasons. On November 5 and November 6, he was off sixteen (16) hours due to an on-duty injury. This cannot count

against the Claimant's absenteeism record. On November 16, he laid off for family emergency which took him out of town. On November 21, he called in saying that he would be late because he had a flat tire, but he did not show up at all on November 21, 1980. On December 5 and December 6, he was off for sixteen (16) hours and called and said that he would be off on the 5th and 6th without giving a reason. The call was received on December 4, 1980. On December 7, he was off eight (8) hours. He called in at 3:15 p.m. and laid off sick. On December 13, he was off an hour and one-half from 6:00 p.m. to 7:30 p.m. On December 14, 1980, he was off four (4) hours on a late report. There was no reason given. On December 17, 1980, he was off an hour and one-half. He called in and said that he would be one (1) hour late without giving a reason. On December 18, he was a quarter of an hour late. On December 20, he was late an hour and one-half. A female called in and said that he would be late without giving a reason. On December 26, he was three-quarters of an hour late for work. He called in and said that he would be one-half hour late. Again, no reason was given. On January 2, 1981, he was six and one-half (6 1/2) hours off without giving a reason. On January 3, he was five (5) hours off. He came in late at 5:30 p.m. and left at 8:30 p.m. stating that he had personal business. On January 10 and January 11, he was off sixteen (16) hours. A female called in and said that Mr. Wilkinson was under doctor's care and he may be back on January 14, 1981.

To offset Mr. Wilkinson's absentee record, the Organization tried to show that he worked during the period in question at least thirteen (13) overtime days.

In his defense, Mr. Wilkinson testified that on November 1, 1980, he did call in and notified someone in the office. However, he does not know who he notified. On November 5, he again called in and he thinks he notified the clerk in the office, but he did not have any idea of the name. His excuse for not being at work on November 16 was that he had an emergency phone call from out of town. He had "emergency family business, beyond my control". Once again, he notified the office. He did not further describe this emergency family business. Actually, his girlfriend called and said he could not come to work because of an emergency in the family. On November 21, he stated that he had a flat tire on the way to work. Again, he stated that he called the office but no one answered the telephone; thereafter he called his girlfriend and she related the message to the office. However, he did not report to work on November 21, 1980. On December 5 and December 6, he was off for personal business. He said that he notified the shop superintendent two (2) weeks in advance. He was also off on December 7, and he once again said that he notified foreman that he would be off on December 5, 6, and 7. He said that on the 5th, 6th, and 7th of December, he was not off sick but that he was off for personal business. He said that on December 13, he was off for personal business for an hour and one-half. He said that he notified the office. On December 17, he was off an hour and one-half and once again, for personal business. On December 18, he was also off for personal business. On December 20, it was personal business again. On December 26, it was personal business again. On January 2, 1981, he said that he was stuck in the mountains and that he would get in as soon as possible. On January 3, 1981, he was

late, but he did notify somone. Once again, he notified the office. On January 10 and January 11, 1981, he was absent. He stated that this absence was because of "doctor's care". He stated that he notified the office. Actually, he stated that his girlfriend notified the office. He was on assigned bulletin positions between November 1980 and January 12, 1981. He was spoken to about his absences by Mr. Gault. He stated that no one talked to him about his absences from November 1, 1980 through January 12, 1981. He would not answer the rephrased question if anyone had spoken to him prior to November 1, 1980. He also stated that he never received anything in writing from Mr. Gault regarding his absences.

Upon further examination, the Claimant stated that he was off on November 1, 1980 for personal business because his back was hurting. He said that it was a result of his October 31 accident. He again repeated that he was off between November 5 through November 7, 1980 because of an on-duty injury. He stated that he had an insurance appointment on December 13, 1980. On December 14, 1980, after some reluctance, he stated that his problem had to do with "personal family business of a domestic nature". On the 17th, the same situation arose. The reason for his tardiness on December 21, 1980 was that he had bought a new pick-up and there was no spare tire and he could not get one at 7:00 p.m. The problems on December 17, 20 and 26 were family business. On January 3, 1981, the problem was domestic in nature again.

The Claimant further stated that he went to the doctor on January 10, 1981 and the doctor gave him some medication and that he was aware of Rule G. He said that he came back to work very quickly after the last day of October because he was afraid that they were going to hold him for investigation and he made the doctor give him a release to come back to work early. Actually, he stated he should have stayed out longer. He again stated that he worked thirteen (13) overtime days from November 1 through January 12, 1981. He said that he made up 101 hours that he lost plus 3. He is claiming that he is being discriminated against.

On cross-examination, he was asked what the normal business hours were for an insurance agent and he answered that he did not have the slightest idea and that the insurance agent was a personal friend of his and the agent came out to talk to him. They met at a restaurant regarding insurance on his pick-up. This was a convenient time for the insurance agent.

Mr. Burks is the diesel foreman and he was asked about the incident on December 13, 1980. Mr. Burks said that the Claimant told him that he had to see his insurance agent. Mr. Burks at first did not give permission, but then Claimant said that if he refused to let him go, he would to home sick. Mr. Burks said that he was short on machinists and had no option.

On December 13, 1980, Claimant did not indicate that he was sick. On cross-examination, the foreman indicated that he had a lot of work in the shop on that day and that he would rather have the employe there for a certain amount of hours rather than lose him for the entire day if he went home sick.

The clerk in the diesel shop was another witness presented by the Carrier. The clerk testified that Mr. Wilkinson did not tell him that he had a bad back on November 1.

The shop superintendent, Mr. Gault, testified that he talked to Mr. Wilkinson about his absenteeism on two (2) occasions. However, he did not speak to him about his absenteeism from November 1, 1980 to January 12, 1981. He spoke to him prior to those dates. Mr. Gault's position is that an employe must have permission to lay off. Mr. Gault testified that Rule G states that if a person goes around using machinery under the influence of drugs, the employe must have permission to lay off.

Mr. Wilkinson did have a report from Amador Hospital indicating that he may not work with machinery until 1/14/81. However, Mr. Gault testified that Mr. Wilkinson never notified the Carrier that he was under the influence of drugs or anything else.

The evidence presented on behalf of the Carrier shows that the Claimant was absent twelve (12) days and arrived late or was absent for a portion of a shift on eight (8) other occasions. The Claimant's reasons have already been entered into the record. In the period between November 1, 1980 and January 11, 1981, there were fifty (50) working days. Claimant did not report for duty at all on twelve (12) of these days being a 24% absenteeism rate. On another eight (8) days during this period, Claimant was absent from his job for a portion of the shift being a 16% rate. If one totals up the absenteeism and the partial absenteeism, the rate is 40% of the total working time available.

As stated in Award No. 117 of Public Law Board 1790:

"Every employer has the right to expect every employe to report for work and work all of the scheduled hours on every regularly scheduled work day. Over the years an employe may occasionally be absent because of illness or an employe may have a long consecutive absence because of sickness or accident. And an employe may have an occasional good reason to be absent, or tardy or in need of leave early for numerous good reasons. But absences, tardiness and early leaves, for whatever the reasons, including illness, may be excessive, and, if continued over a length of time, may be excessive subject to discipline.

There is no precise formula expressed in hours, days or percentage that determines excessive absenteeism. Each case must be examined on its merits. Thus, we held in Award No. 50 that an absence of 16% of the scheduled work days, excluding vacation days, was excessive."

The Carrier has a right to expect employes to be at work on time as a regular practice. No employer can function with employes reporting on a hit or miss basis. Overtime does not offset absence during regular working hours. In fact, employe absence is often the cause of another employe's overtime. Interesting enough, using the overtime argument actually negated the Claimant's strongest point which is that he was out some occasions because of an on-duty injury. The injury appears to be one which inconvenienced the employe's personal needs. Personal business involving domestic problems is not an excuse to miss work. Neither is an appointment with an insurance agent a reason to walk off the job. In all of these matters, the employer received a low priority on the employe's scale of values. The Carrier was justified in similarly valuing the Claimant's services.

Rule 21 reads as follows:

"Rule 21 - Absence from Work:

In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible."

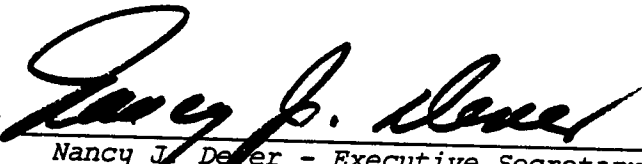
Rule 21 does not justify the employe's behavior. There was no proof that the employe was "unavoidably kept from work". The discharge is upheld.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:



Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1983.