

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

Parties to Dispute: (System Federation No. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Alton and Southern Railway Company

Dispute: Claim of Employees:

1. That Carman Tyrie Harris was improperly dismissed from service with the Carrier, effective December 18, 1974.
2. That accordingly, the Carrier be ordered to restore Carman Harris to service with all rights unimpaired and compensated for all time lost, including payment of all fringe benefits with six (6) per cent interest on wages.

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.

Petitioner's position, simply stated, is that the claimant became ill on the job with a stomach disorder but able to work his regular inside job because of the proximity of the lavatory; he was not well enough, however, to assume an outside assignment. When his foreman, in an effort to fill a temporary vacancy at carrier's hump operation, ordered claimant to fill such vacancy the claimant informed the foreman that he was sick, that he was not going to work the hump job as ordered, and that he was going home sick. The foreman's response to the claimant's statement was "that he had to be seriously ill to go home." Claimant left the property and the hump job was filled with another employee. Petitioner avers that the foreman's response was, at best, vague and did not constitute a clear refusal to claimant that he was authorized to go home; therefore claimant felt he had properly notified his supervisor of his illness and was not insubordinate when he then went home. Claimant testified that he had felt unwell for two days preceding the date involved but not sufficiently so to seek the care of a doctor.

The Carrier's position is that the claimant's refusal to work the hump job was a clear act of insubordination; that it was the order to work a job not to his liking that prompted claimant to "allege" illness and that he left the property without authority. The foreman testified that he lacked authority to grant an employee leave of absence. The incident was reported by a written note from the foreman to the Assistant Mechanical Superintendent. That note stated as follows:

"Mr. Kelley. Giles didn't show for the North Hump job so I told T. Harris (claimant) to go to the N. Hump, he said he wasn't going to the Hump, that he was going home sick. I told him he couldn't go unless he was seriously ill. He said he was so I told McCoy to go the N. Hump. This happened 3:20 PM."

The record contains unrefuted testimony by a fellow employee, Mr. Richard Davis, whether the claimant mentioned his feeling sick prior to the time of the incident, as follows:

"Q. Mr. Davis, on the afternoon approximately 3:00 p.m. Thursday, Dec. 12, 1974, did you talk to Mr. Tyrie Harris?

"A. Yes, I did.

"Q. In your own words, could you tell us what the conversation was about?

"A. When I came in I got a ride to work with my sister and then I asked Tyrie about 10 to 3 could I ride home with him and he said he was sick and didn't know if he would be here all night. I told him if he wouldn't be here all night it would be all right. I could get a ride with someone else."

It is noted that this conversation actually took place prior to the beginning of claimant's shift.

The Board also notes the following exchange during testimony given by claimant's foreman, Mr. DeRossett:

"Q. There is no place in your letter (the note to Mr. Kelley) saying that Mr. Tyrie Harris was insubordinate to you.
Am I correct by saying this?

"A. This is correct.

.....

"Q. Then you couldn't tell if this man was sick or not, would I be correct by saying this?

"A. Yes.

"Q. The night in question, did you tell Mr. Tyrie Harris he couldn't go home, because he was sick?

"A. I stated that he had to be seriously ill to go home.

"Q. Mr. DeRossett, I think you misunderstood my question. I asked you the night in question did you tell Mr. Tyrie Harris he could not go home account of his illness?

"A. No."

This Board is well aware of the volume of prior awards that hold to the principle that discipline assessed by a Carrier will be upheld so long as it is not harsh, arbitrary or capricious. This Board is equally cognizant of often stated principle that, in discipline cases, the burden is on the carrier to prove by probative, objective evidence that the allegedly aggrieved employee did, in fact, commit an infraction and that punishment was warranted. (See Second Division Award No. 6419, among many others).

We have thoroughly reviewed all of the evidence and partisan positions submitted to the Board in this case and conclude that the Carrier did not prove by probative, objective evidence that the claimant committed an act of insubordination as charged. It is noted that the period of discipline runs from December 18, 1974 thru February 27, 1975, the claimant's name having been restored to the seniority roster on April 1, 1975. We will therefore sustain the claim to the extent that claimant be compensated for all regular time lost, less all wages received by him from other sources and all money benefits received under the provisions of any Federal or State law which provides for unemployment insurance benefits, with seniority rights unimpaired. That portion of the claim calling for payment of all fringe benefits with 6% interest on wages is denied.

Rule 19 (f), of the Schedule Agreement, clearly sets forth the agreed upon terms under which an employee reinstated account of having been unjustly dismissed shall receive compensation.

In this regard, Second Division Award No. 5672, stated as follows:

"Claimants also seek six (6) per cent interest, insurance payments, and other so-called fringe benefits that may have been lost during the period they were improperly held out of service. The applicable provision of the Agreement restricts compensation payments to full pay for all time lost. Therefore, other remedies sought on behalf of claimants cannot be allowed within the limits of our authority (Awards 4793, 4866 and others)."

A W A R D

Claim sustained as set forth in Findings.

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Award No. 7229
Docket No. 7064
2-A&S-CM-'77

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 4th day of March, 1977.