Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7048
Docket No. 6917
2-SP-MA-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers - District No. 19
(Southern Pacific Transportation Company

Dispute: Claim of Employes:

1. That under the current Agreement Machinist Regular Apprentice A. E. Edwards (hereinafter referred to as Claimant) was unjustly dismissed from the Carrier's service on April 26, 1974.

2. That, accordingly, the Carrier be ordered to compensate Claimant for all time lost from date of dismissal, April 26, 1974 until his 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.

At the time this dispute arose Claimant was employed by Carrier as a Machinist, having entered its employ on January 6, 1971. On January 30, 1974, because of alleged frequent absences due to claimed illness, Claimant was instructed to appear for complete physical examination "with Dr. Sidney Harris" on February 4, 1974. The letter of instruction also advised him that he was being taken out of service as of January 30, 1974, and stated further:

> "You will not be allowed to return to duty until approval is received from our Chief Medical Surgeon, Dr. V. M. Strange."

Claimant failed to appear on February 4th and further letter was sent to him instructing him to appear for physical examination by Dr. Harris on February 15th. Also, that "Failure to comply with these instructions could result in disciplinary action being taken." Instead, Claimant appeared on February 11th and was examined by a Dr. Villano, Carrier asserts that this examination was

not complete and that it was understood that Claimant was to report back in a few days for certain laboratory tests. The latter assertion appears to be in dispute. However, the record does indicate that Claimant did nothing further after February 11th. In fact, he did not report to Carrier, made no inquiries, and, as alleged by Carrier, absented himself from employment "without proper authority" in violation of Rule 810 of the controlling Agreement for a period of more than two months.

As a result, Claimant was noticed to appear for Investigation on April 22, 1974 "to explain your alleged unauthorized absence from duty". Thereafter, Claimant was found guilty as charged and dismissed from service on April 26, 1974.

Petitioner contends that Claimant was improperly held out of service; that he was unjustly dismissed; and that, accordingly, he should be reinstated with compensation for all time lost. Carrier disputes each of these contentions.

At the outset, we are faced with Petitioner's objection that Carrier's reference in its Submission to the Board to (1) Claimant's "unsavory public record" and related matters and (2) his prior absences and lost time from work, all constitute "new matter" not previously raised on the property and, as such, inadmissible at this level of appeal.

The established principle of inadmissibility of "new matter" not raised during the handling of the dispute on the property has been reaffirmed in innumerable prior Awards of this Division as well as all other Divisions of the Board. The concept of "stare decisis" can well be said to apply to this issue, nor is it necessary to cite supporting cases.

Accordingly, we sustain Petitioner's objection as to those matters under item "(1)" above, relating to Claimant's alleged "unsavory public record"; the record indicates that these matters were not in fact raised on the property.

We do not sustain, however, Petitioner's objection as to item "(2)" above, relating to Claimant's prior absences and time lost from work. This issue was raised on the property as evidenced by the following testimony at the Investigation:

> "Evert (Hearing Officer) to Edwards (Claimant)
> Mr. Edwards, prior to January 30, you have had a long list of absent days and partial days worked. Do you feel that if you were allowed to return to your duties you would be able to fill this requirement for eight hours a day without being tardy or take off early, and be here five days consecutively?
>
> A. Yes."

* * * * * * * * * * * * * * * * * * *

> "Roberts (Organization Representative) to Evert
> Due to the evidence presented at this hearing, I hope that the presiding officer who reviews this case will grant leniency to Mr. Edwards being that he stated he will work every day and work 40 hours a week from now on. . . . ."

Consequently, Claimant's prior service record on absences and time lost are properly before the Board for appropriate consideration. Similarly, and bearing further on Claimant's prior service record, the following uncontradicted assertion by Carrier is also properly before the Board:

> "Claimant has established a pattern of work habits during his three years of employment which reveal a few months of work followed by a sick leave lasting two months or more. His sick leaves during his short term of employment have totalled in excess of 15 months, well over one-third of the available working period since his employment. . . . . "

Specifically, on the merits of the charge in this dispute, we acknowledge that some question exists as to whether Claimant knew he was required to report for further examination or for laboratory tests. Nevertheless, the record does show that Claimant failed to appear for examination on two scheduled dates, but appeared instead on a date that he chose and before another doctor. Moreover, during the period from February 11, 1974 until April 22, when he was summoned to Investigation, he did absolutely nothing and was indifferent to and completely ignored his responsibilities as an employee.

Clearly, in view of these facts, Claimant absented himself from his employment "without proper authority" for over two months and was in violation of Rule 810 of the Agreement. The fact is that Claimant offered no valid explanation for his conduct and conceded that he acted improperly. During the course of the Investigation he acknowledged that he received a letter instructing him "to take a physical February 4, or do not return until I do, and I failed to reply to this message". He stated further:

> "... . Well, I just took off from work after I failed to take the physical and I did not reply to any Southern Pacific personnel as to my absence. I don't have any reason."

In partial explanation, Claimant referred to the fact that his wife had died (without indicating when this occurred) and that he could not "adjust to the situations at that particular time here at work". He then added:

> ". . . and I felt that I had to take off work, which I felt I should have reported to my superiors here - supervisors here at the railroad. That's all."

Again, during the Investigation, he was asked:

> "Can you tell me any reason why you didn't contact your immediate supervisor or one of your Union representatives as to your whereabouts during this extended absence?
>
> No sir. That's all."

We are unable to give credence to Claimant's "explanations" as justifying his conduct, not only in this instance but throughout the course of his employment, which is marked by a pattern of indifference and neglect of duty. We have held repeatedly that continuous unauthorized absences from assigned duty, absent strongly mitigating circumstances (not present in this record), are serious offenses warranting imposition of discipline and possible dismissal from service.

See, for example, Second Division Award 6240 (Shapiro) and Third Division Awards 20767 and 20768 (Norris) among many others.

On the record, therefore, and particularly in view of Claimant's admissions, we have no choice but to find that Carrier sustained its burden of proof that Claimant was guilty as charged. In these circumstances, as established precedent dictates, we are not authorized to disturb the action of Carrier. Carrier acted reasonably and fairly, Claimant was afforded a fair and impartial hearing, and none of his rights of due process were violated.

See Awards 5183 (Harwood), 6456 (Bergman), 6525 (Franden) and Third Divisions Award 20868 (Norris) among others.

Additionally, we cannot conclude that the discipline of dismissal here imposed was unreasonable or unwarranted. Claimant's promises to comply in the future and work full time may be valid as bearing on leniency. But this is a matter within the management prerogatives of Carrier and not within the purview of this Board. This is particularly true when we consider Claimant's poor attendance record in the light of his short period of employment.

Accordingly, on the basis of the record and controlling authority, we are compelled to deny the claim.

A W A R D

Claim denied.

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 7th day of May, 1976.

LABOR MEMBER'S DISSENT TO AWARD

NO. 7048 DOCKET NO. 6917

Award No. 7048 is not only erroneous but is so illogical as to depart from reason.

This fact is readily portrayed such as wherein the record, also the Award, it was established fact that the Company removed the Claimant from service. This is stated in pertinent part:

> "The letter of instruction also advised him that he was being taken out of service as of January 30, 1974, and stated further: You will not be allowed to return to duty until approval is received from our Chief Medical Surgeon, Dr. V. M. Strange."

So it is factual that the Company removed the man from service until their Chief Medical Surgeon approved his return. The Award dictum goes on then to state in pertinent part:

> "XXX as alleged by Carrier, absented himself from employment 'without proper authority' in violation of Rule 810 of the controlling Agreement for a period of more than two months.xxx" (underscoring added)

So the Company removed him from service, after which he could only return to service with their Chief Medical Officers' approval, the record shows that this approval was never advanced, and now such a preposterous statement that the Claimant was absent from employment without proper authority.

The petitioner challenged the majority to show one single letter wherein the Company Medical Officer sought information on the physical examination this Company ordered. There was not one

shred of evidence to support any medical findings, delays, further examinations, tests, etc. The majority in Third Division Award No. 20419 at least used more common sense and judgement on such a failing by stating.

> XXX"An examination of the record of the dispute on the property does not reveal any medical explanation for withholding judgment on the return to duty of Claimant; in fact there is no medical data whatever in that record. In Carrier's letters of June 27, 1972 and October 16, 1972, as well as in Carrier's submission, we find contradictory assertions with respect to the various requests for medical information from Claimant's physician, but no evidence whatever relating to such requests. Based on Carrier's assertions it would be reasonable to expect at least a copy of the letters allegedly sent to the Doctor."
> "Claim sustained xxxx."

A further mis-statement in this Award is in the previous quote stating:

> "In violation of Rule 810 of the controlling agreement."

The record shows the "controlling agreement" to be the Agreement effective April 16, 1942, as subsequently amended. Rule 810 is only a Company imposed unilateral rule that cannot be in conflict with the schedule agreement. In the instant case the Company improperly applied it in conflict with the Claimants' schedule agreement rights and the neutral supports them against all previous rulings and holdings of all boards.

The majority properly upheld the Organizations' protest wherein the Company attempted to raise for the first time before the Board thatthe Claimant had an "unsavory public record." However another error was committed in not upholding objections to