

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. 1 (Formerly System Federation
(No. 30, Railway Employees' Department, AFL-CIO
((Electrical Workers)
(
(The Staten Island Rapid Transit Operating Authority

Dispute: Claim of Employee:

1. That under the current agreement Electrician Helper (Temporary Electrician) John Thomas was improperly dismissed from the service of the Carrier.
2. That accordingly, the Carrier be ordered to return the aforesaid employe to service with all seniority rights restored and all pay due him since he was discharged up to the date he is returned to service at the applicable Electrician Helper (Temporary Electrician) rate for each working day he has been improperly held from service; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment insurance and sickness benefits for the above described period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the above described period; and all other benefits that would normally accrue to him had he been working in the above described period in order to make him whole.

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 were given due notice of hearing thereon.

Claimant apparently injured his hand fixing a flat tire in preparation for his trip to work. There is some evidence at variance but it does not materially change the fact that he promptly thereafter called his supervisor, Mr. Rivallino and informed him that his hand was injured and it was his intention to visit a doctor that day. He promised to call back again that

day after he had seen the doctor. He did so and reported that he had seen the doctor and he would report for work, despite the injured hand, the next morning. Mr. Rivellino informed him he could not do that until he secured a statement from the doctor attesting he could work. Two days later Claimant reported in person at Mr. Rivellino's office to notify him that he was unable to see the doctor because the doctor would not be available until after the Labor Day week-end. As a consequence Claimant could not obtain the required doctor's statement. At that time Mr. Rivellino inspected Claimant's swollen hand. It was left that Claimant was to keep trying to see the doctor and obtain the required statement as a condition of his return to work.

On the morning of Tuesday, September 4, 1973 (immediately following the Labor Day week-end) Claimant called Mr. Rivellino to inform him that he had an appointment with the doctor for later that day and he would, in all likelihood obtain the necessary doctor's statement and be available to return to work the next morning. Thereafter Claimant was examined by the doctor and did receive the necessary statement authorizing his return to work the next morning. That afternoon Claimant was notified by telephone that he was suspended pending a disciplinary hearing. Claimant was counseled by his Committeeman not to present the doctor's statement to the Carrier until the hearing scheduled for September 14, 1973.

The Carrier's letter of suspension dated September 12, 1973 relies upon the following grounds:

1. Claimant failed to respond to direction from supervision relative to improvement in his attendance.
2. Claimant failed to comply with the provisions of Rule 1(c) requiring service for a week of 40 hours consisting of five days of eight hours each.
3. Claimant is charged with violating Rule 19 to the extent that he did not notify his foreman as early as possible that he would be detained from work.
4. Claimant is charged with insubordination for refusal to provide his supervisor with a copy of the memorandum from the doctor concerning his injury.

The substantive charge we must deal with first is that concerning Rule 19 which provides:

"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 either by telephone, messenger, or United States mail. Employees absenting themselves for fifteen (15) days without notifying Management shall be considered as out of service and dropped from rolls and seniority roster."

We believe that Claimant did notify his foreman as early as possible following the injury within the meaning of this rule. In fact, it is difficult to conceive that he could have acted with greater promptness. Insofar as we find that Claimant did not violate Rule 19 we cannot look back into his prior record of absenteeism. Granted, as Carrier contends, that record is bad but that does not alter the fact that his prior absenteeism cannot be a consideration when the instant charge is without foundation.

The further charge that Claimant violates Rule 1(c) lacks merit insofar as this rule does not govern absenteeism. It merely provides descriptive information concerning hours of work. A failure to work those hours may result from a variety of circumstances, including those permitted by the agreement itself. To permit Carrier to apply this rule as it suggests would be improper.

Next, we come to the charges of insubordination. Certainly, the Claimant's supervisors experienced a certain exasperation in dealing with his absenteeism but under the circumstances here, insubordination is not the correct charge. It cannot be said he wilfully refused to obey a proper order. The record indicates he tried to obtain the required doctor's statement. It is unrefuted that he was not able to obtain it until after the Labor Day week-end. He cannot be blamed for the delay and the record is far from clear that he was expected to obtain a statement from some other doctor. The record is clear that he acted promptly to go to see the doctor immediately after the holiday week-end. This does not amount to insubordination.

Lastly, we come to the matter of withholding the doctor's statement until the date of the hearing. The record does not indicate that substantiation of this charge alone warrants dismissal and we do not so view it. In addition, there are certain mitigating circumstances in that the statement was held back by Claimant on recommendation of his Committeeman. Claimant was entitled to such counsel and certainly it must be expected that he would rely upon it. Under the circumstances here we believe this factor blunts the force of any wrong by Claimant.

We conclude Carrier's dismissal of Claimant on these facts was arbitrary and capricious. Accordingly, Claimant must be returned to service but the circumstances do not justify awarding him pay or other benefits during the period he was out of service.

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A W A R D

Claim is sustained in part and denied in part in accordance with these findings.

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 9th day of July, 1976.