

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

Parties to Dispute: (System Federation No. 16, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Norfolk and Western Railway Company

Dispute: Claim of Employee:

1. That the Carrier violated the Agreement of June 1, 1939, as subsequently amended when on August 7, 1975 Carmen (temporary basis) C. R. Miles was given a formal investigation for charges of excessive absenteeism, resulting in unreasonable and capricious assessment of dismissal from the service of the Norfolk and Western Railway Company.
2. That the investigation was improperly arrived at and represents unjust treatment within the meaning of Rule 16 and Rule 33 of the controlling agreement.
3. That because of such violation and capricious action, Carrier be ordered to compensate Carmen C. R. Miles for all lost time beginning August 12, 1975 and until such time as he is reinstated with his seniority rights unimpaired and he is allowed to resume his regular assigned duties.

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, a Carmen with about two years of service with the Carrier, was discharged for excessive absenteeism.

The record establishes: 1) that the claimant, in April, 1975, was assessed a 15-day disciplinary suspension for absences without permission; 2) that, in the course of the last approximately 7 months of his employment

with the Carrier (the discharge came in early August, 1975), the claimant was absent more than half of his work time, claiming illness on most occasions and personal business on some occasions; 3) that the last absence prior to the discharge was in the (uninterrupted) period from June 23 through July 31, 1975; 4) that, in this period, the claimant called in as sick on some days and did not call in at all on others; 5) that, in seeking to go back to work, he brought a doctor's slip stating that he had been under the doctor's care and was now able to return to work; 6) that, according to the claimant, he had been ill with "the flu"; and 7) that, in the course of his employment, the claimant was admonished on a number of occasions (apart from the April, 1975, suspension) that his attendance record would have to improve.

The Organization asks for the claimant's reinstatement both on procedural and on substantive grounds. We are in disagreement with the Organization on both scores.

Relying on the multi-faceted participation in the various stages of the case by the person, the Assistant Freight Foreman, who discharged the claimant, the Organization asserts that the claimant did not receive a fair and impartial hearing. Though much has been written and held on the subject of what is and what is not a fair and impartial hearing and though the writings include some broad pronouncements, it remains true that the particular facts and circumstances in each case play the dominant role. We are so proceeding, and we do not find enough in the record to sustain the Organization's contention. We note that the claimant was represented by the Organization in accordance with his preference and was given every proper chance to submit his version of the facts; that the Assistant Freight Foreman did not preside at the hearing; that it surely is to be accepted that an Assistant Foreman would not alone decide whether an employee's discharge, following a hearing, should be sustained; and that we simply disagree with the Organization when it comes to the introduction in the record of the April, 1975, suspension -- for, in a case involving the discharge penalty for excessive absenteeism, a prior disciplinary action for absenteeism cannot help but be relevant.

In our opinion, the real problem with the record from the Organization's standpoint is that the claimant's explanation in accounting for the June 23-July 31 absence is, to say the least, woefully unpersuasive. We want to make it clear -- for there was a question about it at the hearing -- that we accept that the claimant secured a doctor's slip, that the slip was turned over to the Carrier's physician and was not returned to the claimant, and that, as "D.O." stands for "Doctor of Osteopathy", the person identified by the claimant as a physician was indeed a physician. However, by the Organization's own statement, the slip said no more than that the claimant had been under the doctor's care and was now ready to return to work. In the face of an absence of $\frac{1}{2}$ -week duration and in the face of the claimant's

past record, no Carrier can be taken to task for declining to accept a stip of such inconclusiveness as properly excusing the claimant on grounds of illness. And so it is with the claimant's testimony. There is nothing by way of meaningful substantiation. There is merely the "flu" assertion. Again in the light of the claimant's past record and in the light of the duration of disability commonly associated with influenza, the bare assertion by the claimant cannot be accepted as sufficing to treat the 5½-week period as covered by illness.

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 Breach - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July, 1978.