Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8312
SECOND DIVISION Docket No. 8134
2-CR-CM-'80

The Second Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

Parties to Dispute: (System Federation No. 109, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Consolidated Rail Corporation

Dispute: Claim of Employes:

(a) That the Carrier violated the controlling agreement when on August 19, 1977, they assessed ten (10) days actual discipline to Carman Welder Charles G. DeLong, as a result of a hearing and investigation conducted on July 25, 1977.

(b) That accordingly, the Carrier be ordered to reimburse the Claimant for the equivalent amount of compensation he would have earned during the ten days of his suspension, as well as any other compensation the Claimant would have earned during the ten-day period he served as discipline days lost to be forwarded towards his vacation, remove all record of discipline from his service record, and Claimant's service record be restored unimpaired, plus 6% interest compounded on a daily basis.

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.

Claimant telephoned the Carrier prior to the beginning of his tour of duty on Wednesday morning, June 15, 1977 and stated that he was marking off because he was sick. At 11:15 a.m. the Carrier's Assistant General Superintendent called the Claimant's home to see if the Claimant was available for work. He received no answer to the call.

The Assistant General Superintendent and the General Foreman then went to the Fairgrounds Farmer's Market where they observed the Claimant sitting at a lunch counter. The Claimant's wife operated a candy stand at the Framer's Market. The Market is open two days a week, Friday and Saturday.

On June 24, 1977 the Claimant was sent the following notice:

"Dear Sir:

In accordance with Rule 34 of the former Agreement between Reading Company and System Federation No. 109, AFL-CIO, BRC of US and Canada, you are hereby notified to present yourself for hearing and investigation account your being charged in connection with: your misuse on June 15, 1977 of the contractual intent of Rule 22 'Reporting Off' whereupon you reported off duty as being sick at approximately 6:05 a.m., whereas you were observed at approximately 12:15 p.m. at a lunch counter across the aisle from your stated wife's candy stand, 'Dotties Candies' at the Fairgrounds Farmers Market; your mendacious application of Rule 22 on June 15, 1977 resulting in conflict to the fulfillment of your scheduled position responsibility, to determine your responsibility, if any, in the matter.

Thereto the following is noted:

Rule 22
Reporting Off

'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. When known, employes are expected to make advance arrangements if necessary to be absent.'"

The notice also scheduled a hearing which, after several postponements, was held. The Claimant was then disciplined with a ten-day actual suspension for the alleged offense.

The Organization submits that the suspension was improper. Initially, the Organization argues that the interrogator assigned by the Carrier to the hearing prejudiced the case. Specifically, the Organization objects to the interrogator's questioning the Claimant on the nature of his sickness; to the interrogator's entering into the record the Claimant's attendance record; and, to the interrogator's entering into the record a five-day actual suspension without noting that the discipline had been later rescinded. During the hearing the Organization objected to testimony concerning a prior incident when the Claimant was allegedly observed at the Market. The Organization also protests that a precise charge, under Rule 34, was never given in writing to the Claimant.

On the merits of the case, the Organization states that the Carrier failed to sustain its burden of proof. It is noted that the Claimant did call the Carrier's office in compliance with Rule 22.

The Organization contends that the testimony demonstrated that the Claimant was legitimately sick with diarrhea and that there is nothing to preclude him

from going out to lunch after properly reporting off. Three witnesses offered unrebutted testimony that the Claimant was only at the Farmer's Market for lunch. It was also noted in testimony that the pattern of Wednesday absences cited by the Carrier were, in part, comprised of a series of visits by Claimant to the dentist.

As a remedy the Organization calls for full compensation with 6% interest and vacation credit restored.

The Carrier asserts that the Claimant used sickness as a subterfuge in order to engage in activities related to his wife's candy-store business. In support of this charge and in explanation of the Assistant General Superintendent's driving to the fairgrounds on June 15, 1977, the Carrier notes that, over the preceding nine months, the Claimant reported off or left duty early on eight Wednesdays, four Fridays, one Thursday, and no other days.

This "pattern of absenteeism" combined with the Claimant's presence at the Farmer's Market leads, according to the Carrier, to the conclusion that the Claimant marked off duty for purposes related to his wife's business. The Carrier also cited an earlier incident of the Claimant's putting price tags on bags of candy at the Market while absent from work.

The Carrier acknowledges that an employee can and will be sick but states that when the absences become excessive and follow a pattern the Carrier can and must take action to attempt to correct the situation. The Carrier notes that the discipline was reasonable in light of the legion of awards which have consistently ruled that absenteeism is a serious offense.

The Carrier also argues that the mere fact that the Claimant called the office does not constitute compliance with Rule 22. An employee can only call in sick under the Rule if he or she is, in fact, sick.

In explaining the phone call to the Claimant's home and the visit to the fairgrounds, the Carrier states that it can not just be limited to accepting an employee's word. In this case, the Carrier notes, it had good reason to investigate the Claimant's absence.

In defense of the interrogator's entering into the record the Claimant's prior attendance record, the Carrier states that the Organization did not object at the introduction of this evidence and thus waived any right to object subsequently. Moreover, the Carrier argues, the attendance record was relevant in light of the testimony on the Claimant's chronic absenteeism. The Carrier adds that the interrogating officer did not act as a judge and jury since the decision to impose a ten-day suspension was made by another Carrier official, the General Superintendent of Shops.

In defense to the Organization's charge that the Claimant was never given written notice, the Carrier points out that its June 24, 1977 letter contained a precise charge in that it referred specifically to the time, place and occurrence which was to be investigated as well as quoting the rule allegedly violated.

In response to the damages demanded by the Organization, the Carrier notes that Rule 34 (b) only provides for compensation for wages lost, and not for interest.

The Organization's threshold argument raises the important issue of an interrogator's duty to fairly develop a full and complete record. In the first instance the interrogator did pursue a line of questioning, concerning prior absences, which was a proper issue to be developed by the Carrier's representative. On several occasions, objections of the Organization were noted without stopping the testimony or hearing further argument on the objection. Also the interrogator did not note that a five-day suspension that the Claimant received was later rescinded. These latter two actions raise some questions regarding the proper conduct of the hearing. However, the Organization has not shown how the Claimant's rights were prejudiced by these actions.

Turning to the merits of the case, the Carrier argues that the Claimant's presence at the Farmer's Market on Wednesday, June 15, 1977, combined with his pattern of Wednesday absences, is proof that he was not legitimately sick. There was unrebutted testimony that the Claimant was at the Market to eat lunch. There is no evidence that the Claimant performed work at the Market or elsewhere inconsistent with his claim of illness. The Board is consequently left with the issue: Does going out to lunch after reporting off sick constitute an abuse of the provisions of Rule 22 and does it make any difference that the Claimant did so on a Wednesday and at the Market?

The Carrier does not offer arguments that the Claimant could not go out to lunch; it only argues that the Claimant's having done so is proof of a pattern of his reporting off to help his wife at her business establishment. However, beyond pointing out that the illness occurred on a Wednesday, the Carrier failed to demonstrate that the Claimant did anything but eat lunch. In fact, it did not even question the witnesses who testified to that effect. Also, the Claimant argued that on some of the days comprising the alleged pattern of absenteeism he visited the dentist. The Carrier did not address that point either. The Carrier has not proven that the Claimant's actions on the day in question were part of an alleged pattern of absenteeism.

The Carrier has gathered substantial circumstantial evidence and marshalled many compelling arguments regarding this case, and although this Board is cognizant of the detrimental effects of chronic absenteeism we must conclude that an abuse of Rule 22 was not proven.

The Claimant is ordered to be made whole for any lost wages less outside earnings. Interest is not awarded to the Claimant since the language of the contract is clear and refers only to wages as the remedy.

A W A R D

The Claim is sustained, in part, as noted in the above Findings.

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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 16th day of April, 1980.