

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 45, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Electrical Workers)
 { St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company (hereinafter referred to as the Carrier) improperly withheld Mr. M. W. Williams from service on various dates in January, 1979 and did not compensate him for the time withheld from service.
2. That accordingly, this Carrier be ordered to compensate Mr. M. W. Williams for the following days which he was withheld from service; January 9, 10, 11, 12, 13, 15, and 16, 1979 at the current pro rata rate applicable at the time he was withheld from 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.

On January 9, 1979, Claimant, a Lead Gang Lineman in the Carrier's System Communications Department, reported for work and requested of his Supervisor that he be permitted to work in the Pine Bluff, Arkansas area that day because he had scheduled an appointment to see his personal physician later that afternoon. Although Claimant was afflicted with a case of bleeding hemorrhoids, and this condition was the basis of his request, it is unclear in the record as to whether Claimant informed the Supervisor at that time of the particular nature of his malady, of whether the Supervisor sought out this information from Claimant himself.

Be that as it may, however, the Supervisor denied Claimant's request and gave him the option of either working his scheduled assignment in Memphis, Tennessee that day, or laying-off for the day. Claimant chose to lay-off for the remainder of the day, thus remaining in Pine Bluff in order to keep his scheduled physician's appointment.

At this point, there arises a second dispute in the record which concerns whether the Supervisor apprised Claimant that he would be required to secure a release from his physician before he could report back to his work assignment. Carrier contends that Claimant was so apprised, and further that he was aware of the existence of this particular rule. Claimant and his Organization, however, dispute these two contentions.

Claimant reported for work on January 10, 11, 12, 13, and 15, however, he was not assigned, but rather, he was informed by his Supervisor that he would not be allowed to work until he secured a release from his physician. On January 16, Claimant reported for work, again without having secured the physician's release. This time, however, the Assistant to the General Superintendent for Communications reiterated the directive which had previously been issued to Claimant by his Supervisor.

According to Claimant, he reported for work on the following date, January 17, 1979, with the requisite physician's release in his possession. Said release was dated January 16, 1979. On this point, however, Carrier contends that though said release was dated January 16, 1979, Claimant did not return to work until January 18, 1979. Thereafter, as the record shows, Claimant filed a time claim for pay for the days on which he was absent. Said claim was denied by Carrier and this issue is now the basis for this instant review.

In addition to previously stated arguments, Carrier further contends that it has been its policy to require a physician's release when an employee returns to work following a job-related injury or an illness which is related to such an injury. Carrier contends that such information is necessary to insure that an employee is, in fact, physically able to perform the work which is assigned to him. Carrier further argues that it is within its managerial right to withhold an employee from service on the basis of a medical examination, unless Carrier has not acted in good faith or has acted arbitrarily or capriciously. Such a requirement, according to Carrier is neither unreasonable nor is it prohibited by any of the parties' agreed upon rules. Lastly, Carrier summarizes that Claimant was not unjustly treated, nor was he withheld from service by Carrier. According to Carrier, Claimant was responsible for his own situation since it was he who claimed to be ill and thus unable to work; it was he who failed to obtain the physician's release; and it was he who failed to return to work promptly after obtaining said release.

Claimant's organization contends that he was unjustly treated when Carrier withheld him from service without just and sufficient cause. Specifically, petitioner maintains that Carrier was aware that the basis for Claimant's condition was his hemorrhoidal problem which was not a work related injury or illness resulting therefrom, and, therefore, was not a situation which required the presentation of a physician's release prior to an employee's return to work.

Secondly, petitioner, while acknowledging Carrier's right to promulgate reasonable standards for employees returning to work from injury or illness, argues that Carrier's rule in this instant case was not applied consistently or in a uniform manner. As evidence of this situation, petitioner, inter alia, cites the fact that Claimant was not required to produce a physician's release when he returned to work after he was off for two days because of the same hemorrhoidal problem only a week after returning from his initial absence.

The third and final area of argumentation proffered by petitioner is that Carrier's actions in this matter is violative of the parties' Rule 5-2, a pay rule covering monthly rated employees. Said rule reads:

"No overtime is allowed for service performed in excess of eight (8) hours per day. However, no time shall be deducted unless the employee lays off of his own accord, is furloughed, on leave of absence, his position is abolished, he is suspended for cause, or is displaced under the rules of this agreement."

Petitioner maintains that the reason for Claimant's absence does not fall within the stated exceptions of Rule 5-2, and he is, therefore, entitled to pay for this period of time since such time lost is a contractual benefit afforded to monthly rated employees, such as Claimant, as opposed to the hourly rated employee who is otherwise compensated for hours worked in excess of his eight (8) hour day.

Upon a careful and complete review of the entire record in this instant dispute, and having considered the arguments advanced by the parties, it is the conclusion of this Board that Carrier's actions were arbitrary, and, therefore, were improper. The rationale for this conclusion, simply stated, is that the record is clearly absent any supportive or probative evidence which would indicate that Claimant's hemorrhoidal condition was "caused by a job-related injury or an illness which is related to such an injury" as specified in Paragraph VIII of the Carrier's letter of August 26, 1977 and as argued by the Carrier in this dispute.

Additionally, Carrier has failed to offer a modicum of evidence which would suggest that Claimant's condition would have adversely affected his ability to perform his assignment, which, obviously, is a further consideration in cases of this nature.

In support of its position, Carrier has introduced several awards which have been issued by this and various other divisions of the National Railroad Adjustment Board which purportedly deal with Carrier's right to withhold employees from service on the basis of a medical examination. While this Board is cognizant of and supportive of Carrier's right in this regard, the fact situations of these Carrier submitted awards are considerably disparate from the facts of this instant case to make them totally distinguishable.

Having disposed of the critical issue relative to the resolution of this dispute, there are two related secondary issues which affect the remedy which will be directed herein.

First, the record clearly shows that Claimant chose to "lay-off" on January 9, 1979, so as to remain in Pine Bluff, Arkansas, in order to see his personal physician. As this was a voluntary action on the part of Claimant, no back pay will be awarded for that day.

Secondly, the record is unclear regarding whether Claimant, pursuant to his obtaining the physician's release form on January 16, 1979, returned to work on the following day, January 17, as he and his Organization contend, or whether he

remained off work one additional day and returned on January 18, as argued by Carrier. In this regard, the Board directs that the parties are to determine the exact day on which Claimant returned, and in the event that it is determined that Claimant returned to work on January 18, pay for the previous day, January 17, will be denied since Claimant's absence was caused by his own malingering on that date. If it is determined that Claimant did in fact return to work on January 17, as claimed, then this particular issue will have resolved itself.

A W A R D

The claim which has been presented to this Board shall be sustained in that Claimant shall receive pay for the dates of January 10, 11, 12, 13, 15 and 16, 1979. In the event that it is determined that he did not report back to work until January 18, 1979, then pay for the previous day shall be denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 1st day of October, 1980.