

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Washington Terminal Company

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling agreement when they unjustly assessed car cleaner M. A. Morris a three (3) calendar days suspension as a result of an investigation held on December 13, 1978.
2. That accordingly the Washington Terminal Company be ordered to compensate for his net wage loss for this unjust suspension and to expunge this charge from his record.

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.

As the result of a hearing held on December 13, 1978, claimant, an equipment serviceman, was assessed a three day suspension for absenteeism. Specifically, claimant was charged with excessive loss of time on November 5, 20, 26, 27, and 28, 1978.

Claimant did not work on any of the five days in dispute. According to the carrier's records, claimant called in on November 5, and 28, 1978 and was marked absent due to illness. On November 20, 1978, claimant testified that he reported his absence to a carrier clerk and that he was unable to work because he had to take his daughter to the hospital. On November 26, 1978, the claimant stated he called the carrier to report car trouble and the clerk ostensibly promised to mark claimant on the books as eligible to work on November 27, 1978. When the claimant reported to work on November 27, 1978, he was held out of service for his entire shift because the carrier had no record that the claimant had called on the previous day.

The organization urges us to reverse the assessment of discipline because the carrier failed to prove the infractions with substantial evidence. The organization offers two arguments. First, the claimant was unavoidably absent

on the days in question and, thus, his absences are excused under Rule 18 of the applicable agreement. Second, the claimant was already punished once when he was held out of service on November 27, 1978. According to the organization, the carrier is charging claimant with an improper absence on a day the carrier unilaterally held the claimant out of service. The carrier contends the claimant excessively absent during November, 1978 and that, after reviewing his prior attendance record, a three day suspension was warranted.

This dispute turns on the interpretation of the relevant portions of Rule 18, which state:

"In case an employee is unavoidably kept from work he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible, by telephone...

An employee who is absent from work for any cause and has not arranged for a definite time to resume duty, will not be permitted to work except on approval of ranking officer, unless he gives his foreman notice of his intention to report for duty at least one hour before the regular quitting time of the shift on which he is employed, on the day previous to the day on which he intends to report for work...." (Emphasis Added)

As an appellate body we are unable to resolve credibility issues where, as here, the carrier records for November 26, 1978 directly contradict the testimony of the claimant. Thus, the carrier may exercise its prerogative under Rule 18 to hold the claimant out of service on November 27, 1978 for his failure to timely report on the previous day that he intended to return to service on November 27, 1978. However, the carrier, once it decided to hold the claimant out of service, cannot charge the claimant, who was ready and willing to perform his tour of duty, with an impermissible absence on that date. Rule 18 confers the carrier with the power, at its discretion, to hold an employee out of service when the employee has not complied with the notice requirements but since such discretion rests solely with carrier, it is barred from claiming the employee caused the absence.

As to the November 5 and November 28 absence, the carrier's records explicitly state that claimant was absent due to illness. The carrier takes the position that in order to maintain essential railroad service, it cannot tolerate employee absences regardless of the excuse. However, Rule 18 contemplates that some absences are excused. Since the carrier's own records demonstrate that the claimant was sick, the claimant was unavoidably detained from work. Illness constitutes good cause under Rule 18. While Rule 18 only protects the claimant from discipline when he is genuinely ill, there is no evidence in the transcript to show the claimant was feigning illness. Therefore, the carrier failed to prove excessive loss of time on November 5, 27, and 28, 1978.

As to the remaining two days, November 20 and 26, we find the claimant was absent without proper cause. There is substantial evidence to support a reasonable

conclusion that the claimant either did not promptly report the absence to his foreman or had an unacceptable excuse for his failure to report for work. Even on November 20, 1978 when he took his daughter to the hospital, the claimant neglected to tell the carrier why he was detained from work.

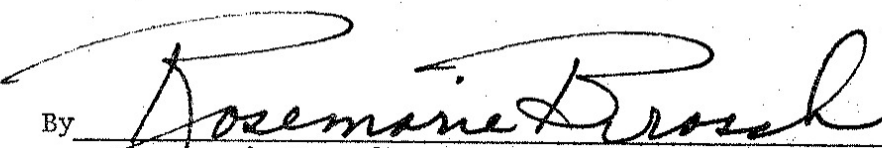
After reviewing all the mitigating circumstances in this case, we find the penalty imposed to be excessive and unduly harsh. We recognize the carrier's right to consider the claimant's previous warning for excessive absenteeism, but, here, the carrier proved that the claimant was improperly absent on only two days of the five days and an admonishment from this Board should be sufficient to impress upon the claimant that he has an obligation to minimize his absences. In the future, we expect the claimant to diligently and timely report for his assigned shift. Claimant is entitled to three days of back wages at the rate of pay in effect when claimant served the suspension.

A W A R D

Claim sustained, but only to the extent consistent with our findings.

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 4th day of March, 1981.