

The Second Division consisted of the regular members and in addition Referee James F. Searce when award was rendered.

Parties to Dispute: ( United Steelworkers of America, AFL-CIO  
( The Lake Terminal Railroad Company

Dispute: Claim of Employees:

(1) On May 11, 1981, employee J. T. Pando was disciplined by the Carrier after an investigation conducted on May 4, 1981. The Carrier charged Mr. Pando with "malingering" in connection with his absence as a result of his injury of March 23, 1981, in violation of Rule I of The Lake Terminal Railroad Company Book of Operating and Safety Rules and Instructions Governing Employees. The Carrier assessed a ninety (90) day suspension and held Mr. Pando out of service beginning 7:00 A.M., May 14, 1981 and ending 6:59 A.M., August 12, 1981.

(2) It is the position of the Union that Mr. Pando was improperly and unfairly disciplined and requests that Mr. Pando be compensated for all wage loss, including holiday pay, incurred by the suspension noted above, under the provisions of Rule 7, Section 4 of the controlling Agreement.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 was classified as a machinist and assigned to the Carrier's Locomotive Shop when, on March 23, 1981 he allegedly sustained an on-duty back injury. Examination at the Carrier's medical facility resulted in a diagnosis of "left cervical and dorsal strain" and a restriction of "no lifting or stooping": but the Claimant was returned to duty. The Claimant contended continuing back pain the following day, saying that he had had to go to a hospital for emergency treatment and evaluation -- which included X-rays and application of heat treatment-- the night before. Such complaints resulted in his re-examination by Carrier medical personnel whereupon he was found fully fit for duty; the Claimant, nonetheless, contended he was unable to work and was allowed to go home. Claimant continued to allege pain and requested permission to seek outside medical opinions; he was provided the necessary forms to do so.

He returned such forms completed by a chiropractor who diagnosed "lower back injury," ordered confinement to his home with restrictions of "no lifting, bending, reaching or squatting" with physical therapy and chiropractic treatment as ordered. His probable date of return to duty was considered unknown at the time (3/27/81) of execution of such form. On April 6 and 7, the Claimant was observed opening and closing his car hood, changing oil, jacking up and lowering such vehicle and sliding beneath and working on the car. On April 23, 1981 he was instructed to appear for an investigation in connection with alleged violation of Rule I of the Book of Operating and Safety Rules and specifically a charge of "malingering". Such investigation was postponed until May 4, 1981, but the Claimant apparently returned to duty on receipt of such notice and before May 4, 1981. A hearing was held, the Claimant found at fault and assessed a 90-day suspension, commencing May 14, 1981. The Organization disputed the suspension and here seeks compensation for the Claimant for the period of suspension. (The Claimant did not serve out the full 90-day suspension in that he was apparently dismissed from service for an unrelated offense not before this Board.)

The Organization disputes the Carrier's claim of malingering, citing the dictionary definition of pretended illness so as to avoid duty or work. The Organization points to the diagnosis by the outside physician as proof of illness.

While the record may lend some credence to the claim that some injury may have occurred to the Claimant on March 23, 1981 the important factor here is whether or not it rendered him incapacitated for duty. It is well-established fact that lower back conditions are most difficult to affirm or diagnose and that pain is a subjective condition, not readily given to objective identification. Thus, this Board must look to the remainder of the record for guidance. In doing so, we note the observed activities of the Claimant on April 6 and 7, 1981 -- which he did not deny during the investigation. Such activities run counter in virtually every aspect of directives of his own physician, prompt a conclusion that the Claimant was not incapacitated from duty and, thus, was malingering as charged. Under such circumstances, we find no basis to disturb the Carrier's judgment that discipline was called for. Further, we will not substitute our judgment for that of the Carrier insofar as the extent of discipline assessed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Dever-Executive Secretary

Dated at Chicago, Illinois, this 7th day of March, 1984