

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

(International Association of Machinists and  
( Aerospace Workers  
Parties to Dispute: (  
(Seaboard System Railroad (L&N Division)  
(Formerly the Louisville and Nashville Railroad Company)

Dispute: Claim of Employees:

1. That under the current agreement Machinist Helper Apprentice G. W. Taylor I. D. 111305, was improperly dismissed from the Carrier's service November 3, 1981.

2. That accordingly the Carrier be ordered to restore Machinist Helper Apprentice G. W. Taylor to service, with seniority unimpaired, and compensated for all time lost retroactive to November 3, 1981.

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 employes 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 had missed many work days in the years 1978 and 1979. As a result of these absences he had been directed to report to an Investigation looking into the matter. During the course of the Investigation it was revealed to the Investigating Officer that he was suffering from a lengthy illness. The physician's report introduced into the evidence reported that the prognosis was favorable. Based on this evidence the Investigation was cancelled.

Because Claimant's work record worsened he was later charged with excessive absences from February 1, 1980 until February 1, 1981. It was alleged that he had missed over fifty percent of the available work days. Because of illness this Investigation was twice postponed. When the Investigation was rescheduled, it was postponed two more times. In the meanwhile,

Claimant's attendance was so sporadic that additional charges of excessive absenteeism from the period from February 1, 1981 through September 1, 1981 were brought up as new charges. A date was set for these consolidated Investigations. Once again these Investigations were postponed. All requests for postponements had been made by Claimant through his representatives.

When the Investigation convened Claimant was not in attendance. At the time of the Investigation once again a request for postponement was made by Claimant's representatives. There was an allegation that Claimant was ill, but there was no knowledge of this fact. A Certified letter stating the date of the Investigation and further stating that failure to attend would lead to a Hearing in absentia was delivered to Claimant's residence and was signed for.

The Hearing continued and evidence was introduced from the files of the Carrier which established that Claimant had been absent over fifty percent of his available work days for this extended period of time. Based on this evidence, the Investigating Officer held that the charges had been proved and as a result dismissed Claimant from service.

Most of Claimant's appeal concerns allegations that he was denied a fair and impartial Hearing because the Investigation was held in absentia. Evidence discovered after the Investigation indicated that Claimant was under a doctor's care at the time.

It is axiomatic that absentia hearings are not favored. The Investigating Officer is denied the opportunity to listen to the witnesses and to hear what evidence he would offer had he been present. However, there are times when the holding of such a hearing is necessary. In this case the Claimant had been granted many postponements. He did not contact either his representative or the Carrier with a reason for his inability to attend. The Carrier had suffered for an extensive period of time with the attendance problem of Claimant.

Claimant had not taken a medical leave, the normal procedure for an employee who is too ill to attend work on a regular basis. His absences had undoubtedly been placing a burden on the Carrier who is forced to either do without his services or replace him on the days of his absence, having received no notice in advance. The virtue of the medical leave of absence is that the Carrier has a definite period in which to expect that absence of an employee and can make its plans accordingly.

The nature of the evidence Claimant would possibly have given if he had attended the Investigation would likely not have been of much benefit to the Investigating Officer. If he had reported that he had a chronic illness and had presented evidence to establish this fact, it would have not resolved the issue. The nature of the charge of excessive absenteeism is not necessarily dependent on the reasons for the absence. Illness is undoubtedly a meritorious reason for absence. However, the Carrier has a right to expect that an employee present himself for work on a regular basis. Even if the employee misses work on a regular basis for an apparently meritorious reason, as here, the Carrier has the right to question the employment relationship at some point in that relationship.

Claimant should have sought a medical leave of absence. The fact that the Carrier worked with him as long as it did before the Investigation would indicate that Claimant was an employe worth saving. The Carrier knew that the Claimant was suffering from a severe illness and would probably have granted the leave. We find that the Carrier had the right to bring the charges, to hold the Hearing in absentia and to impose discipline. However, the fact that the Claimant was undeniably suffering from a prolonged illness is a mitigating factor for the amount of discipline imposed. We find that, under these unique circumstances, dismissal was an excessive penalty.

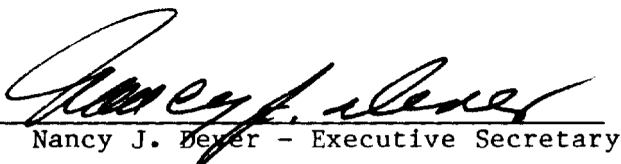
This Board will not speculate that at some hypothetical time the Claimant was well enough to return to work. Based on his record of illness over a period of years we could not reasonably find the hypothetical date. We will reinstate him with seniority unimpaired but without compensation for time lost provided that he can prove to the Carrier's satisfaction that he is physically able to return to work.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April 1987.