

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13192
Docket No. 13078
98-2-95-2-101**

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

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

- 1. That the Burlington Northern Railroad Company violated the terms of Rule 35 of the current Agreement.**
- 2. That, accordingly, the Burlington Northern Railroad Company be ordered to compensate five (5) workdays at the straight time rate of pay to 14th Street, Chicago, Illinois Carman Kermit Audain resulting from a suspension commencing September 1 through September 6, 1994 after an investigation accorded him on August 16, 1994. We also requested the following:**
 - 1) Compensate him for all wages lost;**
 - 2) Make him whole for all vacation rights;**
 - 3) Make him whole for all health and welfare insurance benefits;**
 - 4) Make him whole for all pension benefits, including Railroad Retirement and Unemployment Insurance;**
 - 5) Make him whole for any and all other benefits that he would have earned during the time withheld from service;**

- 6) Any record of this arbitrary and unjust disciplinary action be expunged from his personal 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 employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

As a result of an Investigation held on August 16, 1994, the Claimant was charged with being absent from duty without authorization from July 9-13, 1994 in violation of General Rule 570, and assessed a five day suspension, which is protested by the claim herein.

The record reveals that Claimant was absent on July 9, 10, 11, 12, and 13, 1994 and that his wife telephoned in for him at least once each day and left a voice mail message with his Supervisor concerning the fact that Claimant would be absent and indicating that further communication was desired. Claimant or his wife never spoke personally to any of his Supervisors concerning his absence or the reasons for it during this period of time. Claimant testified at the Investigation that he was physically and mentally incapacitated and could not call himself, so he had his wife call. The record reflects that Claimant was incarcerated during part of the period and under house arrest for the remaining time. Claimant indicated that using voice mail had been an acceptable practice of marking off or reporting late for duty in the past, and that he and others had done so without penalty or question on prior occasions.

The record reflects that a notice was posted to all employees at 14th Street on November 29, 1991, concerning the appropriate supervisory phone numbers to be used

when calling in to lay off. This notice also indicates that in the event the employee's Foreman cannot be reached personally, an attempt to reach either the General Foreman or Administrative Assistant to the Shop Superintendent should be made prior to leaving a voice mail message concerning the specifics of your absence and a phone number where you can be reached. Foremen Pavlick and Donaldson both agreed that a spouse would be an acceptable person to phone in if an employee was physically or mentally incapacitated, and stated that a voice mail message was a proper way to report an absence in the event that a Supervisor cannot be reached personally. Neither Foreman indicated that they had approved the Claimant's absence during the period between July 9 and 13, 1994. Claimant did not furnish any medical certification concerning the reason for his absence nor is there evidence that was he asked to do so upon his return to work.

Carrier argues that Claimant never substantiated his claim of incapacity with any medical records and offered various excuses for his absence. Carrier contends that leaving a voice mail message is not the same as being granted permission to be off, and that Claimant failed to follow the required procedure to report his absence or obtain authorization, thereby violating Rule 570. Carrier also argues that it would never have approved an absence due to incarceration, relying upon Second Division Award 11185 and Special Board of Adjustment No. 279, Award 592 to support a Carrier's right to impose discipline under such circumstances.

The Organization contends that Claimant complied with his responsibility to protect his assignment by having his wife call in sick for him and leave a voice mail message each day of his absence, as well as attempting to reach various Supervisors to communicate the cause for the absence. The Organization notes that this method allows Carrier advance knowledge of the absence and the ability to fill the position if necessary, and has been acceptable to authorize an absence in the past. The Organization also argues that Carrier failed to ask him to substantiate the cause of his absence or inform him of another procedure he was required to follow to obtain permission for his absence, thereby negating any argument that Claimant was somehow at fault for failing to do more.

A careful review of the record leads the Board to conclude that Carrier failed to sustain its burden of proving that Claimant failed to comply with Rule 570 under the facts of this case. While Carrier's established procedure for calling in sick at 14th Street indicates that an attempt should be made to reach a Supervisor personally, it also

reveals that a voice mail message would be acceptable if unable to do so. There is no dispute that such messages have been accepted in the past to report an absence. Further, the Foremen acknowledged that a spouse could be an appropriate person to report an absence if the employee was unable to do so. Claimant's wife clearly phoned, attempted to reach various Supervisors, and left voice mail messages daily concerning her husband's absence. The fact that she was unable to reach someone personally, or they to reach her at home, does not negate her attempt to comply with the procedure for reporting off.

It is clear that an underlying basis for Carrier's disciplinary action was its discovery that Claimant's absence was caused by incarceration, an excuse which in its view warrants discipline, not authorization. While Carrier may be within its rights to determine that such an absence should not be excused after full consideration of the facts, it must first provide Claimant with sufficient notice of the appropriate procedure for him to follow in obtaining approval for his absence. In this case, Carrier relied upon Claimant's failure to submit medical documentation of his incapacity or inability to work on the dates in question, noting that leaving a message is not the same as obtaining authorization. However, the record does not indicate that Claimant knew, or should have known, that he was required to bring in documentation to substantiate his absence to get approval for it. In fact, the notice of phone-in procedure makes no mention of any other requirement for seeking approval prior to reporting an absence. In these days where voice mail systems have often taken the place of personal contact between employee and Supervisor, it is imperative that Carrier make clear to its employees their specific responsibility for getting authorization for an absence or providing certain documentation prior to determining that a reported absence is without permission in violation of Rule 570. This is especially true where additional information was not sought from Claimant at the time he returned to work in this instance or during past absences.

Under the specific circumstances of this case, we find that the underlying reason for the absence is not the appropriate focus of our inquiry, and our determination is not based thereon. We conclude that Carrier failed to prove that Claimant violated known procedures for seeking approval for his absence of July 9-13, 1994. Accordingly, the discipline imposed shall be set aside and removed from Claimant's record, and he shall be compensated for any wage loss suffered in accordance with the provisions of Rule 35 (g).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 11th day of February 1998.