

Award No. 4439

Docket No. 4396

2-PRR-MA-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. - C. I. O. (Machinists)**

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier unjustly suspended Machinist George V. Sponsler for one week, August 7, 8, 9, 10 and 11, 1961, charged with being absent without permission on April 18, 1961.

2. That the Carrier be ordered to remove the one week's discipline from George V. Sponsler's record and compensate him for August 7, 8, 9, 10 and 11, 1961, account of being suspended those days.

EMPLOYEES' STATEMENT OF FACTS: Machinist George V. Sponsler, hereinafter referred to as the claimant, is employed by the Pennsylvania Railroad Company hereinafter referred to as the carrier, at the Samuel Rea Shop, Hollidaysburg, Pa., which is a part of the carrier's heavy repair shops of the Altoona Works.

Claimant Sponsler was first employed by the carrier on June 10, 1941, and has seniority standing on the common laborer, assigned laborer, machinist helper and machinist rosters. On April 18, 1961, claimant owned a job as a machinist, first trick, Monday through Friday, with Saturday and Sunday rest days at the Samuel Rea Air Brake Shop.

On April 18, 1961, claimant reported for work and he told his Foreman that he had the diarrhea and that he would be unable to work, and, that he wanted to go home account of not feeling good account of being up and down most of the night. On April 24, 1961, claimant was served a Notice of Trial in which he was charged with—

“(1) Failing to come in to work on Tuesday, April 18, 1961, after having been certified by physician as being fit for duty.

“(2) Making false statements regarding activities while allegedly off duty sick on April 14, 1961.”

Statement of A. J. Mackie

"To the best of my knowledge, on the morning of April 18, 1961, G. V. Sponsler came to the A. B. Shop Office with a return duty certification for that date.

From my observation of him, I don't think he was wearing working clothes and he complained of still having the diarrhea and expressed himself as taking this day off to return to duty the next day.

He arrived at the office some time after the tour of duty started and before the noon hour. I am unable to pin point the exact time as I do not remember."

In view of the foregoing, it is submitted that it is clearly evident there is no proper basis for the employees' contention that the claimant "reported for work on April 18, 1961."

The employees allege in their position of the Joint Submission (Carrier's Exhibit "1") that Foreman Miller attempted to deny claimant "the right to seek medical attention when he was sick." The carrier is frankly at a loss to understand by what process of reasoning the employees have arrived at such an allegation because nowhere in the trial record is there any support for such an assertion.

The carrier submits that the employees' contention in this respect is illustrative of how far afield they have gone in their efforts to overthrow the discipline assessed. There is nothing in the record to support such a contention. In fact the record demonstrates that claimant consulted Dr. Fleck, his personal physician, on April 18, 1961.

The carrier submits that there is no evidence that its action in disciplining the claimant by suspension of one week in this case was in any way arbitrary, capricious or in bad faith. The carrier contends that, to the contrary, the discipline meted out to this claimant was imposed upon him only after a proper trial clearly established his guilt of the offense with which he was charged.

In view of all of the foregoing your Honorable Board is respectfully requested to dismiss or deny the claim of the Employees in this matter.

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 waived right of appearance at hearing thereon.

The Claimant, George V. Sponsler, who was hired by the Carrier as a Laborer on June 10, 1941, held a regular, first trick Monday through Friday assignment as a Machinist at the Carrier's Samuel Rea Air Brake Shop, Hollidaysburg, Pennsylvania.

On April 13, 1961, the Claimant "reported off sick to his Foreman, E. R. Miller". On April 14, and 17, 1961 he was treated by Dr. Charles H. Fleck "for gastro-enteritis with diarrhea", which, according to Dr. Fleck, prevented the Claimant from "working at that time".

On April 18, 1961, the Claimant reportedly told his Foreman that he was still unable to work.

The Carrier, on April 24, 1961, charged the Claimant with "Failing to come in to work on Tuesday, April 18, 1961, after having been certified by physician as being fit for duty".

On April 28, 1961, the Claimant went through a trial, was found guilty, and on May 18, 1961 received a one week suspension—which he served from August 7 through August 11, 1961.

(Exhibits not reproduced)

The Organization contends that:

- 1) the Claimant "reported for work on April 18, 1961, but after being in shop sometime he found that he was still sick and told his Foreman Mr. E. R. Miller, Jr. to that effect and was not able to work";
- 2) the Claimant was denied his contractual rights (under Rule 6-A-3 (a and b)) when the Carrier refused to postpone his trial until such time as the General Chairman could be present;
- 3) "the Carrier unjustly suspended the Claimant from service".

The Carrier, on the other hand, contends that:

- 1) "its action in disciplining the Claimant was neither unjust, unreasonable, nor arbitrary, but was taken only after a proper trial established his guilt";
- 2) the Claimant "did not have permission to be off" on April 18, 1961.

Turning first to the Organization's contentions, we find that the Claimant did not, as alleged, "report for work" but, according to his own statement, did the following:

"On Tuesday, the 18th, I reported to my foreman notifying him in person **that I was not able to work** on account of this diarrhea condition." (Emphasis ours).

Regarding the Organization's second contention that the Claimant was denied "his contractual rights" under Rule 6-A-3 (a and b) when the Carrier refused to postpone his trial. Here again the Board believes that the record does not support the charge.

In arguing the case before the Referee the Organization stressed the fact that "there is no certified doctor's copy in the record that the Claimant was fit for duty on April 18, 1961". The record, however, indicates that the Claimant asked for and received a return to duty slip on April 17, 1961—as evidenced by his statements:

"* * * on the 17th I went to Dr. Fleck. Thinking I was feeling OK, I asked him to give me a slip so I could go back to work on Tuesday, the 18th."

On April 18th, when Claimant again went to see Dr. Fleck—the latter told Claimant of his conversation with Carrier officials and, accordingly to the Claimant, made the following statement—"Dr. Fleck had told me that he had told them I would be able to go to work on Tuesday."

From the evidence set forth above, we believe that the Carrier's charge against the Claim of

"Failing to come to work on Tuesday, April 18, 1961, after having been certified by physician as being fit for duty."

is supported by the evidence above.

Accordingly, the Board denies the Organization's claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1964.

LABOR MEMBERS DISSENT TO AWARD 4439

The majority, by their conclusions when they state:

"From the evidence set forth above we believe that the Carrier's charge against the claimant of "failing to come in to work on Tuesday, April 18, 1961, after having been certified by a physician as being fit for duty" is supported by the evidence above"

is without substantive facts just as clearly as the Carrier failed to substantiate their charges during the original investigation of this claimant.

The referee, in his statement:

"Regarding the Organization's second contention that the claimant was denied his contractual rights under Rule 6-A-3 (a and b) when the Carrier refused to postpone his trial, here again the Board believes that the record does not support the charge"

must have failed to take cognizance of Page 1, Employees Exhibit B which is the opening statement by the claimant in the transcript of the original investigation. That is,

"I desired Mr. Shriner. I asked for a postponement till he could be here but that was denied." * * *

It is fundamental that a fair hearing include the principles of reasonable requests such as this that the defendant be permitted sufficient time to secure

a representative of his choosing, in this case, the experienced general chairman. It is clear, by the Carrier's very own record of transcript, that they denied this reasonable request.

Further, the record reveals the Carrier introduced certain alleged type-written statements relative to telephone conversations between persons identified as J.T.S. and Dr. Fleck. (See Page 5, Employees Exhibit B). Also alleged statements initialed by a W. B. (See Page 6, Employees Exhibit B).

Page 7 of Employees Exhibit B is a record of the defendant and/or claimant's protest to these written statements. Part of his objection being that he was unable to cross-examine the alleged sponsor of these statements. This was brushed off or ignored by the Carrier and is clearly reflected in the Carrier's own record. The right to cross-examination by the defendant is again one of the very basic principles relating to a fair and impartial hearing. The accused must have an opportunity not only of testing the recollection and sifting the conscience of a witness, but also to determine the demeanor and the manner in which the testimony is given.

The best evidence for Employees requirements when absent from work is found on Page 89 of the Shop Craft Agreement, that is, Rule 8-I-1, which states:

"An employe detained from work for any cause must notify his foreman as soon as possible."

It is admitted by the Carrier that the claimant notified the foreman and therefore had complied with the agreement. Any further requirement of failing to come to work on Tuesday, April 18, 1961 is merely an assertion of requirement claimed by the Carrier and not supported by the agreement.

In face of the record and the transcript of the investigation, the claim should have been sustained and we are compelled to dissent.

/s/ R. E. Stenzinger

/s/ E. J. McDermott

/s/ C. E. Bagwell

/s/ T. E. Losey

/s/ James B. Zink