Award No. 5049
Docket No. 4841
2-NYNH&H-FO-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. The Carrier failed to comply with Rule 19-A and accordingly the claim should be allowed as presented.

2. That under the current agreement the carrier unjustly dealt with and improperly discharged Laborer Colburn E. Tompkins from the service of the carrier on March 11, 1964;

3. That, accordingly, the carrier be ordered to reinstate Laborer Colburn E. Tompkins to the service, with all seniority, vacation, health and welfare and life insurance rights unimpaired, and compensate him for all time lost due to such action by the carrier.

EMPLOYES' STATEMENT OF FACTS: Mr. Colburn E. Tompkins (hereinafter referred to as the claimant) was regularly employed by the New York, New Haven & Hartford Railroad (hereinafter referred to as the carrier) at its Cedar Hill Engine Terminal, New Haven, Connecticut, as an engine preparer, Thursday through Monday on the 12:00 Midnight to 8:00 A. M. shift, with Tuesday and Wednesday as rest days.

Under date of March 5, 1964, the carrier's General Foreman, W. J. Mahon, addressed the following letter to the claimant:

"Mr. Colburn E. Tompkins
515 Sherman Parkway
New Haven, Connecticut

Dear Sir:

Please arrange to be present at a Hearing to be held in Room 307 Railroad Station, New Haven, Connecticut at 10:00 A. M., Tuesday, March 10, 1964, in connection with the following charge:

Claimant's prior discipline record was reviewed during the hearing and shows as follows:

"Suspended for 10 days account being asleep on duty Sept. 13, 1958.

Suspended for 8 days account refusing duty May 26, 1968.

Reprimanded account being absent without booking off Dec. 6, 1961.

Reprimanded account excessive absenteeism Jan. 1961 thru Nov. 1961."

Based upon the whole record we submit that carrier's action in dismissing Mr. Tompkins was not arbitrary, capricious, or unreasonable but was fully justified.

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.

The claim as made, progressed and denied on the property was that the carrier unjustly dealt with claimant and violated Rule 17 when it removed him from service. It was denied, first by the General Foreman; and second, by the Master Mechanic, for the reason that "there was no violation of Rule 17." The third denial by the General Mechanical Superintendent went further into particulars. At each step the claim was presented and argued on the merits, but at a conference on the final appeal, which was to the Director of Labor Relations and Personnel, the further argument was made that the General Foreman had violated Rule 19-A by not stating the reasons for the original denial of the claim.

In the claim as filed here, this point is stated as Claim 1. However, it is not a part of the actual claim, which is that Rule 17 was violated by Claimant's discharge. Failure to comply with Rule 19-A is not a violation; it merely results in a forfeiture of the right to contest the merits, since "the claim or grievance shall be allowed as presented" without constituting "a precedent or waiver of the contention of the company as to similar claims or grievances."

Since the point as to Rule 19-A was not made until the discussion at the final step, and all prior arguments and all appeals were on the merits, the objection was waived and came too late. But since the claim was that Rule 17 was violated by Claimant's discharge, the statement that "there was no violation of Rule 17," was a sufficient reason for the denial. For both reasons the claim must be considered on the merits.

Three different notices were sent Claimant of the hearing, but the first two were returned as undeliverable. However, he acknowledged the receipt of

the third, which notified him to appear at a hearing on "the following charge:

"#1. Excessive absenteeism.

"#2. Absent from your position of Engine Preparer on January 26th and 27th, 1964, without reporting off."

A report introduced at the hearing showed that Claimant had been absent six days in September, thirteen days in October, six days in November, and fifteen days in December, 1963, fourteen days in January and twenty-nine days in February, 1964. It further stated that he did not report off for absences on January 26 and 27, 1964. The February figure is apparently erroneous but claimant did not deny his absences. He did, however, deny his failure to report off on January 26 and 27, 1964, although he could not say to whom he reported. As to that point we have an unresolved question of fact.

He gave his wife's illness and hospitalization as the reason for some of his absences, but admitted that he had been working for two other employers, whom he mentioned as "Goodwill" and "Employment Office." Whatever his reasons or excuses, it is apparent that such a record of absences, especially in view of his working for other employers, made him an undependable employee of the carrier. His seniority rights carried with them an obligation.

The employees argue that claimant could not properly be discharged because of the provisions of Rule 33, which are as follows:

"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 soon as possible, and when ready to return to service shall notify his foreman during his regular tour of duty on the preceding day."

But he was not discriminated against or discharged because he was unavoidably kept from work he was discharged because his absenteeism made him a completely undependable employee. "Absenteeism" is defined by Webster's New International Dictionary as follows:

"The practice by an employee or group of employees of being absent from work, especially when such absences are continued or often repeated."

Nothing in the Agreement obligates the carrier to attempt to operate its railroad with employees repeatedly unable or unwilling to work the regular and ordinarily accepted shifts, whatever reason or excuse exists for each absence, and even without the complication of work for other employers. His practice, if permissible for him, is permissible for all employees.

Claimant's prior discipline record was introduced and was as follows:

"Suspended for 10 days account being asleep on duty Sept. 13, 1958.

"Suspended for 8 days account refusing duty May 26, 1958.

"Reprimanded account being absent without booking off Dec. 6, 1961.

"Reprimanded account excessive absenteeism Jan. 1961 thru Nov. 1961."

The last item of this record indicates that claimant's absenteeism in 1963 was not a new or isolated development, and that in discharging him for absenteeism the carrier was not guilty of unfair discrimination or arbitrary, capricious or unreasonable action.

This was virtually conceded by this statement by his representative at the hearing:

"I would like to state for the record, due to the fact that this man has had family trouble and a lot of sickness that you give him another chance, and if you do, he will work according to the rules of the Company."

Finally, it should be noted that if claimant's discharge involved a violation of any rule, it would not be of Rule 17, which merely specifies the grievance procedure, but of Rule 19, which provides that an employee shall not be disciplined without a fair hearing, and if unjustly suspended or dismissed from service shall be reinstated, and "compensated for the wage loss, if any, resulting from said suspension or dismissal."

If the claim as made and processed on the property had been that Rule 19 had been violated, it would have been difficult, if not impossible, to determine what claimant's wage loss would have been. In the case of an employee able and willing to work the regular hours permitted and expected of him under the Agreement, his wage loss would be 40 hours' pay per week; but in view of claimant's work record, his loss would have been indeterminate.

The claim must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1967.

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