Award No. 6215
Docket No. 6017
2-IT-MA-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee David Dolnick when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 154, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

ILLINOIS TERMINAL RAILROAD COMPANY

DISPUTE: DISPUTE OF EMPLOYES:

1. That the Illinois Terminal Railroad Company violated the controlling Agreement when it improperly discharged Machinist Kenneth R. Cole, Federal Shop, Alton, Illinois, on February 7, 1970, as a result of investigation held on January 20, 1970.

2. That accordingly the Illinois Terminal Railroad Company be ordered to restore Machinist Cole to service with all seniority, vacation, insurance and all other rights and benefits unimpaired and to properly compensate him for all wage loss retroactive to date of discharge.

EMPLOYES' STATEMENT OF FACTS: Mr. Kenneth R. Cole, hereinafter referred to as the claimant, was in the service of the Illinois Terminal Railroad Company, hereinafter referred to as the carrier, as a machinist at the carrier's locomotive shop, known as Federal Shop, Alton, Illinois with seniority date of January 3, 1965.

In a letter dated December 29, 1969, and signed by Chief Mechanical Officer F. C. Barnhart, claimant was ordered to appear in the Chief Mechanical Officer's Office, Alton, Illinois, 10:00 A.M., January 20, 1970, for formal investigation to determine whether he absented himself from duty without authority at Federal Locomotive Shop, Alton, Illinois on September 22, 1969, and if so, your responsibility therefor.

In a letter dated February 6, 1970, and signed by F. C. Barnhart, Chief Mechanical Officer, claimant was advised he was discharged from the service of the carrier, effective February 7, 1970, as a result of investigation held on January 20, 1970.

Claim was filed with the proper officer of the carrier, requesting that the claimant be restored to service under the conditions set forth in employes'

From all of the foregoing, it becomes obvious that the claimant was unjustly treated, and is entitled to a sustaining award by your Honorable Board.

CARRIER'S STATEMENT OF FACTS: Under date of September 22, 1969, claimant was advised by carrier's Chief Mechanical Officer to report for formal investigation in his office at 10:00 A. M. on October 2, 1969. At the request of Mr. Cole's representative, investigation was postponed and subsequently held on January 20, 1970. After formal investigation, claimant was notified that he was discharged from carrier's services effective February 7, 1970.

POSITION OF CARRIER: There is an agreement bearing an effective date of September 1, 1949 and covering Rules and Rates of Pay between Illinois Terminal Railroad Company and its Mechanical Department Employes represented by System Federation 154, Railway Employes' Department which is on file with the National Railroad Adjustment Board and which by reference hereto is made a part of this submission.

Claimant was cited by the carrier for investigation for a day of absenteeism on September 22, 1969. On page 3 he admits that he was absent; and that he made no effort to contact the carrier concerning his absence as required by the second sentence of Rule 22 of the effective Collective Bargaining Agreement reading as follows:

> "An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible."

There can then be no doubt that claimant was found guilty as charged and thus the only question is whether the offense merited permanent discharge from carrier's services. Standing alone, the offense might not warrant permanent discharge. However, the offense when viewed in the light of this employe's work record with the carrier, can only lead to the conclusion that Carrier did not overstep its bounds by discharging claimant. The statement furnished Assistant General Chairman Smith by carrier's letter of June 10, 1970, indicates that for the six years immediately preceding his discharge subject man was absent on 500 days, which is one third of the total working days in such six year period. By referring to pages 4 and 5 of the transcript as it relates to the review of claimant's past personal record of the carrier, one will note that Mr. Cole was first warned by the carrier on December 22, 1964, concerning his absentee record. There then followed letters to claimant on March 3, 1965, June 22, 1966, July 11, 1966, July 26, 1966, December 6, 1966, and, finally, on April 7, 1969, all of which letters pertained to his absences from Carrier's employ. With such numerous warnings by the carrier and with an absentee rate of one day out of three for the past six years, one finds it incredible to believe that anyone would challenge carrier's actions in dismissing this man. In this writer's opinion, carrier's decision to discharge claimant in the light of the foregoing setting cannot be considered as arbitrary or capricious.

Carrier requests the Board to deny the instant claim.

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.

On December 29, 1969, the Carrier wrote to Claimant to appear for a formal investigation on January 20, 1970, to determine "whether you absented yourself from duty without authority at Federal Locomotive Shops, Alton, Illinois, on September 22, 1969, and, if so, your responsibility therefor." He was also advised that his "past absentee record and personal record will be reviewed at this investigation."

After the investigation, the Carrier again wrote the Claimant on February 6, 1970, the pertinent part of which reads:

> "Transcript of investigation reflects that you have been continuously absent from work without proper authority, all in violation of Rule 22 of the collective bargaining agreement, in view of which this is to advise that you are discharged from services of the Carrier effective February 7, 1970."

A careful reading of the transcript of the investigation conclusively shows that the Claimant was ill on September 22, 1969. His wife telephoned the Carrier on September 24, 1969 and reported her husband's illness. Claimant had no telephone at home. He lived two miles from the nearest public telephone; he was too ill to leave home; his wife was away; she called when she returned to her home. As a matter of fact, Claimant was sick almost continuously from September 22, 1969 to the date of the investigation, January 20, 1970.

All of this is supported by Carrier's only witness, the Diesel Shop Foreman.

Carrier's witness testified that Claimant's wife called on September 24, 1969, reported him sick, said that he had a doctor's appointment and that "she did not know when he would be in to work." That witness was then asked to read Rule 22, which he did, and which reads as follows:

> "In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible."

The Assistant General Chairman then asked the witness the following question:

> "In your opinion, would you say Mr. Cole had complied with Rule 22 to the best of his ability?"

His reply was: "Yes, sir."

The hearing officer's attempt to impeach his own witness was not only improper, but also without avail. Not only was that witness correct in his interpretation of Rule 22 in this case, but the evidence clearly shows that the Carrier was notified of Claimant's illness "as early as possible" under all of the circumstances. It is clear that the Carrier failed to prove by a preponderance of evidence that the Claimant's absence from work on September 22, 1969 was in violation of Rule 22.

Perhaps the Carrier may have realized this situation because Claimant's discharge was not based upon his absence on September 22, 1969, but, rather, because he was "continuously absent from work without proper authority." "Continuously absent" because of his bad absentee record.

It is a well established principle that an employe's work record may be considered in assessing a proper penalty, but only after the charge of the investigation has been fully and effectively sustained to justify a disciplinary penalty. Where the charge has not so been proven, the work record has no effect. In view of the fact that the Carrier has not proven the charge of an unauthorized absence on September 22, 1969 in violation of Rule 22, Claimant's otherwise poor absentee record may not be used to assess a valid disciplinary penalty.

For these reasons, the Claimant was improperly discharged and the penalty was arbitrary, capricious and discriminatory.

Petitioner requests that the Claimant be restored "to service with all seniority, vacation, insurance, and all other rights and benefits unimpaired and to properly compensate him for all loss retroactive to date of discharge."

Rule 37 of the schedule agreement reads in part as follows:

> ". . . If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Insurance may or may not be a "wage loss." It depends upon the kind of insurance, who pays the whole or part of the premium or provides the benefits, was the cost thereof considered as part of the "wage" package when agreed to, what is the history of collective bargaining with respect to the insurance coverage, and did the Claimant actually suffer an insurance loss during the period he has been held out of service. None of the elements appear in the record. Employes have submitted no evidence to sustain a "wage loss" attributable to insurance benefits. In view of this, the Board is obliged to support the principle pronounced by many Awards of this Division that the term "wage loss" as used in Rule 37 "in its ordinary and popular sense means payment of a specific sum for services performed." Insurance, under these circumstances, is not an integral part of the hourly or monthly wage rate. The Board has no power to include insurance among the benefits to which the Claimant may have been entitled during the period he has been held out of service because of his discharge. See Awards 3883, 4913, Interpretation No. 1 to Fourth Division Award 2034 and Fourth Division Award No. 1613. Claimant shall be reinstated with his seniority rights unimpaired and paid for all time lost since his discharge less any amount earned in other employment,

but he shall be entitled to no insurance benefits he may have accrued during his discharge.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of December, 1971.

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