

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and
Aerospace Workers
(
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the terms of the Agreement, the Norfolk and Western Railway Company improperly and unjustly placed charges against Machinist C. C. Settles, Jr. Investigation was held June 1, 1978 and completed on the same date. On the date of June 27, 1978, he was notified, "You are hereby dismissed from all services with the Norfolk and Western Railway Company, effective this date."
2. That accordingly, the Norfolk and Western Railway Company be ordered to compensate Machinist C. C. Settles, Jr. in the amount of eight (8) hours at the pro rata rate for each day of his work week assignment beginning on the date of May 26, 1978, until he is returned to service, with 6% annual interest.
3. And, further, that he be restored to service with all rights unimpaired, health and welfare benefits restored and paid for during the time he is held out of service and all seniority and vacation rights restored as if he had continued in the employment of the Norfolk and Western Railway Company.

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.

Claimant was discharged for being absent without permission during the period of February 12, 1978 to May 25, 1978, and thus failed to protect his assignment. Said neglect, according to Carrier, was in violation of Rule 21 which reads:

"RULE NO. 21 - DETAINED FROM WORK

An employee desiring to be absent from service must obtain permission from his foreman. 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 early as possible."

The specific facts which are critical to the resolution of this instant dispute are as follows:

At approximately noon on February 11, 1978, which was Claimant's rest day, Claimant's daughter telephoned Carrier's office and notified the shift supervisor that Claimant was "sick" and would not be at work on the following day which was his regular assignment. The shift supervisor did not challenge Claimant's daughter's statement at that time, although he was aware that it had been rumored that Claimant had been involved in some type of criminal incident and was in the custody of the local authorities. After receiving said telephone call, shift supervisor consulted with other supervisors relative to this matter, and later that day, it became public knowledge that Claimant was incarcerated by the County Police on suspicion of murder.

The next day, February 12, 1978, Claimant failed to report to work as assigned, and he was listed by his supervisor as "absent without permission". After a period of five (5) consecutive days absence, Carrier sent Claimant a notice to his last known address, notifying Claimant that he would be dropped from the seniority roster if he either did not return to work within five days, or furnish Carrier with an acceptable reason for his absence.

Carrier received no such response from Claimant, and heard nothing further from him specifically, until May 26, 1978, at which time Claimant appeared on Carrier's property and reported that he was ready to work. This request was denied and is the subject matter of this instant dispute. Prior to said reporting, however, Carrier did receive correspondence dated March 15, 1978, from Claimant's legal counsel requesting information concerning what Claimant's "...current employment status is, and especially what insurance and benefit coverage exists for (Claimant's) family."

The essence of Carrier's position in this matter is that Claimant's incarceration is not considered as being "unavoidably kept from work" as prescribed in Rule No. 21; and further that Claimant did not have permission to be absent from duty during the period of time which is under consideration herein.

In support of its initial claim Carrier argues that in the disputed February 11, 1978 telephone conversation, Claimant's daughter distorted the true facts of her father's anticipated absence. Further, Carrier maintains that Claimant's incarceration by civil authorities does not constitute an acceptable reason for his being absent because Claimant's situation resulted from an act which was perpetrated by the exercise of his own free will. (See: Second Division Awards Nos. 1508, 2925, 4648, 6043, 6606, 7242, 7262, 7578 and 7777; also Third Division Awards Nos. 18562 and 21228).

Carrier additionally argues that Claimant was not sick as he alleges for reasons that: (1) no proof, medical or otherwise, has been produced to confirm Claimant's assertion; (2) Claimant's hospitalization which was ordered to determine

if he had a mental condition lasted only for a portion of Claimant's total absence; and (3) Claimant was found not to be sick (mental or otherwise), but instead he was judged competent to stand trial, and he subsequently was found to be guilty of the charges which had been filed against him.

Lastly, Carrier maintains that there have been no violations of Claimant's due process rights in the processing of this matter in that: (1) investigatory hearing was conducted fairly and impartially; (2) substantial evidence has been produced which would support Carrier's finding of guilt; and (3) the penalty which has been assessed is neither harsh nor excessive.

Claimant's Organization contends that the charges which have been filed against Claimant in this case are improper and lack foundation; and also that the investigatory hearing which was conducted on June 1, 1978 was neither fair nor impartial as required by Rule 37 of the parties' controlling agreement.

In the main, Organization argues that Claimant was led to believe that he had been granted permission to be off sick, since the supervisor to whom Claimant's daughter spoke on February 11, 1978, did not specifically state that such permission had been denied.

Related to this point, Organization further argues that Carrier's issuance of the five (5) day notice requiring Claimant to return to work or to offer a good reason for his continued absence, was equally improper since Claimant had been given permission to be off sick in the first place by his supervisor. Additionally, Organization contends that Claimant's situation satisfied both the "sick" and the "unavoidably detained" criteria specified in Rule No. 21 since, according to Organization, the record demonstrates that Claimant was sick to the extent that he had to undergo an extensive mental examination, and further, that Claimant's incarceration was involuntary on his part and, therefore, unavoidable.

Concerning Carrier's contention that Claimant's daughter's description of her father as being sick was a misrepresentation of Claimant's true condition, Organization argues that such a characterization was a true description under the circumstances; and even if it were not true, however, Claimant cannot be held responsible for his daughter's words or her deeds.

In regard to its allegation that Claimant's investigatory hearing was neither fair nor impartial, Organization charges that Carrier had predetermined Claimant's guilt prior to the hearing ever being conducted. As support of this charge, Organization maintains that various Carrier documents, particularly a computerized payroll printout sheet for March 1978, indicate that Carrier considered Claimant terminated as early as February 10, 1978 which was five (5) days before the return to work notice was sent, and some three (3) months prior to the holding of the investigatory hearing itself. Finally on this point, Carrier argues that the hearing officer conducted the hearing improperly by allowing Carrier witnesses to offer testimony which was based on rumor and otherwise unsupportable allegations.

This Board has carefully read and studied the complete record in this instant dispute and is convinced that Carrier's position is the more creditable, and, therefore, must be upheld.

Organization's contentions regarding the alleged improper conduct of the investigatory hearing are found to be completely unsupportable and without merit. Said hearing was conducted in total conformity with the parties' agreed upon rules and procedures as specified in Rule No. 37. Additionally, Organization's allegations of Carrier prejudgement of Claimant lacks the existence of any probative or creditable evidence. Organization's allegation in this regard rests almost entirely on the existence of a payroll computer sheet which identifies Claimant as being terminated on February 10, 1978. This Board is of the opinion that this particular document has no real bearing on this case since said document is merely a payroll department document which is used by that particular department for its own intradepartmental purposes. Moreover, said document described Claimant's payroll status as of March, 1978, using preprogrammed computer symbols which, though recognizably limited in variety, were technically accurate for that particular purpose.

Turning now to the merits of this particular case, this Board cannot accept Organization's argument that Claimant was "sick" and his absence, therefore, was covered under Rule No. 21. This argument is rejected because, most importantly, neither Claimant nor his Organization produced one shred of probative evidence which would corroborate this allegation. As subsequent events would demonstrate, no such evidence is in existence. Indeed, Claimant's own testimony disclaims both the logic and the reasonableness of this entire line of argumentation. For example:

"Q. (Mr. Garnett) - Do you have anything to offer to prove that you were sick for that extended period of time?

A. (Claimant) - I do not have it with me, only that I was in Marion.

Q. (Garnett again) - Were you detained in the Bedford County Jail on February 2, 1978?

A. (Claimant) - Yes.

Q. *** Were you there because you were sick?

A. *** Yes.

Q. *** Were you under a doctor's care while in the Bedford Jail?

A. *** On February 13.

Q. (Garnett again) - Were you sick during the entire period of February 12, 1978, through May 22, 1978?

"A. (Claimant) - Was I sick all that period of time? No.

Q. *** What period were you not sick?

A. *** The period from April 12, to May 17.

Q. *** Did you say that you were not sick April 12, through May 17, 1978, and that you were still marked off sick with the NW?

A. *** As far as I know I was marked off.

Q. *** Were you sick during the time of April 12, 1978 through May 17, 1978?

A. *** No.

Q. (Garnett again) - Did you have any doctor's excuse to offer at this time for extended absenteeism?

A. (Claimant - No. I do not.

Q. (Garnett again) _ Mr. Setter, do you have any doctor's excuse to offer at this time?

A. (Claimant) - No, sir.

***"

The import of the above cited exchanges between Claimant and Carrier representative is that: (1) Claimant had no doctor's excuse to verify his absence; and (2) "sickness" was not the cause of Claimant's absence from February 12, 1978 to May 26, 1978.

In similar fashion to the above analysis, Organization's contention that Claimant's incarceration was "unavoidable", and, therefore, also exempted from the "unavoidably detained" language contained in Rule No. 21, this argument must also be rejected since Claimant admittedly was the cause of his own misfortune. Once again, it is Claimant's own testimony which establishes this point:

"Q. (Mr. Garnett) - Were you unavoidably kept from work?
Were you detained by the civil authorities?

A. (Claimant) - Yes, I was detained by authorities.

Q. *** Was this due to no fault of your own?

"A. *** Of my own, I don't know if it was mine or not.
You can interpret it any way you want to." (Emphasis
added by Board).

Given the above exchange, it is obvious to this Board that Claimant was detained because of his own actions, and, under such circumstances, incarceration in jail does not constitute an unavoidable absence for good cause. This interpretation is consistent with numerous other awards which have been adopted by several other Boards in this and other Divisions (See: Second Division Awards Nos. 1508, 2925, 4648, 6043, 6606, 7242, 7262, 7578 and 7777; also Third Division Awards Nos. 18562 and 21228). These cases are specifically disparate with those offered by Organization since the latter's submissions (Second Division Award No. 7130; Third Division Awards Nos. 21449 and 22559) address the issue of "discharge because of arrest and/or indictment", whereas the former's submissions deal with the precise issue of "discharge because of absenteeism due to arrest and/or incarceration."

Having determined that Claimant was not "sick" as prescribed in Rule No. 21, that he was not "unavoidably detained", and further that his absence was not for "good cause", our attention turns to another aspect of this analysis and that is Claimant's daughter's telephone call to Carrier on February 11, 1978. In this regard, Organization contends that Carrier's supervisor did not specifically deny Claimant permission to be "off sick", and, therefore, his absence was excused. Carrier maintains that permission was neither granted nor was it implied in supervisor's reply to Claimant's daughter.

While it is true that the supervisor who received the disputed telephone call did not specifically deny the daughter's request, it is equally true that said daughter knowingly withheld essential information from the supervisors, apparently, in a sincere effort either to portray her father's absence in as favorable a light as possible, or to save her father from any more embarrassment in the eyes of his co-workers than he had already brought upon himself. Though some might feel compassion for a daughter who would attempt to aid her father in his time of crisis, the fact remains that her characterization of her father's situation on February 11, 1978, was a material misrepresentation of the true facts as she knew them, and, under these circumstances, the supervisor cannot be faulted for his actions.

In a case involving the same Carrier and basically the same fact situation as contained herein, Referee Edgett in Third Division Award 18562, articulated somewhat the same analysis as that presented above wherein he summarized:

"The record amply supports the charge that Mr. Staples made a false statement to be absent from duty as charged by this Carrier. Mr. Staples stated that he told his father to mark him off as sick. He alleges that he was both sick and in jail. However, the withholding of essential information may also constitute the making of a false statement. In the instant case Mr. Staples had an affirmative duty to inform the Carrier of the entire reason for his absence, to wit, the fact that he was in jail." (Emphasis added by Board).

As the record in this instant case clearly demonstrates, Claimant directed his daughter to call Carrier and report him off sick:

"Q. (Mr. Garnett) - You are charged with being absent without permission February 12, 1978 through May 25, 1978. Would you please explain to us the reason for this absence?

A. (Claimant) - The reason for my absence. I told my daughter to mark me off sick on February 11, 1978. She called in up here that I was sick." (Emphasis added by Board).

Because of this conclusion, this Board concludes that Claimant was absent without permission, and Carrier's actions relative hereto were neither improper, arbitrary nor capricious, and Claimant's discharge shall remain intact.

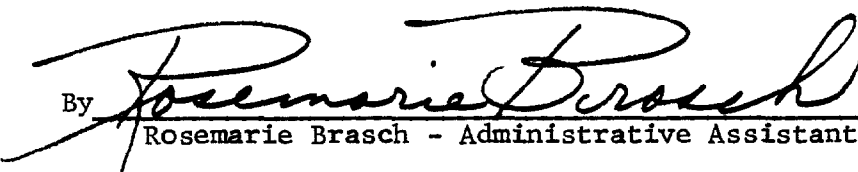
A W A R D

Claim denied for reasons specified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 1st day of October, 1980.