

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current agreement Coach Cleaner A. B. Foster hereinafter referred to as the Claimant, was unjustly deprived of his service rights and compensation when he was improperly discharged from service under date of June 30, 1978 after two (2) years of service with the Carrier.
2. That the Carrier be ordered to:
 - (a) Restore the aforementioned Claimant to service with all service and seniority rights unimpaired, and he be compensated for all time lost retroactive to Monday June 6, 1978 the date that he was certified to be able to return to duty by his personal physician had he not been unjustly withheld, and removed from service.
 - (b) Grant to the Claimant all vacation rights he would have enjoyed, had he not been removed from service.
 - (c) Assume and pay all premiums for hospital, surgical and medical benefits for Claimant and dependents, including all costs for life insurance.
 - (d) Pay into Railroad Retirement Fund the maximum amount that is required to be paid for an active employee, for all time he is held out of service.

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.

Claimant, Carman, Amos B. Foster, a Coach Cleaner formerly employed at Carrier's Passenger Yard in Oakland, California was dismissed from all service of the Carrier on June 30, 1978, following an investigation held on June 13, 1978, wherein, on the basis of the evidence adduced, he was adjudged guilty as charged of being absent

from duty without proper authority. At the time of dismissal, Claimant had accumulated with the Carrier of one (1) year and eleven (11) months service.

Claimant allegedly sustained an on-duty injury on date of April 30, 1978, when, in the process of descending from the second floor locker room he fell down a flight of nineteen (19) stairs. Following his fall, Claimant was taken to the emergency room at Providence Hospital where he was examined, given medication, and subjected to taking X-rays. Claimant was advised by the attending physician he had not broken any bones and that he should go home to rest and relax. At the hearing, Claimant testified the attending physician said nothing to him regarding the length of time he required to be off from work to recuperate. However, J. P. Recend, Assistant Trainmaster and the inquiring Carrier Officer in the instant case, testified that when he saw the Claimant at Claimant's home, Claimant related that the emergency room doctor had given him an estimated disability period of two (2) to four (4) days.

On May 3, 1978, at Carrier's direction, Claimant was examined by Dr. Vernon R. Dennis, a physician selected by the Carrier and employed on the staff of Berkeley Industrial Medical Group. Following examination of Claimant, Dr. Dennis, in a letter to Carrier dated May 10, 1978, set forth in extensive detail his findings regarding Claimant's medical condition. Among his remarks, Dr. Dennis reported the following:

"(After his fall, Claimant), states (that while he did not lose consciousness) he was unable to arise under his own power because of pain in the right lower extremity, the right buttock region, the right side of his body and the right shoulder.

The patient is a very well developed black male, appearing to be about the stated age of 24 years.

Because I was unable to find any visible evidence of old or recent trauma to the affected parts, he was asked to point out any areas of abrasion, discoloration, or swelling that the examiner might have missed. He was unable to point out any areas, but explained that he had 'pain' in the areas as previously described.

OPINION

Although the examinee may have suffered the fall described, I believe that at the time of this examination, there is no significant residual, at least not sufficient residual to prevent his returning to work at his customary occupation (which was described in detail by the examinee to the examiner), and I believe there is no basis for treatment.

The examinee was advised of this opinion at the time of the current examination.

You will note the complete absence of any visible evidence of injury. You will also note the peculiar gait with and without a crutch. You will also note the contradiction in his poor ability to flex his trunk when standing or allow straight

"leg raising when lying, as compared with his ability to forward flex his trunk (straight leg raise) when seated."

The Carrier takes the position that based on the medical findings of Dr. Dennis, Claimant was found to be physically fit to return to work as early as May 4, 1978 and that his failure to do so was in violation of Rule 810 of the Carrier's General Rules and Regulations which reads in relevant part as follows:

"Rule 810 - Employees *** must not absent themselves from their employment without proper authority.

Continued failure by employees to protect their employment shall be sufficient cause for dismissal."

The Carrier notes that in his testimony at the investigation, Claimant acknowledges the fact that Dr. Dennis told him that in his (Dr. Dennis') opinion, his physical condition did not prevent him from returning to work and that he understood that such a finding constituted a medical release terminating his authority to be absent.

It is Carrier's view there does not exist one iota of medical evidence that Claimant ever sustained a personal injury. Rather, Carrier submits that the instant case is a classic example of an employee with little service who has a past record of poor attendance and performance attempting to justify further absence from work by employing the personal injury game.

The Organization asserts Claimant was not absent from work without proper authority and in support of its position relies on the policy set forth in Western Division Superintendent's Special Notice No. 27, issued May 12, 1977 which reads as follows:

"Written authorization is not required for an absence when such absence is caused by an employee being under the care of a physician. In such cases, the name and address of the attending physician must be disclosed. If requested, it will be necessary for the employee to immediately provide medical proof of necessity for absence; if the absence extends beyond 30 days, it will be incumbent upon the employee within 10 days to have his attending physician furnish medical proof of necessity for such absence and estimated length of such absence."

The Organization notes that Claimant testified he consulted and was examined by his own personal physician, Dr. Constantine on May 1, 1978 and that he remained under Dr. Constantine's care and continued to receive medical treatment from him until June 5, 1978. On this latter date, Dr. Constantine issued Claimant a medical Return to Work Order certifying Claimant would be able to return to work as of June 12, 1978. Therefore, contends the Organization, Claimant could not be considered as being in violation of Carrier's General Rule 810 as his authority to be absent from work flowed from the provision set forth in Special Notice No. 27 cited above. In addition, the Organization argues that, notwithstanding Dr. Dennis' opinion that Claimant was physically fit to perform his assigned work, Claimant was nevertheless

experiencing pain to a degree he felt he was unable to return to work. The Organization submits that, in spite of Claimant's profession of pain and inability to perform his assigned duties, carrier without any compassion and without seeking a second medical opinion, chose to accept Dr. Dennis' opinion as gospel without giving Claimant the benefit of doubt.

The Organization further submits that in the private sector, second medical opinions are sometimes sought because there is a recognition that no matter how well qualified a doctor may be, he/she may not always be infallible. In the instant case, Claimant placed himself under the care of his own personal physician and in said physician's judgment, which here, argues the Organization, constitutes a second medical opinion, Claimant was not physically able to return to work until June 12, 1978. In support of this latter point, the Organization notes that in his testimony at the investigation, Assistant Trainmaster Recend observed that it is allowable for an employee to place himself under the care of another doctor for any reason. Thus, inasmuch as Claimant continued to be in pain as a direct result of the injury sustained on-the-job April 30, 1978 and the fact that Claimant was being treated by a qualified physician between May 1, 1978 and June 5, 1978, he was therefore not, the Organization asserts, in violation of Rule 810 and should thus be reinstated with all benefits restored.

The Carrier rejects the Organization's defense of Claimant based on the policy enunciated in Special Notice No. 27, arguing such position lacks validity on two grounds: (1) there was no reasonable evidence supporting Claimant's need to remain off duty account injury beyond May 3, 1978, as Dr. Dennis could find no signs of injury nor evidence of lingering effects from his alleged fall; and (2) according to the requirements set forth in Special Notice No. 27, it is incumbent upon an employee, should he/she require extended care by a doctor, to disclose the name and address of the attending physician and this the Claimant never did. As to Claimant's medical release issued by his personal physician Dr. Constantine, Carrier asserts this document was never presented either prior to the commencement of the investigation, during the investigation nor any time before June 30, 1978, the effective date of dismissal. Carrier maintains that the first time it became aware of the release was during the handling of the claim on-the-property on December 18, 1978, a full six (6) months after the formal investigation was held. Carrier submits said medical release obtained from Dr. Constantine is untimely but that in any event, even assuming arguendo he was released on June 5, 1978 for unrestricted return to service beginning June 12, 1978, Claimant never did return to service any time prior to the investigative hearing or date of dismissal. Carrier asserts it has a right to expect regular, punctual and reliable service of its employees and argues that in the instant case, Claimant's absence was without justification and therefore it should not be required to take back Claimant into its employ.

A very thorough review of all the evidence and argument of record convinces this Board that the Claimant, for reasons known only to him, did, in fact, choose to malingering rather than return to work when physically restored to do so. At the same time, however, we are not sure Claimant was so physically fit on date of May 4, 1978 as so judged by Dr. Dennis. In any event, we note Dr. Dennis' full account of his examination of Claimant is set forth to the Carrier in a letter that was dated May 10, 1978, and we presume Carrier did not receive the letter until sometime after that date. Claimant therefore could not have returned to work on

May 4, 1978 even if he were fit to so do. Although Dr. Constantine's medical release is indeed deficient, as the Carrier notes, with regard to indicating certain information, specifically, the exact period in which treatment was administered to Claimant, nevertheless, such release constitutes a prima facie difference of opinion between Claimant's personal physician and Dr. Dennis as to the date Claimant was able to return to work. However, we are disturbed over Claimant's failure to attempt to return to work on June 12, 1978 even though he was scheduled to appear at his investigation the very next day. In addition, we are baffled as to why Claimant did not present a copy of Dr. Constantine's medical release to the hearing officer any time during the investigation. These latter two concerns, we confess, cause us to view Dr. Constantine's medical release with some skepticism. Nevertheless, we are persuaded by the evidence Claimant did experience the accident from which he apparently sustained an injury or injuries causing him pain which, for real or imaginary reasons, prevented him from returning to work within a reasonable period of time. We agree with Carrier's position that under the circumstances, it was incumbent upon Claimant to notify Carrier of his continuing physical condition and to provide Carrier with the required information regarding his personal physician. We therefore admonish Claimant for neither notifying Carrier or providing this required information. However, despite Claimant's failure to provide such information and his failure to resume work when released by Dr. Constantine, we are inclined to give Claimant one more, that is, one last chance, to keep his employment with Carrier. In so doing, we caution Claimant in no uncertain terms to get himself together and to conduct himself in a responsible manner. We believe a job, especially in today's economy, is a precious commodity to be honored, highly regarded and protected and we urge the Claimant to view his job as such.

A W A R D

Carrier is directed to reinstate Claimant, Amos B. Foster with seniority unimpaired but without back pay or other requested monetary benefits. The time Claimant has been out of service shall serve as the disciplinary penalty imposed for his conduct.

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 18th day of March, 1981.