Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8691
SECOND DIVISION Docket No. 8576
2-ICG-MA-'81

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That the Illinois Central Gulf Railroad violated Rule 39 of the Schedule "A" Agreement made between the Illinois Central Gulf Railroad Company and the International Association of Machinists & Aerospace Workers, AFL-CIO, when they discharged Machinist B. M. Farmer from duty on August 10, 1978.

2. That, accordingly, the Carrier be ordered to reinstate Mr. Farmer to service, seniority rights unimpaired and pay him for all wages lost as a result of his dismissal.

3. Compensate the Claimant for all overtime losses.

4. Make Claimant whole for all Holiday and vacation rights.

5. Pay premiums on Travelers Policy GA-23000, Illinois Central Gulf Hospital Association, Provident Insurance Policy R-5000, Aetna Policy GD-12000.

6. Pay interest of six (6) percent on all lost wages.

7. Make Claimant whole for all losses.

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, a machinist welder, with fourteen years of service, was charged with being continuously absent without permission since August 3, 1978 and for creating a false justification for his absence since July 18, 1978. A hearing was held on August 10, 1979. On the same date, the carrier discharged the claimant for excessive absences (since February 1, 1978). Those charges were adjudicated at a hearing on July 20, 1978 and appealed to this Board in Docket No. 8531 which resulted in Second Division Award No. 8564 (Vernon). On August 24, 1978, the

carrier again dismissed the claimant from service for the offenses presented to the Board in this case. Since the carrier had previously discharged the claimant, the second dismissal had no practical effect other than to trigger the organization's right to appeal the carrier's guilty finding on the above two charges. Because the organization partially prevailed in Award No. 8564, the instant case is not moot but is ripe for decision. In Award No. 8564, we issued a stern, final warning to the claimant to improve his attendance record and we reinstated him without back pay. The claimant is being held out of service pending our decision in this case.

Before turning to the facts of this case, the employes' have raised several procedural objections regarding hearsay testimony and the introduction of evidence only extraneously related to the charges. We have considered these objections and find them without merit because a Rule 39 investigation does not follow the formal, legal rules of evidence and because the claimant suffered no decernible prejudice.

On July 18, 1978, claimant allegedly injured his knee while on duty. After a thorough hospital examination, claimant was placed under a physician's care. While the examination and x-rays did not reveal any physical injury, the doctor first instructed claimant to use crutches and after about a week he told the claimant to start exercising the knee. Claimant was held out of service indefinitely but was instructed to regularly visit the doctor at designated times. On August 2, 1978, claimant failed to keep an appointment with the doctor because he was attending a nine day horseback riding event which started on July 28, 1978. Claimant contends he missed the appointment due to illness in his family. Claimant did see the doctor on August 7, 1978 but the record is unclear as to what treatment, if any, he received on that date.

The organization argues that the carrier has failed to meet its burden of proving either charge because claimant was on a genuine disability leave of absence during the period in dispute. On the other hand, the carrier claims the surrounding circumstances demonstrate claimant was feigning an injury and, since he failed to keep the August 2, 1978 doctor's appointment for a spurious reason, the claimant was absent without permission since August 3, 1978.

Claimant's attendance at and active physical participating in a nine day horseback riding outing strongly suggests that his knee injury was insignificant. Both a carrier special agent and the shop superintendent observed the claimant performing strenuous physical activities at the outing without any apparent impairment to his knee. There is an inference that claimant's original injury on July 18, 1978 was not authentic. The inference falls, however, since both the hospital and the attending physician provided the claimant with medical treatment. If such treatment was necessary, the knee injury was genuine.

The carrier has not brought forward substantial evidence that claimant falsified the reason for his absence beginning on July 18, 1978. However, the carrier has proved, with substantial evidence, that claimant had the physical capability to return to work on or about July 28, 1978. The claimant is guilty of falsely representing and prolonging the effects of his injury to attend the horseback ride. So the carrier has proved part of the first charge, i.e. claimant was absent without a proper justification after July 28, 1978.

As to the second charge, claimant conceded that he missed a mandatory doctor's appointment which by implication means he was absent without permission starting August 3, 1978. If claimant had kept his doctor's appointment and had disclosed the true nature of his physical activity to the doctor, the claimant would have been released from injury leave. While there may have been an illness in claimant's family, it was not the illness but rather the horseback ride which caused the claimant to miss the appointment. Therefore, the carrier has sustained its burden of proof on the second charge.

We recognize that claimant's offenses are serious but there are some mitigating circumstances which warrant reduction in the penalty. First, claimant is a long time employe with a overall good record. Second, the carrier failed to prove that claimant feigned an injury on July 18, 1978 and so claimant was properly on a leave of absence for ten days. Third, we should defer to our previous award (Second Division Award No. 8564) which gave claimant a final opportunity to improve his conduct. Claimant should be permitted to have his last chance. We also reiterate the warning issued in the prior award. We expect the claimant to timely report to his assignment on each working day. Therefore, claimant shall be reinstated with seniority unimpaired but without back pay and without the other relief requested by the claimant.

A W A R D

Claim sustained only to the extent consistent with our findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of April, 1981.