Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8918
Docket No. 8718
2-WFE-CM-'82

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Western Fruit Express Company

Dispute: Claim of Employes:

(a) That under the controlling agreement, the Carrier improperly dismissed Claimant Vance Gilliam from service by letter of November 13, 1978.

(b) That accordingly, the Carrier be ordered to compensate Carman Vance Gilliam for all lost wages, and reinstate Claimant to service with seniority rights, health, retirement, and all other benefits due under the controlling agreement.

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 Carman at Carrier's Cicero, Illinois facility with approximately 9 years of seniority, was charged with "... failure to protect your regular assigned position on October 24, 25, 26 and 27, 1978". Pursuant to an investigation which was conducted on November 3, 1978, Claimant was adjudged guilty as charged and was terminated from Carrier's service effective November 13, 1978.

Claimant alleges that while at work on October 23, 1978, he informed his immediate supervisor(s) that he was not feeling well. In the record Claimant proffers two (2) somewhat different versions of this purported statement. These are: "I told Mr. Estrada on the 23rd that I was not feeling well and that if I felt the same on the 24th that I would go to see a doctor"; and (2) "I notified General Foreman, J. P. Estrada, and Supervisor, H. Beagle on October 23rd that I was ill and that I would not be in". Carrier Supervisor(s) contend, however, that Claimant did not make any such statement. Despite these discrepancies, the record shows that Claimant was absent from work on October 24, 25, 26 and 27, 1978, and that at no time during that period did he contact Carrier to report his continuing absence. Regarding this matter, however, Claimant maintains that he did attempt to contact the supervisors but that every time he called on the telephone, "... either there was no answer or the line was busy".

On October 27, 1978, Claimant was notified by Carrier to appear for an investigation on November 3, 1978; and on October 31, 1978, Claimant secured a statement from Dr. Jose N. Munoz stating that Claimant:

> "... was home confined 10/24/78 to 10/30/78 due to severe headaches. He was on medication and may return to work 10/31/78."

Organization contends that Claimant was not proven guilty of the charges which were raised against him and that Carrier's subsequent termination of Claimant was arbitrary and capricious, and thus in violation of Rule 27 of the controlling agreement. In support of this position Organization maintains that Claimant complied with Rule 18 in that: (1) he did notify his supervisor(s) on October 23rd that he was not feeling well and that if he felt the same on the next day that he would go to see a doctor; (2) supervisors did not deny that the disputed conversation could have taken place; (3) Claimant was ill on October 24-30; and (4) he did go to a doctor and received a doctor's statement verifying his condition on October 31. Further elaborating on this particular aspect of the case, Organization next argues that "Rule 18 ... does not require an employee to call in each and every day that he is absent ..." and that "(F)or more than forty years, it has been an established practice that when employees were off sick for more than one day's duration, they would notify the foreman or Carrier's office as early as possible, and upon their return to work, furnish a statement from the doctor treating the employee".

As for Carrier's allegation that the instant claim is barred under Rule 26-A because "Organization did not advise Director-Operations C. W. McCollister of the rejection of his decision of February 26, 1979", Organization contends that the June 7, 1979, letter from L. K. Hall, Assistant to the Vice President, denied the claim only on its merits and, therefore, Carrier waived the alleged procedural argument (Third Division Award 11044).

From the outset Carrier contends that Organization's representatives failed to reject any decisions made by Carrier's representatives in this dispute within the 60-day time limit, and that under Rule 26-A(b) of the Agreement the claim is considered closed and barred from further handling (Second Division Award 6471).

In addition to the foregoing Carrier maintains that Claimant's investigatory hearing was fair and in compliance with Rule 27; and further that, given the facts of this case, Carrier's action herein was not arbitrary or capricious. For these reasons, along with Carrier's right to resolve credibility conflicts against Claimant, Carrier asserts that Claimant's discharge should remain undisturbed.

As its next series of arguments Carrier asserts that "(E)ven if the Claimant had, contrary to the weight of the evidence, informed the supervisors that he would be absent on October 24, 1978, that would not have relieved him of the obligation to call a supervisor on the subsequent days of absence". In this context Carrier maintains that there is nothing in the Agreement which supports Organization's contention that an absent employee need not report off every day; and Claimant's

reluctance to directly respond to Carrier representatives questions regarding this point clearly supports this position (Second Division Award 7142 and Third Division Award 19558). Further Carrier maintains that Claimant's production of the doctor's statement which allegedly accounts for his absence on October 24-30, 1978, is inconsequential since said document "does not address the Claimant's principal wrongdoing, his failure to notify the Company in advance and/or during the period of his absence."

The last significant area of argumentation proffered by Carrier regarding the merits portion of this matter is that the penalty which has been assessed herein is neither excessive or unreasonable because "(U)nexcused absence from work is a serious offense and the Board has held repeatedly that dismissal is proper discipline in cases of absenteeism, particularly where, as here, there is a past record of such offenses" (Second Division Award 7308, 7769 and 7852).

The Board has carefully read and studied the complete record in this dispute and is of the opinion that while Carrier validly argues that the instant claim was not rejected by Organization when the issue was handled on the property, the fact remains that both parties were somewhat remiss regarding various procedural requirements which were prescribed in the Rules, and were considerably less than consistent in articulating their procedural objections once having raised such an argument. Because of this "duality of responsibility" and the parties' obvious failures in this regard, the Board concludes that any further consideration of any of the procedural issues would be indeterminative.

Turning next to the merits portion of this dispute, the Board, in similar fashion as concluded hereinabove, is of the opinion that there was also a "duality of responsibility" which existed on the part of Claimant and his supervisor(s) in this portion of the dispute as well. It is quite clear from an examination of the record that Carrier completely neglected to consider this factor when reviewing the evidence and assessing the penalty; and because of this, the Board is led to conclude that Carrier acted arbitrarily and capriciously in the imposition thereof. While it is true that Claimant's initial statement to his supervisor(s) merely served to put Carrier on alert as to what action might occur on the next day if Claimant continued to be sick, Claimant's statement was not "so far from the mark" that its true intent was obscured from the supervisors. Most assuredly, one or two simple brief questions or instructions directed to Claimant by the supervisors would have: (1) apprised Claimant of what was expected of him; and (2) would have helped in clarifying what it was that Claimant was attempting to say. More importantly, in the context of this dispute, such questions or instructions would have been in order under any circumstances because neither Rule 18 nor General Foreman Estrada's explanatory letter of September 30, 1977, alone or in combination, can be interpreted to contain the specific details of an employee's call-in responsibility such as Carrier has argued herein.

Lastly, the Board has taken cognizance of Carrier's arguments regarding Claimant's past attendance record, and suffice it to say that though said record is not enviable, it is not so wanting or repugnant so as to preclude granting Claimant one final chance to prove that he can be a valued and responsible employee in service to Carrier. For these reasons the Board will direct that

Claimant be reinstated to his previous position with normal restoration of full rights and benefits, but without back pay.

A W A R D

Claim sustained to the extent indicated above.

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 17th day of February, 1982.