

The Second Division consisted of the regular members and in addition Referee Francis M. Mulligan when award was rendered.

Parties to Dispute:

(International Association of Machinists and
{ Aerospace Workers
{
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That, under the current Agreement, the Baltimore & Ohio Railroad Company unjustly dismissed from service Machinist Helper Jacob Jenkins, from the date of June 3, 1980.
2. That, accordingly, the Baltimore & Ohio Railroad Company be ordered to reinstate Machinist Helper Jacob Jenkins to his former position, compensate him for all time lost, from June 3, 1980 until restored to service, with seniority unimpaired, made whole for all vacation rights, and payment for Health and Welfare and Death Benefits, under Travelers Insurance Policy GA-23000 and Railroad Employees' National Dental Plan GP-12000.

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.

It is undisputed that Claimant, a machinist helper with almost three (3) years service, was refused permission to leave before the end of his shift on May 30, 1980 by both his immediate supervisor and the Acting Plant Manager, and that he then left anyway.

The Organization contends that since Claimant offered the reason of illness, denial of his request was unreasonable and his action in leaving without permission was therefore not insubordinate.

The Carrier points out that the alleged illness was not raised by Claimant until after he had objected to the work assignment given him by his immediate supervisor. Under the circumstances, the Carrier insists, it was not unreasonable for supervisory personnel to disregard the claim of illness and insist that he remain and perform the work assigned to him.

The fact that another employee had been allowed to go home sick at noon is not evidence of disparate treatment where that employee did not allege illness in connection with avoiding a specific work assignment. The two (2) cases are clearly distinguishable and the timing of Claimant's request clearly supports the conclusion that although he may not have been feeling well, he did not feel incapable of continuing until faced with an assignment he did not want to accept. He offered no specific reason why his illness, which was not specified, would have made the undesired assignment dangerous or more hazardous than the job he had been performing.

The doctor's statement attesting to a "big ward (sic) on his chin" does not state in any specific way that certain tasks would have endangered Claimant's health or aggravated Claimant's condition.

Thus, the Board finds that the record supports the charged offenses of refusal to perform the work of removing axles from the axle rack as assigned by the wheel shop foreman, abandoning his job assignment, and leaving company property without permission at approximately 1:45 p.m. on May 30, 1980. While we agree with the Carrier as to guilt, and even as to the very serious nature of the charged offense, we are not satisfied that sufficient consideration was given to all the facts in assessing the penalty or discharge.

The record shows that Claimant had an excellent record for the three (3) years in the Carrier's employ. The Carrier did not dispute that Claimant's work record was good or offer evidence of any prior discipline. The testimony by Carrier witnesses as to a loss in production was not particularly convincing nor backed up by documentation the Organization asked for. Finally, although Claimant's alleged physical discomfort does not excuse his decision to leave, it is a factor to consider. That is, his record is devoid of prior instances of this nature.

This Board has consistently held that an employee's past record is an appropriate consideration in determining the degree of discipline. Such consideration obviously extends to good past records as well as bad ones. In Second Division Award No. 8892 (Herrington), the Board held that "... in determining the degree of discipline, after a rule violation has been established, a Carrier may take account of an employee's entire service record. Not only is it proper to do so, but necessary on grounds of equity and justice..." (emphasis added). In this case, although the conduct is normally dischargeable, weighed against a background of a three (3) year unblemished record which includes no hint of prior feigned illness or other misconduct, the Board finds that Claimant should be given another chance. In light of the seriousness of the offense, we are not inclined to order back pay, but Claimant should be reinstated with the same seniority and benefits that he had prior to termination.

For the benefit of the Claimant, the Board feels he should recognize that feigning illness or even appearing to do so in conjunction with refusal of a work order is a very serious offense, and although he is being given another chance on the basis of his prior record, lack of evidence of prior insubordinate or uncooperative attitude and the fact that his alleged illness may have had some bearing on his behavior, his reinstatement without back pay should put him on

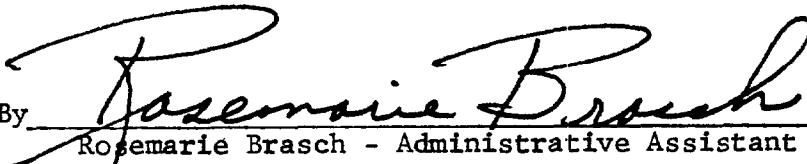
notice that any future incident of an insubordinate nature may not be looked upon by this Board in a favorable light.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of July, 1983.