

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Port Authority Trans-Hudson Corporation

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, the Port Authority Trans-Hudson Corporation has unjustly dismissed Electrician I. J. Celentano from service effective June 16, 1980.
2. That accordingly, the carrier should be ordered to restore Electrician I. J. Celentano to service with seniority unimpaired; and to restore to the aforesaid employe all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician's rate for each day he has been improperly held from service; and all benefits due him under the group hospital and life insurance policies for the above mentioned period; and all railroad retirement benefits due him including unemployment and sickness benefits due him for the above mentioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally accrue to him had he been working in the above mentioned period, in order to make him whole.

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.

In September, 1979, based upon what it characterized as a continuing deterioration in the Claimant's job performance, the PATH Personnel Office referred him to Neil Roughgarden, a counselor with its Medical Department. Roughgarden, attempted to ascertain whether it would be helpful for the Claimant to enroll in the PATH Occupation Alcoholism Program, but the Claimant denied having an alcohol problem. Roughgarden then offered the option of weekly counselling, but the Claimant declined that as well.

It was apparently sometime after the above encounter with Roughgarden that the Claimant was placed on medical leave of absence "in light of the fact that alcoholism is considered an illness by the Carrier and should be treated accordingly" (p. 2, Carrier's Statement of Facts). A January 9,

1980, appointment was made for the Claimant with Dr. Howard Hess, the employer's psychiatrist. Hess could not see him immediately at the designated appointment time, and asked the Claimant to wait. The Claimant said he had other commitments and left.

Dr. Hess then contacted Counselor Roughgarden and asked him to speak to the Claimant once again. According to Roughgarden, the session was fruitless. He reported this to Hess, who wrote the following January 29, 1980, memorandum regarding the Claimant's sick leave status:

"It has come to my attention that James Celentano is now on sick leave.

Mr. Celentano is an active alcoholic who is not following the guidance of the Special Medical Services Unit. Alcoholism can only be considered a disease when it is being treated and since Mr. Celentano refuses treatment, he should certainly not be receiving sick pay."

On February 19, 1980, Roughgarden and the Claimant met once again. According to Roughgarden, the Claimant "... was at that time still refusing medical help for his alcoholism". That same day, the Carrier's Supervisor of Personnel & Employee Relations, Thomas Cullen, wrote to Dr. Hess, asking whether the Claimant had availed himself of the professional services of the Medical Department. Hess answered as follows in a memorandum dated February 20:

"James Celentano continues not to cooperate with the Special Medical Services Unit of the Medical Department."

In a letter to the Claimant dated February 28, 1980, L. A. Pelton, Superintendent, Track & Structures Division, notified him of the following:

"This is to advise you to appear in my office at the Journal Square Transportation Center, 8th Floor, One PATH Plaza, Jersey City, New Jersey at 1:00 P.M. on Monday, March 10, 1980, for a hearing of the charge that you have violated Rule 7 of the PATH Book of Rules.

Rule 7 states: To enter or remain in the service, employees must be of good character and must not commit an (insubordinate), dishonest, immoral, illegal or vicious act. They must conduct themselves at all times, whether on or off PATH property, in such a manner as not to bring discredit upon PATH.

Gambling or making bets while on PATH property is prohibited, and more specifically, you were insubordinate in that on Tuesday, February 19, 1980 you failed to cooperate with the Special Medical Services Unit of the Medical Department (sic).

At this hearing, without cost to PATH, you may be assisted by a duly authorized representative of the IBEW (May 7, 1980, hearing trans., p.2-3)."

The hearing was ultimately conducted on May 7, 1980. On May 16, 1980, letter containing the statements below was sent to the Claimant by S. Wiecek, Acting Superintendent, Track & Structures Division:

"After carefully reviewing the transcript of your hearing held on May 7, 1980, charges are sustained and you are terminated effective June 16, 1980.

If, however, before June 16, 1980, you bring in supporting documentation which indicates you are actively pursuing a structured counselling program, and if this documentation satisfies the Port Authority Medical Unit, the termination decision will not take effect."

The Claimant answered by letter of May 28, 1980, asking that the Carrier specify a program which would meet with its satisfaction. In a June 10 letter Superintendent Wiecek responded as follows:

"... As you may recall, your testimony in the hearing of May 7, 1980, indicated that you were under the care of a psychiatrist, and more specifically, a Dr. Miller whom you indicated is associated with St. Vincent's Psychiatric Center in Staten Island.

In light of that statement, it was PATH's determination that your dismissal would be deferred until such time as you had provided, presumably through Dr. Miller's Office, information to our Medical Department indicating that you were under his care, and more specifically, in a program which satisfies the Medical Department requirements for 'Rehabilitation'.

With respect to your request that the Port Authority Medical Unit make available to you information relating to a structured program, it was clear in your hearing that this had been done and that, in fact, you refused to avail yourself of their services.

From PATH's viewpoint, you have had more than ample opportunity to take those steps which are necessary to affect your recovery, and I must again advise you that your employment will be terminated on June 16, 1980, unless you comply with my letter of May 16, 1980."

The Claimant's June 16, 1980, termination was processed, as confirmed by a June 23, 1980, letter to him from Superintendent Wiecek. An appeal hearing was conducted on September 22, 1980, and the appeal was denied.

The Carrier's position may be summarized as follows:

1. The Claimant's insubordination has been clearly established. He went to the Medical Department on February 19, 1980, met with Agency Psychiatrist Howard Hess and Alcoholic Rehabilitation Counsellor Neil Roughgarden, and refused to accept their services.

2. Any suggestion by the Claimant that he does not understand what steps he must take in order to comply with the instructions of the Special Services Unit of the Carrier's Medical Department is indicative only of the flagrant disregard he has taken toward the Carrier's attempts to assist him

in his recovery. He is fully conversant with the course of action that an individual who wishes to rehabilitate himself must follow.

3. The Carrier has been quite successful in rehabilitating alcoholic employes due in part to its effective working relationship with the Special Services Unit of the Medical Department. To suggest, as the Claimant does, that the Carrier acted unjustly in dismissing him from service for failure to take those steps necessary for his rehabilitation is remarkable at best given the facts.

The Organization believes the Claimant's dismissal was unjust. Its principal arguments in support of its position may be summarized as follows:

1. The Claimant was never notified of the precise charges against him.
2. The Claimant complied with the Carrier's request to meet with Dr. Hess and Mr. Roughgarden on February 19, 1980. At that time he was under the care of psychiatrist Dr. Miller.
3. The Carrier insisted that the Claimant accept treatment from its lay counsellor Roughgarden and refused to recognize that the Claimant was in counselling program through Dr. L. Miller, a psychiatrist associated with St. Vincent's Medical Center in Staten Island.
4. Dr. Miller corresponded with the Railroad Retirement Board and with Superintendent Wiecek about the Claimant's status and even recommended that he return to work effective June 12, 1980.
5. There are various procedural errors in the Carrier's processing of this case as well.

The sole basis of the charges against the Claimant is his alleged insubordination on February 19, 1980. Since the Carrier raised the allegation, we look to the Carrier for proof. "Insubordination" is usually defined as a willful refusal to perform a direct order, the primary objective of which is to defy the employer's authority. Therefore, in order to determine whether the Claimant was "insubordinate" on February 19, we need to know exactly what was said between Dr. Hess, Mr. Roughgarden, and the Claimant. Did either man give the Claimant a direct order? Did either man tell him that failure to comply with their directives would result in discipline? If not, it is possible that the charges came down suddenly and unpredictably upon the Claimant in a capricious manner. And did Hess and Roughgarden issue any "directives" at all on that day, or were they merely recommendations? The record is not clear on any of these points.

Furthermore, while we applaud the Carrier's extensive and generally successful attempts to rehabilitate its alcoholic employes, we do not believe the Carrier can rightfully force a given employe to accept such treatment. We are supportive of procedurally appropriate disciplinary decisions based upon work related reasons, such as poor attendance or job performance, but the Claimant was not dismissed for those reasons - he was dismissed for alleged refusal to comply with directives of the Medical Department.

Obviously, an employer can require an employe on sick leave to bring medical verification of his illness. In cases where the employe does not do so, appropriate discipline can result, and that discipline is usually upheld in arbitration. But such is not the case here. The Claimant was not disciplined for failure to submit a letter from Dr. Miller to the effect that he was under his care, he was disciplined for alleged insubordination on February 19, 1980. And, for reasons already stated, the Board is not convinced from a study of the record that any insubordination took place on that date.


Finally, while we are in agreement with previous Awards to the effect that an employer has a right to establish its own medical opinion concerning the medical status of employes on sick leave (Award No. 48 of S.B.A. No. 589, Second Division Awards No. 6850, 7134) and that such employes who refuse to be examined by employer appointed medical doctors have been appropriately disciplined, we are not convinced from the record in the instant case that the Claimant refused to be examined by Dr. Hess on February 19, 1980.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:



Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of October, 1983.