NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9704
Docket No. 9414
2-C&O-EW-'83

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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(Chesapeake and Ohio Railway Company

DISPUTE: CLAIM OF EMPLOYES:

1. That the Chesapeake and Ohio Railway Company violated the current Agreement when on November 7, 1979 Electronic Maintainer John C. Milstead was unjustly dismissed from service.

2. That accordingly, the Chesapeake and Ohio Railway Company be ordered to restore Electronic Maintainer John C. Milstead to service with his seniority rights unimpaired, all other benefits he would have been entitled had he not been dismissed from service and also be compensated for all wages denied, retroactive to August 8, 1979.

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.

The Claimant, an Electronic Maintainer, had been in the Carrier's employ for a little over three years when on seven different work days (August 9, 12, 15, 21, 29, and 30, 1979) he missed a total of 38 hours' work due to arriving late, leaving early, or being absent together.

He received an August 31, 1979, letter from R. F. Silbaugh, Manager Engineering directing him to attend a September 19 investigation concerning his "being absent without permission" on the dates noted above. The investigation was ultimately held on October 29, 1979. Silbaugh again wrote the Claimant on November 7, 1979, informing him that the investigation had resulted in a confirmation of the charges and that he was dismissed from service.

The Organization argues that the Claimant missed work on account of sickness, citing Rule 22 of the controlling agreement in support of its position:

> "In case an employee is unavoidably kept from work, he will not be discriminated against. An employee detained from work on account of sickness, or any other good cause, shall notify his foreman promptly."

Furthermore, the Organization notes, the Claimant suffers from a "sickness which is quite prominent in our society." He voluntarily enrolled in the Carrier's Alcoholic Rehabilitation Program, thus demonstrating his desire to recover.

The Organization also points out that the Claimant was absent only one full day (August 21) of the seven dates in question. According to Employe's Exhibit B, he reported off sick that day, but a foreman arbitrarily changed the record to read "no report". And, the Organization argues, nothing in the record indicates that the Claimant did not have supervisory permission to arrive late or leave early on the other six days.

Finally, the Organization maintains that the Carrier has not met its burden of proof. Its dismissal decision was based merely upon a 1-day absence and upon partial absences on six other days. No evidence of the Claimant's past work record was entered on the property and it would be improper to consider it now.

The Carrier notes that during the investigation the Claimant acknowledged his absence on the dates in question. It also cites the testimony of the Claimant's Supervisor, B.G. Parrish, who recalled that the Claimant failed to notify him about any of the absence incidents prior to their occurrence.

In addition, the Carrier points to several prior Board decisions to the effect that leniency is solely an employer prerogative (e.g., Second Division No. 2787, Third Division Nos. 16120 and 16950).

It is clear from the record that the Claimant was absent on the days and times specified in the charges. The record also supports the charge that he failed to notify the Carrier prior to his absences. There is simply no probative evidence in the record that he reported off in the proper manner on any of the dates in question. He did report off sick on other days (August 6, 7, 16, and 22, 1979), so there is no question that he understood the procedure. And if he received permission from a supervisor to leave work early on any of the dates listed in the charges, it is reasonable to expect him to recall that supervisor's name. There is no such evidence in the record.

With respect to the Organization's claim that a supervisor arbitrarily changed the "sick" entry, we are persuaded by the record that such a change was not improper. Foreman Parrish testified that the time sheet was originally prepared by the Claimant, and since he (Parrish) had not received advance notice of the Claimant's absence, the entry was appropriately changed to "no report". This testimony was unrebutted.

There are two remaining questions: (1) Did the Carrier's action violate Rule 22? and (2) If not, was the dismissal an appropriate penalty?

Rule 22 prohibits discrimination against an employe who is "unavoidably kept from work". However, it also, requires a sick employe to "notify his foreman promptly". Assuming for the month that the Claimant was indeed sick, he still failed to notify his Foreman according to the requirement of Rule 22. Thus, it was the Claimant, not the Carrier, who violated Rule 22 by failing to report his absences in a timely manner. This Board has gone on record many times in the past to the effect that unreported absenteeism cannot be condoned (Second Division Award Nos. 6240, 6710, 7348, 7852, and 8663). We will not condone it here.

This brings us to the propriety of the Claimant's dismissal. We note from the Carrier's submission that the Complainant was suspended for 30 days for "excessive absenteeism" earlier in 1979 and warned in writing prior to that for the same offense. The Organization argues that such evidence should not be considered since it was not introduced during the investigation on the property and, thus, the Claimant had no rebuttal opportunity. We disagree. The purpose of an investigation on the property is to gather facts related to the charges against a Claimant in order to determine guilt or innocence. If it is determined that the employe is guilty, then it becomes appropriate to consider his past work record to determine the proper degree of any penalty assessed. In the instant case, the Claimant had contractual opportunity under Rule 35 and 36 to rebut the charges connected with the earlier suspension during the investigation of those charges. An on-property investigation of a separate set of charges is not the appropriate forum for such rebuttal.

In review of the Claimant's overall attendance record, his record of similar offenses in the past, and his disciplinary history, we conclude that the dismissal from service was not an excessive penalty.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1983.