

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Boston and Maine Corporation

Dispute: Claim of Employees:

1. That, in violation of the current agreement, Firemen and Oiler Robert A. Letellier was unjustly dismissed from service of the Carrier for the alleged charges of:
 1. Falsification of Day work cards on May 11, 1982 and May 14, 1982.
 2. Falsification of weekly time returns, week ending May 20, 1982.
 3. Excessive absenteeism commencing March 29, 1982.
2. That, accordingly, the Carrier be ordered to make the aforementioned Robert A. Letellier whole by restoring him to Carrier's service, with seniority rights unpaired, made whole for all vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensated for all lost time plus ten (10%) percent interest annually on all lost wages, also reimbursement for all losses sustained account of coverage under health and welfare and life insurance agreements during the time he has been held out of service.

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 employes 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 Robert A. Letellier entered the Carrier's service some sixteen years prior to the events under consideration in this case. By letter of May 26, 1982, Claimant was served notice to attend a June 10th hearing to consider charges which included the development of facts surrounding an allegation of excessive absenteeism commencing March 29, 1982. After an investigation held by mutual agreement on July 8, 1982, the Carrier determined that the Claimant was guilty as charged. The Claimant was notified by date of September 13, 1982 that he was discharged for excessive absenteeism.

The Employees argue that the Claimant's dismissal from service was improper due to denial of a fair and impartial hearing and a failure of Carrier to meet its burden of proof. With regard to the procedural matters raised by the Employees, an examination of the entire record in this case demonstrates that the Claimant was afforded a fair and impartial hearing, made aware of the charges, and allowed all procedural standards applicable in discipline cases as required by the governing rules (Second Division Award 7812, Third Division Award 20954). With regard to the substantive issues the record in the case at bar with respect to the Claimant's attendance is extensive.

The Employees argue that in fact, Claimant violated no rule. Under the working agreement as contained in Rule No. 27, employees who were unable to work because of illness would not be discriminated against if they notified the appropriate official of the absence. In pertinent part, Rule 27 states that:

"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 for any other good cause shall notify his foreman not later than the close of the first day's absence, and when ready to return to service shall notify his foreman during his regular tour of duty on the preceding day."

The record in this case substantiates that the Claimant was in complete compliance with Rule 27 in that he notified the Carrier in every instance of absence. Even further, with minor exception, his absences were medically related, substantially documented and the Carrier had complete knowledge of Claimant's medical conditions. As such, arguments for the Claimant emphasize that since absences were due to medical conditions and the contract was not specifically violated, discharge for excessive absenteeism is without agreement support and discriminatory.

This Board has thoroughly reviewed the record and finds that the record does establish sufficient evidence that Claimant was guilty of the charge for which he was dismissed. His attendance record during the time under consideration documents well over eighty hours in an eight week period in which he was absent. While there is no fixed measure of excessive absenteeism, Claimant on average lost over 25% of a standard work week for each week under consideration. Although the Claimant did notify the Carrier of each absence, it is clear that the extensive absences substantiated in the record go beyond unavoidable conditions for an employee and beyond the rule of reason. This Board cannot expect the Carrier to maintain an employee who is so habitually absent from work that he can no longer be depended upon. There is nothing in the Agreement that obligates the Carrier to operate its system with employees who are chronically absent for whatever reason including medical illness (see Second Division Awards 10211, 5049).

It has been established by many prior Awards that the Board will not substitute its judgment in discipline cases for that of Carrier (Second Division Awards 8308, 8322, 8326) when the charges are substantiated as they are clearly in the case at hand. Nevertheless, the Board has justifiably reduced a penalty if it was considered excessive in view of the facts before it and the principle of progressive discipline.

In the present instance, the Claimant's ill health was accepted repeatedly by the Carrier as an excuse for absence. The Carrier did not dispute his ill health or argue that the Claimant was a malingerer. Carrier was aware of both the Claimant's medical history and absences. Yet in over ten years Claimant received only 24 demerits for excessive absenteeism. Based upon the clear record of guilt, even considering a medical defense, Carrier had a right to discipline the Claimant. While this Board finds the charges substantiated, it notes that during the period in which the problem occurred, the Claimant was never subjected to the type of progressive discipline that would warn the Claimant that a continued disregard for his employment responsibilities would result in even more severe discipline, such as dismissal.

In view of the facts, this Board finds that the discipline was excessive. The Claimant exercised extremely poor judgment in not assuring his physical ability to work, in scheduling his blood tests and medical appointments at times conflicting with his employment responsibilities; and in failing to maintain a responsible level of work attendance. Sufficient sanction for such poor judgment, in the mind of this Board, is the time off which Claimant has already lost without back pay. This should not disallow him one last chance to prove his worth to the Carrier, although he should be cautioned to assure his medical ability to work without excessive interruption before return. Excessive absenteeism in this industry most often results in dismissal (Second Division Awards 10129, 10128, 7719, 7348).

This Board directs that the Claimant and his representative meet with his immediate Supervisor to reaffirm that the Claimant is physically able to meet his responsibilities and to remove any doubt in the Claimant's mind regarding his attendance obligations for continued employment with the Carrier. For the above stated reasons, this Board orders that the Claimant be returned to service with seniority and other rights unimpaired, but without back pay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of March 1985.