Award No. 4462

Docket No. CL-4294

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the carrier violated the Clerks' Agreement:

(1) When on August 11, 1947 is denied Miss Margaret V. Carney the right to return to work after being absent from July 12, 1947, due to personal sickness.

(2) Then on October 13, 1947 again denied Miss Margaret V. Carney the right to return to work at the expiration of leave of absence granted on July 14, 1947 account personal sickness.

(3) That Miss Margaret V. Carney be compensated for time lost by reason of Agreement violations stipulated in items (1) and (2).

OPINION OF BOARD: Claimant, Margaret V. Carney, a Comptometer Operator in the Office of Auditor of Passenger Accounts at Omaha, Nebraska, reported for work on July 12, 1947. Shortly after the regular starting time, she complained of the air-conditioning and began to fill in a sick leave request form which the Head Clerk (her superior) had indicated he would not approve, asserting that there was nothing wrong with the air-conditioning. Miss Carney then left the office to contact the Local and Division Chairman who undertook to discuss the matter with Mr. Bearss, Auditor of Passenger Accounts. Before receiving any word of the result of that meeting, Claimant left the office after making a statement to her superior that she was going to the dispensary to lie down and that if she received a call, to advise the party calling where she was. However, she did not go to the dispensary. When Claimant reported for work on Monday, July 14th, she was informed by Mr. Bearss, the Auditor of Passenger Accounts, that she was out of service for violating Rule 22. (Termination of Seniority Rights by voluntarily leaving the service, etc.) Claimant, thereupon, contacted the Local Chairman who advised her to submit to a physical examination to determine whether or not she had been or still was ill. She underwent such an examination by a private physician. On July 15, 1947 in conference with the Local and Division Chairman and Mr. Bearss, at which her examining physician's certificate was considered, it was agreed that the Rule 22 violation asserted by the Carrier would be compromised by Claimant applying for and being granted a firm ninety day leave of absence account of personal sickness. Before the expiration of the ninety day period on August 5, 1947, Claimant served written notice of her intention to return to work on August 11, 1947.

Mr. Bearss made no acknowledgment of this notice but the Local and Division Chairman wrote her and said in effect that he would not repudiate the agreement made on July 15, 1947, when it was understood that she was not to return to work before the expiration of ninety days, and advised her of her right to appeal the matter to the General Chairman. Nevertheless, Miss Carney reported for work on August 11, 1947 but was told by Mr. Bearss that she could not go to work until the ninety days were up. On October 7, 1947, Claimant received a letter from Mr. Bearss in which he stated that he assumed she desired to return on the expiration of her leave of absence and that inasmuch as the Carrier's rules required that she have a medical clearance prior to her return in case she wished to have that arranged in advance she should present herself to Dr. L. T. Hall, who would examine her in the Carrier's Dispensary at 11:30 A. M. on Thursday, October 9, 1947. She telephoned Mr. Bearss after receipt of this letter and advised him that she did not want to be examined by Dr. L. T. Hall, but would get a letter from her own physician. She reported for work on October 13, 1947, whereupon she was told by Mr. Bearss to report to Dr. Hall for examination. This, she refused to do and was then suspended from service pending investigation for insubordination. Employes have filed claim as indicated. (The brief statement of facts outlined above is not complete but serves to give a general background on the claim. Such further facts as are relevant to a disposition of this docket will be referred to in the Opinion.)

With respect to the first item of the claim, it appears that although Employes are now contending that Rule 22 does not operate in case of illness or physical disability, there is abundant proof in the record to indicate that on July 12, 1947 (the day Miss Carney left the office without permission) there is considerable doubt as to whether or not she left because of illness or personal pique, with the preponderance indicating the latter. The action of the Local and Division Chairman indicated that such was his concept when he agreed to the compromise of the Rule 22 violation. Ae we view the matter the only question to be determined in connection with the disposition of the first part of the claim is whether or not the agreement of the Local and Division Chairman with respect to the firm ninety day sick leave is valid. Although thc agreement was madc by the Local and Division Chairman, there is substantial evidence in the record that the General Chairman approved and ratified the same orally. It is contended by the Employes, however, that the agreement is invalid, inasmuch as it is in conflict with Rule 43 (d), quoted below and local representatives of either party may not make local agreements which conflict with the collective agreement.

Rule 43 (d)—

> "An employe desiring to return from leave of absence before the expiration thereof must give at least thirty-six hours advance notice before making displacement."

In view of all the circumstances surrounding the understanding with respect to the ninety day leave, we are of the opinion that the agreement was a valid one which the Employes may not repudiate. It must be remembered that the agreement was made in compromising an individual grievance in a quasi-disciplinary matter. Certainly, it would be destructive of the orderly process of settlement of such grievances if a clearly reasonable compromise such as this one were to be held invalid, where, as here, the compromise was ratified by the General Chairman. Accordingly, we hold that part (1) of the claim should be denied.

With respect to Part II of the claim, it is contended by Employes: (1) That the Rules and Instructions Governing Physical Examination and Re-examination adopted unilaterally by the Carrier did not give Carrier the right to require Claiimant to undergo a re-examination by a company doctor, or (2) Conceding for purposes of argument that Carrier had such right, it could not have had the arbitrary power which Mr. Bearss attempted to exercise to wit: specify the particular doctor to re-examinc her and at a specific time and then charge the employe with insubordination for not complying with such instructions.

Insofar as the first above mentioned contention is concerned, it is to be noted that the Agreement is silent with respect to the matter of requiring physical examination either as a condition of continuing employment or as a condition of returning to work after a leave of absence. The question as to whether or not a physical examination may be required of an employe returning from leave of absence was presented to this Board in an early case, Award 362 wherein it was said:

> "That the agreement is silent on the specific matter of requiring physical examinations as a condition of continued employment for clerical employes falling within its scope, whether following leaves of absence or at other times, is acknowledged by both parties. Such silence, however, cannot reasonably be construed either as authorizing the carrier to request physical examinations under any and all circumstances or as prohibiting the carrier from requesting such examinations under any and all circumstances. To accord absolute freedom to the carrier would open the door to arbitrary infringements upon the seniority rules of the agreement; to impose an absolute prohibition upon the carrier would restrict its managerial discretion beyond the limits contemplated by the agreement. In its extreme form, on principle neither the position of the employes nor that of the carrier is tenable. No such sweeping authority or denial of authority can, by interpretation, properly be read into the agreement. The decision of an employe to return to work after leave is subject in some measure to the judgment of the carrier as to his physical fitness, and this judgment in turn is not final, but subject, upon a properly submitted dispute to review by this Board as to its reasonableness, in light of the express provisions of the agreement."

We cannot say that in this instance the Carrier was unreasonable in requesting that Miss Carney undergo a physical examination before returning to duty. The record reveals that she chronically complained of the air-conditioning and drafts in the building. Her own doctor's certificate stated that in his opinion further exposure thereto should be avoided. Certainly it would seem that Carrier was within reason in wishing to determine if Miss Carney's health at the time of her return to employment was sufficiently good to carry on her work. Miss Carney seemed to recognize that this was a reasonable request for the record shows that she did meet with Dr. Hall on October 10, 1947 and apparently made arrangements for certain X-ray and laboratory work on Saturday morning, October 11, 1947. The record further shows that she did not keep the appointment made for her for that purpose. Further evidence of the reasonableness of the request in this instance is shown by the fact that the General Chairman advised Miss Carney to submit to a medical examination of the Assistant Medical Director of Carrier's Medical Department before she returned to service, if asked to do so by her supervisor. We conclude that the request to undergo a physical examination in this instance was reasonable and that the Carrier was not obliged to accept the certificate of her personal physician. See Award 362, wherein it is stated:

> "The fact that the complainant submitted medical certificates from his personal physician was in itself an acknowledgment that the requirement of a physical examination was reasonable, and there appears to be no ground for accepting the findings of these physicians in place of those of the company physician as required by the carrier."

With respect to the second contention, it is our opinion that such instructions under the circumstance here present (and we only pass upon the question as related to the facts in the instant case) was reasonable and Miss Carney, in refusing to comply with the same, left herself open to a charge of insubordination. We have already shown the uncooperative and inconsistent attitude of Miss Carney in connection with this matter. That clearly indicated the need for some instruction which would bring about a note of finality with respect to the harangue about her undergoing a physical examination and we cannot say that in this instance the method chosen by

the supervising officer was unreasonable. But we do not base our conclusion on this ground alone. It is important to note that the Carrier in its own regulations has set forth a procedure by which an employe who may have been found unfit for service by the Company Doctor may appeal such decision and if dissatisfied may eventually have the question submitted to a Medical Board of three doctors, one chosen by the Carrier, one by the employe and the third by the two appointees. Obviously, then Claimant would have had full protection in the event that the Company Doctor's report was unfavorable.

Insofar as the conduct of the hearing and notice of charge is concerned, we believe that although the notice could have been more specific on the improper conduct phase of the charge it was very specific with respect to the incident of insubordination alleged and on that point there was overwhelming evidence of guilt. While there may have been some irregularities, in the conduct of the hearing by Mr. Bearss, we do not believe that the Claimant was prejudiced thereby. Nor were they of such moment as to warrant a holding that it should be set aside. As to admission of proof of previous offenses by Claimant, that has been held by this Board as being proper for purposes of assessing punishment, although not for the purpose of proving guilt on the charge set forth in the notice of hearing. On the whole we cannot say that Miss Carney was deprived of the protection afforded her by the provision of the Agreement in connection with procedure in discipline cases.

Finally, we believe it is worthy of note that the claim herein does not ask for reinstatement indicating that the employes concurred to some extent in the dismissal.

It follows from what we have said above that the claim should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Divisiono f the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.