

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Clerk's Rules Agreement when it held Employee D. Flanigan, Jr. from service and subsequently dismissed him.
2. Carrier shall now be required to return D. Flanigan, Jr. to Carrier service on Storehelper Position No. 34 in the Store Department at Milwaukee Shops, Milwaukee, Wisconsin, with all rights unimpaired and compensate him for all wage loss sustained from August 30, 1957.

OPINION OF BOARD: Claimant, an employe as Storehelper in the Store Department of the Carrier, after his return to service on August 30, 1957, having been absent on the 28th and 29th of August, was called to the office of E. F. Volkman, Assistant District Storekeeper. Present besides Flanigan and Volkman were T. H. Reidy, Assistant District Storekeeper, E. H. Brussock, General Foreman and Mrs. E. Koreen, Secretary and Stenographer.

It appears that Mr. Flanigan had been absent from his work frequently during the years of 1957 and 1956, some of this time for whole days and some on parts of days. Much of Mr. Flanigan's absence occurred on week ends when the work in his department was especially heavy. This absence was stated to have seriously interfered with the normal operation of the services to be performed which situation was brought to Mr. Flanigan's attention on several occasions.

Mr. Flanigan's absence on the 28th of August was reported to some one in his department on the 29th of August. Mr. Flanigan says that he attempted to report the cause of his absence on the 28th but that he was unable to do so

by 'phone. However, Mr. Brussock states that there were 33 telephones through which information of his absence could have been transmitted to the Store Department, and, therefore, he is skeptical concerning the effort to reach the department on the 28th.

It was the foregoing record of absenteeism which brought about the meeting at the office of the Assistant District Storekeeper and the proceedings from which grew the suspension of Mr. Flanigan.

The Organization in its brief, but not in oral discussion, asserts that the charge of insubordination is not precise, as required by Rule 22 of the controlling Agreement.

It is also urged that Rule 22 was disregarded, wherein it provides: "* * * however, investigations will be held prior to the time employes are held from service when it is possible to do so."

In view of our finding on this submission, the question is without materiality. We discuss it briefly.

Few, if any instances could occur wherein it would not be possible to hold an employe in the service prior to a possible investigation. However, it is probable that the rule should be construed in the light of the nature of the conduct upon which the suspension is based. Insubordination is of such a character as to require summary discipline which is essential to the orderly progress of the work of the Carrier. To require that the punishment for insubordination should be deferred to some date after it occurs would eliminate the very purpose of such action. Award No. 4449, Third Division.

Coming then to the claim that the charge (No. 1) of insubordination is not precise under Rule 22.

This claim is not well made. There was but one proceeding to which the acts of insubordination set out in the charge could refer—the meeting of August 30, 1957 at the office of the Assistant District Storekeeper. The time when, the place where and the person before whom the acts transpired are designated. The claimant was put upon precise information as to the basis of the charge against him which enabled him to fully understand and to prepare any defense he might have. This is all that the rule required.

At the meeting in the office of the Assistant District Storekeeper on August 30, 1957, the first words spoken were by Mr. Volkman, who said—"Delbert Flanigan, Jr., due to the seriousness of your absenteeism I would"—* * *. He did not get to complete the sentence but was interrupted by Mr. Flanigan, who said—"I want Union representation."

Then followed several pages of questions and answers disclosing a continuous effort on the part of Mr. Volkman to prevail on Mr. Flanigan to give some explanation of his numerous absences from work. Mr. Flanigan took the position that an investigation was being carried on and that by reason thereof he was entitled to representation. Notwithstanding numerous explanations that no investigation was in progress, Mr. Flanigan remained obdurate and insisted that because of the number of superior officers in attendance and particularly because of the presence of the stenographer, he was faced with an investigation.

It is urged that Mr. Flanigan was not ordered to answer the questions propounded. True, he was not specifically directed to answer any question, but this was implied and the intent is obvious and was recognized by Mr. Flanigan at the outset. Notwithstanding, he refused to say anything concerning reasons for his absences and his stand was definite and uncompromising.

He was mistaken in his stand that he was facing an investigation under Rule 22 of the applicable Agreement and that he was entitled to representation.

Essential and prerequisite to an investigation under the rule, is that "prior thereto the employe will be notified in writing of the precise charge." No charge, written or otherwise, was asserted at the meeting such as it contemplated by the rule. Nor does it appear that the sole purpose of this proposed inquiry was to develop facts upon which a charge would be preferred against Mr. Flanigan although, of course, such an effect may have resulted from developments had he consented to fully and truthfully answer the questions put to him.

The Carrier is entitled to the presumption of good faith in the inquiry which it attempted to carry on and Mr. Flanigan's superior officers had full right to ask and receive full information from him respecting reasons for his absenteeism. Nor did he need fear the presence of a stenographer who would do no more than to put in exact and permanent form the information which he alone was in position to give and should have given willingly, if his many failures to report for duty were justified.

Not only did Mr. Flanigan refuse to answer any inquiry touching his absence from work but, unfortunately, he manifested a disrespectful, combative attitude and arbitrarily set up the only condition under which he would answer any question respecting his absences. This attitude is manifest in part from the written word in the record but is made more plain by the testimony of all present except Mr. Flanigan. They characterized his attitude as uncooperative, belligerent, arrogant and impudent. This manner, somewhat changed to an air of unconcern, continued to and through the formal investigation on the charges.

Mr. Flanigan's refusal to cooperate in any manner at the preliminary inquiry as to his absenteeism and his attitude toward his superior officers, acting strictly within the scope of their duty in seeking information on the subject at hand, constituted insubordination as charged against him.

The charge was established even though Mr. Flanigan had been correct in his contention that he was facing an investigation under Rule 22, and was, therefor, entitled to Union representation.

He was required to answer any reasonable question put to him by his superior officers respecting his conduct in the course of his employment. Had he been denied representation improperly, a remedy for that error would have been available to him under the Agreement between his Organization and that of the Carrier. Award 8712, Third Division.

The second charge against Mr. Flanigan was "being absent without permission from your assignment of Storehelper, Position No. 34 on August 28th, 1957."

It is established that Mr. Flanigan was absent, without permission, from his assignment of August 28, 1957. His defense is that he did not have to

secure permission because he was absent on account of sickness and, therefore, should be considered as on leave of absence, under Rule 25 of the controlling Agreement.

The rule provides:

"An employe detained from work because of sickness * * * shall notify his Supervising Officer as early as possible; an employe detained from work because of sickness * * * of himself * * * will be regarded as on leave of absence and his return to service will be governed by the provisions of Rule 23 (e)."

This rule can be violated by failing to report absence because of sickness as early as possible, or failing to report to employe's Supervising Officer. But the rule continues and says that "an employe detained from work because of sickness * * * will be regarded as on leave of absence".

It can be said that there may have been some doubt if the report of absence as to the 28th of August was to a Supervising Officer and if it was made as soon as possible, but Mr. Flanigan's statement, if true, that he was sick on that day requires that his absence be regarded as on leave. The rule is explicit to that effect.

The charge here is not that Mr. Flanigan, though sick, did not report his absence as soon as possible, that it was not made to a Supervising Officer or that he was not sick.

Although the proof of Mr. Flanigan's illness on the 28th of August, if challenged, would be subject to careful scrutiny, it is not questioned nor is there any controverting evidence. Thus, it must be accepted that he was absent on the 28th of August because of sickness and this absence for this cause prevented a finding against him on the second charge. When Mr. Flanigan met the charge with proof that his absence was caused by sickness, he was not required to have a permit to justify his absence and the proof against him failed.

It is difficult to understand why the Carrier, in view of the many absences for which it contends Mr. Flanigan gave no satisfactory explanation, would produce no evidence to refute that the absence on the 28th of August was caused by sickness. It is also a little difficult to appreciate why the second charge against Mr. Flanigan was restricted to one date only, inasmuch as the absences seemed to be a continuous course of conduct. However that may be, we are required to take and adjudge the record as it comes to us and may not engage in conjecture independent thereof.

The insubordination of Mr. Flanigan, clearly established, his general attitude of unwillingness to cooperate with his employer and his failure to accept reinstatement to his former position, though without pay for time lost, requires us to hold that the Carrier in its right to weigh and evaluate the facts developed did not act in bad faith, or in an arbitrary or capricious manner nor abuse its discretion in finding the first charge against him established and in ordering his discharge from the service.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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 Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 29th day of September, 1959.