

Award No. 16282
Docket No. CL-16974

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
CHICAGO AND WESTERN INDIANA RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6203) that:

1. Carrier violated the Clerks' Agreement when it acted in an arbitrary and capricious manner in dismissing employe Mrs. Ruth G. Mills from the service of Carrier on August 9, 1965; and

2. Carrier shall be required to reinstate Mrs. Ruth G. Mills to the service of the Carrier with seniority and all other rights unimpaired and compensate her for all wages lost as a result of her dismissal, from August 9, 1965 and for each work day thereafter to the date she is restored to service.

OPINION OF BOARD: This is a discipline case.

The Claimant, Ruth G. Mills, was employed as Information and Reservation Clerk, by the Carrier, at its Joint Ticket Office at Dearborn Station, Chicago, Illinois. Her regularly assigned working days were Monday through Friday, inclusive. Her hours were from 8:00 A. M. to 5:00 P. M. with a sixty minute lunch period. She had been in the employ of the Carrier from February 2, 1943 until August 9, 1965.

Under date of August 25, 1965, the following communication was addressed and sent to the Claimant:

"CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

A. C. MOUSTEIKO

Joint Ticket Agent

Dearborn Station
Telephone 427-7751
Chicago, Illinois 60605
August 25, 1965

Mrs. Ruth G. Mills
8141 West 45th Street
Lyon, Illinois 60534

Dear Mrs. Mills:

Please report to Room 231 --- Dearborn Station, 47 West Polk Street, Wednesday, September 1, 1965 at 9:30 A. M. (Daylight Saving Time) for investigation, to develop the facts and determine your responsibility, if any, in connection with your failure to protect your assignment from August 10, 1965 to present.

If you desire a representative of your organization present, so arrange.

Yours truly,

/s/ A. C. Mousteko
Joint Ticket Agent"

The hearing date was adjourned by the parties in accordance with the following communication:

"August 27, 1965

Mr. A. C. Mousteko
Joint Ticket Agent
Chicago & Western Indiana Railroad Company

Dear Sir:

The subject of the R. Mills, Investigation-Hearing, scheduled for 9:30 A. M., September 1, 1965; was discussed in your office today. It was mutually agreed that Mrs. Mills would begin her vacation as scheduled, starting August 30, 1965. It was further agreed that the Investigation-Hearing referred to above, would be postponed until 9:30 A. M., D. L. S. T. on Tuesday, September 28, 1965. This letter is being provided to you in duplicate, please affix your signature in the place provided below, retaining the original for your files and returning the second copy for my files.

Yours truly,

/s/ Alfred B. Collins
General Chairman
BRC

Agreed:

/s/ A. C. Mousteko
Joint Ticket Agent"

The hearing took place on the adjourned date, September 28th, 1965, with the Claimant and her organizational representatives present. A copy of the transcript of the testimony adduced at the hearing is a part of the record.

Under date of October 18, 1965, the following communication was addressed to the Claimant:

"CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

Dearborn Station, 47 West Polk Street

Chicago, Illinois 60605

R. E. Dowdy
Superintendent

J. J. Moriarty
Assistant Superintendent

October 18, 1965
File P/R

Mrs. Ruth G. Mills
8141 West 45th Street
Lyons, Illinois — 60534

Dear Mrs. Mills:

This letter is in connection with the investigation held in my office Tuesday, September 28, 1965.

This investigation develops that you failed to protect your assignment; that you refused to comply with instructions that had been issued to you by your supervising officer when you challenged his authority rather than complying with his order; that you marked off at approximately 9:15 P. M., C. S. T., July 27, 1965 under a pretext.

After a complete review of this investigation and giving due consideration to your record of service as shown in your personal file, I hereby notify you that you are dismissed from the service of the Chicago and Western Indiana Railroad Company effective this date.

Yours truly,

/s/ R. E. Dowdy
Superintendent"

The record in this case discloses that on the 26th day of July, 1965, at or about the hour of 6:31 A. M., the Claimant advised the Chief Clerk, Mr. J. A. Bourne, by telephone that she was not feeling well and would not report for work. On July 27, 1965, the next day, she again telephoned Mr. Bourne, at or about the hour of 6:40 A. M., and advised him that she was still not well and would not report for work. At or about the hour of 9:15 P. M. of July 27, 1965, the Claimant again telephoned but instead of talking with Mr. Bourne, she spoke with Mr. C. D. Varnold, the Night Supervising Ticket Seller. Mr. Varnold states that when the Claimant spoke with him she advised him that she would remain away from her work until such time as she could report herself available for work, as she was having bladder trouble and that she might require surgery.

On August 7, 1965, the Claimant telephoned Chief Clerk Bourne and advised him that she would return for work on August 9, 1965. Mr. Bourne instructed the Claimant to bring with her a release from her doctor when she returned to her work on August 9, 1965.

On August 9, 1965, the Claimant appeared for work but did not have or produce a doctor's release. Mr. A. C. Mousteko, the Joint Ticket Agent and the Claimant's immediate superior instructed her to obtain such a release and return to her work on August 10, 1965. At noon on August 9, 1965, the Claimant, by telephone, advised Mr. Mousteko that she had a doctor's release and he again instructed the Claimant to bring it with her when she reported for work on August 10, 1965. Some time after noon of August 9, the Claimant again called for Mr. Mousteko by telephone. He was not in and she spoke with the Chief Clerk. She left a request for Mr. Mousteko that he write to her setting forth the company policy, as to the doctor's release, and also explain why she was being held out of service. The Claimant also informed the Chief Clerk that she would not produce a doctor's release for work.

On August 9, 1965, Mr. Mousteko wrote to the Claimant instructing her to report for work and bring with her her doctor's release.

On August 10, 1965, the Claimant wrote to Mr. Mousteko requesting that he advise her of the applicable rule with reference to his instructions to her re her returning to her work assignment.

On August 12, 1965, Claimant again wrote to Mr. Mousteko stating that he had failed to advise her of the rule that allowed her to be held out of service.

On August 13, 1965, Mr. Mousteko again wrote to the Claimant advising her that in order for her to return to her work it was necessary that she have a doctor's release and called her attention to his order and/or instructions of August 10, 1965, when she did appear for work.

On August 17, 1965, Mr. Mousteko telephoned the Claimant and inquired of her when she planned to return to work. The Claimant questioned Mr. Mousteko's authority requiring her to have a doctor's release before she could return to work and also advised Mr. Mousteko that she was ready to return to her work at any time provided that no doctor's release would be required of her.

On August 27, 1965, two (2) days after the Claimant had received the notice of investigation, she appeared at the office of Mr. Mousteko, with Mr. A. B. Collins, her General Chairman.

Mr. Collins advised Mr. Mousteko that he was ready to give to him a doctor's release covering the Claimant's period of treatment. Mr. Mousteko informed Mr. Collins that in view of the pending investigation hearing, the offer would have to be declined. There is some testimony to the effect that the Claimant did admit that she had the release from her doctor for and during the period from August 9, 1965, through August 25, 1965, and could have, if she so chose, presented the same to her superior and thus returned to her work.

The Claimant submits for the consideration of the Board four (4) pertinent issues, as follows:

1. Carrier's use of "hearsay" and "speculative" evidence throughout the handling of this dispute on the property.
2. The defect in the procedural handling by Carrier.
3. Carrier's failure to comply with its own operating rule governing an employe's physical examination and submitting a doctor's release before being permitted to return to service after illness.
4. The evident discrimination against Claimant by various Carrier officers.

We agree with the contention of the Claimant that under the provisions of Section 3 (i) of the Railway Labor Act and the Rules of Procedure of the Board (Circular No. 1) and the numerous Awards of this Board, that on appeal to this Board, we may only consider those issues that were under consideration by the parties when the dispute was handled on the property. We cannot consider argument on facts not presented on the property. We note from an examination of the record, that the Carrier, in its Ex parte Submission, has included exhibits that were not under consideration when this dispute was being considered on the property. They will not be considered by the Board on this appeal.

Claimant also objects to the inclusion in the record of her previous work record.

This Board has held on numerous occasions, that while an employe's past work record may not be considered in determining as to whether or not an employe is guilty of the charges preferred against such employe, the past work record may be considered in assessing the penalty.

In Award 4042, Second Division (Daugherty) it was held:

" * * * It does not matter whether claimant's record was placed in the investigation transcript. Carrier was entirely within its rights in giving weight to said record at any time before making its final decision. * * * so long as Carrier's submission contains claimant's record."

See Third Division Awards 11166, 11017, 12126, 12492.

Claimant further contends that there were many procedural defects, on the part of the Carrier, in the handling of this matter. The law is well settled that procedural defects may be waived by the mutual consent of the parties involved. We find that any procedural defects were waived by the Claimant by the letter of August 27, 1965, over the signature of Alfred B. Collins, her General Chairman, wherein the investigation-hearing was mutually postponed to September 28, 1965, without any reservations.

The main issue, before us, is whether or not the Claimant was justified in her refusal in complying with the instructions and/or order of Mr. A. C.

Mousteiko, her immediate superior, when, on August 9th, 1965, he instructed her to report for work on August 10th, 1965 and bring with her a release from her doctor.

Under date of January 19, 1962, Mr. H. Evans, the President and General Manager of the Carrier, issued the following Statement of Policy:

"TO ALL EMPLOYEES:

Company policy provides that if, during any period of absence from the service, an employe was ill for a period of thirty days or more, underwent an operation, or was involved in an accident, before returning to service such employe will be required to report to the Chief Surgeon for physical reexamination.

In order for the Chief Surgeon to conduct this examination, employe must furnish him with a satisfactory medical report and release from attending doctor covering disability; to include period of hospitalization, if any, history, findings (clinical, laboratory and x-ray), diagnosis and treatment."

In addition to the above Statement of Policy, Rule 63 of the Agreement, between the parties, also refers to Physical Examinations. That part of the rule that concerns us, reads as follows:

"RULE 63. PHYSICAL EXAMINATIONS

(a) Employes coming within the scope of this agreement will submit themselves to physical examinations by the company doctor only when it is apparent their health or vision is such that examination should be made. * * *

The Claimant asserts that she was not required to submit a doctor's release, as set forth in the Statement of Policy and under Rule 63, because of the fact that she was not absent 30 days, was not operated upon and it was not apparent that her health was such that an examination should take place.

Carrier, on the other hand, claims that it was entitled to such release by reason of the Claimant's statement to Mr. Varnold that she was suffering from bladder trouble and might need surgery.

The Claimant's answer to the contention of the Carrier, that she informed Mr. Varnold that she needed surgery, is contained in her letter to Mr. Mousteiko, dated August 10, 1965, wherein she states among other things:

"Your letter contains an incorrect account of the conversation between Supervising Ticket Seller C. Varnold and myself on July 27th."

This bare statement, standing alone, without any explanation on the part of the Claimant to show in what respects the account of her conversation with Mr. Varnold was incorrect, speaks volumes.

This Board has held on any number of occasions that the orders of superiors must be obeyed. If the Claimant, in this dispute, was of the opinion

that her instructions to obtain and deliver to her superior a doctor's release, was in violation of her contractual rights, her duty was to perform the services directed, and she then had the right to file a claim or grievance to obtain such redress as she was entitled to for the alleged violation. See Awards 8711; 14067; 15049; 14581; 14273.

Discipline is a very serious matter for the safe operation of a railroad. The Carrier, of necessity, must have the right to require its employees to comply with the orders of those authorized to give them. This is especially so in this case when we find that the Claimant was not a neophyte in these matters, and further that she did admit that she was familiar with the Company Policies.

In Award 13179 (Dorsey) we said:

"In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether: (1) Claimant was afforded a fair and impartial hearing; (2) the finding of guilty as charged is supported by substantial evidence; and (3) the discipline imposed is reasonable.

We do not weigh the evidence *de novo*. If there is material and relevant evidence, which if believed by the trier of the facts, supports the finding of guilt, we must affirm the finding."

With reference to the penalty imposed, we are not warranted in disturbing it unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of discretion. Whether or not the penalty assessed is justified depends upon the many factors and circumstances of each case.

It is our opinion that the record discloses sufficient competent and relevant evidence to support the charges against the Claimant. We have searched the record and fail to find any facts to sustain the contention of the Claimant that she did not have a fair and impartial hearing or that any of her substantive procedural rights were violated.

From a reading of the voluminous record in this case, it is obvious that both the Claimant and the representatives of the Carrier were unyielding in their respective positions.

Considering all of the many factors in this case, and in view of the Claimant's years of service in the employ of the Carrier, it is our judgment that the decision, dismissal from the service, was too severe and harsh. Under no circumstances do we wish to convey the impression that we view this matter lightly. The opposite is true. We consider the charge to be one of the most serious offenses, but because of the circumstances presented by the facts in this case and the Claimant's years of service, we order her to be reinstated, with no loss of seniority, but with no compensation from the date of her dismissal.

Claim sustained to the degree consistent with the expressed opinion.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 violated.

AWARD

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of May 1968.