Award No. 18899
Docket No. CL-19120

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6872) that:

1) Carrier's suspension of employe R. A. Miller from service at St. Paul, Minnesota for a period of 90 days in connection with charges preferred against him which were neither precise nor proven, was arbitrary, unreasonable and unjustified.

2) Carrier shall compensate employe R. A. Miller for 8 hours sick leave pay for December 9, 1969.

3) Carrier shall clear the record of the charges preferred against employe R. A. Miller and compensate him for 8 hours at the pro rata rate of Steno-Clerk Position 10080 for each day, Monday through Friday, he is withheld from service; such payment to be in addition to any compensation received from his part-time job with Harold's Skelly Service Station.

4) Carrier shall reimburse employe R. A. Miller for actual necessary expenses incurred attending appeal hearing at Chicago, Illinois.

OPINION OF BOARD: There are procedural questions to be dealt with before going to the heart of the case. The Organization contends that (1) the notice charging Claimant and summoning him to the investigation on December 29, 1969 was not in accord with Rule 22(a) of the agreement and was therefore prejudical to Claimant and (2) Carrier erred in not considering evidence offered at subsequent appeal hearings.

The gravamen of the Organization's complaint as to the former is that at the investigation Carrier introduced evidence tending to show that on the day in question, December 9, 1969, Claimant was active at another pursuit. Organization argues that by failing to include this evidence in the charge served on Claimant he was unable to prepare his defense. The charge reads as follows, in relevant part:

"1. For misrepresenting facts to absent yourself from duty on your regular assignment on December 9, 1969.

2. For failure to protect your regular assignment on December 9, 1969.

3. For accepting leave of absence under false pretenses on December 9, 1969.

4. For falsely claiming sick leave payment on December 9, 1969."

Rule 22 (a) reads in part as follows:

"* * * prior thereto the employe will be notified in writing of the precise charge."

The charge clearly shows the purpose of the investigation and meets the requirements of Rule 22 (a). Organization is seeking, it would appear, to have evidence included in the charge. There is no requirement that evidentiary matter, as such, be included in a charge. All that is required to comply with Rule 22 (a) is that Claimant be made aware of the charges against him so he may prepare his defense. The charge, in this instance, meets that requirement. Moreover, Claimant agrees, on the record, that he received proper notice.

As to the latter, it is well settled, that evidence proferred by either Carrier or Organization after the conclusion of the investigation is not admissible. (Award No. 17595 and others).

Thus we are left with the question of whether Carrier sustained its burden at the hearing on December 29, 1969. The record reveals that Claimant was employed as a Statistician in the Superintendent's office with assigned hours of 8:00 A. M. to 4:30 P. M., Monday through Friday. His seniority dates from 1956.

The record further reveals that his wife reported him off on account of sickness on December 8 and 9 and that he absented himself those days and the 10th of December. No issue is raised by Carrier as to the adequacy of the notice received from Claimant's wife or his absence on any day other than the 9th.

At the investigation Carrier introduced the testimony of its Police Captain, Police Lieutenant and its Superintendent, who joined the former at 8:19 P. M., showing that Claimant was under surveillance from 7:40 P. M. until 11:00 P. M. on December 9, 1969. The testimony of these three witnesses is that Claimant was observed working at a gas station during the time of the surveillance. The observation was accomplished from a car a distance of 280 to 300 feet away from the station by the use of a large pair of 7 x 35 field glasses. The record shows that the use of such glasses brings the subject to a distance of 40 feet from the user of the binoculars.

All three witnesses knew Claimant. As stated above he worked in the Superintendent's office where the Superintendent saw him daily. While admitting that he worked part time at the gas station in addition to his regular job with Carrier, Claimant denies he was so employed during he period of the surveillance.

At the investigation, when Claimant's representative, the Local Chairman, sought to inquire of the Superintendent why he did not go into the sta-

tion to confront Claimant, the Conducting Officer, the Trainmaster, objected to the question stating in part "that the observation was not made to find out what he was doing there but to establish if he was there." At another point when Claimant's representative inquired of the Superintendent whether it was his "practice to use high-powered binoculars to observe your employes." the Conducting Officer rules the question out saying "I object to that question on the basis that the breath in other words the width concerned is much too undefined to give an honest answer."

At the hearing Claimant, as well as producing a notarized statement from his wife concerning her phone call to a doctor's office on December 8, 1969, produced a certificate signed by another doctor which reads as follows:

> "TO WHOM IT MAY CONCERN: Mr. Richard Miller had a flu virus on Dec. 8 thru the 10th of this year."

The questions to which Claimant, through his representative, sought answers were relevant to the investigation. The answers might have led the way to an understanding of why the Carrier employed the means of surveillance rather than following the agreement which on page 84 part (H) reads as follows regarding sick leave:

> "The employing officer must be satisfied that the sickness is bona-fide. Satisfactory evidence as to sickness in the form of a certificate from a reputable physician, preferably a company physician, will be required in case of doubt."

It is apparent from the record that little weight was given to the doctor's certificate presented by Claimant at the hearing. Nor is there any evidence in the record which would tend to show that it was not issued by a "reputable physician" as contemplated by Rule (H) above.

This Board finds that the question of whether Claimant was seen at the gas station between 7:40 P. M. and 11:00 P. M. on December 9, 1969 does not answer the question as to whether Claimant was sick during his regular tour of duty on that day. The evidence adduced by Carrier shows the condition as it existed during the time of surveillance. It is only an assumption, in the face of the doctor's certificate, that Claimant was not ill during his tour of duty. Moreover as a medical matter was involved, it is of more than passing interest that Carrier did not employ the services of its own doctor to medically establish the condition of Claimant pursuant to Rule (H) above, rather than rely solely on surveillance as it did.

In discipline cases, this Board does not lightly reverse a Carrier's decision. It is likewise reluctant to sustain them when it cannot find Carrier has carried its burden and where, as here, only an assumption of guilt is present. Accordingly, the suspension of Claimant was arbitrary and capricious.

On the basis of the foregoing the suspension is voided.

The claim for pay for December 9, 1969 which Claimant refused during the investigation is denied as it was untimely filed.

Claimant is to be recompensed in accordance with Rule 22 (f) of the agreement. The Rule does not provide that Claimant be made "Whole" for loss of wages. It merely provides he shall be "paid for all time lost less any amount

earned in **other** employment." (Emphasis ours.) While this holding may seem harsh under the circumstances it is not for this Board to add or detract from agreements of parties. Particularly is this so where the words are clear and there is no ambiguity in the language.

The claim for expenses to attend the hearing is also denied as it is not provided for in the agreement.

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 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 violated.

AWARD

Claim sustained except as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1971.

DISSENT OF CARRIER MEMBERS' TO AWARD 18899, DOCKET CL-19120
(Referee Cull)

The claim is sustained in part on the basis of the following finding:

> "This Board finds that the question of **whether Claimant was seen at the gas station between 7:40 P. M. and 11:00 P. M. on December 9, 1969 does not answer the question as to whether Claimant was sick during his regular tour of duty on that day.** The evidence adduced by Carrier shows the condition as it existed during the time of surveillance. It is only an assumption, in the face of the doctor's certificate, that Claimant was not ill during his tour of duty. Moreover as a medical matter was involved, it is of more than passing interest that Carrier did not employ the services of its own doctor to medically establish the condition of Claimant pursuant to Rule (H) above, rather than solely on surveillance as it did." (Emphasis ours.)

In making this finding, the Referee has contrived his own personal basis for sustaining a portion of the claim—a basis that is wholly at odds with the evidence and completely lacking in logic.

It is the Referee's own contrivance because Petitioner did not make any such argument in the record. It is wholly at odds with the evidence, because all of Claimant's evidence indicates that he was uniformly ill—too sick to leave the house—on the entire day involved, as well as on the preceding and following days. As the Employes state in summing up the case in their rebuttal: "Mr. Miller (Claimant) stated that he did not leave the house."

Even the doctor's statement which is quoted in the award indicates that Claimant "had a flu virus on Dec. 8 through the 10th of this year," without giving any indication that the Claimant's disability therefrom might have been spasmodic. It is also significant that **the doctor admittedly did not see the Claimant or examine him, but relied solely on information which the doctor received from Claimant's wife who testified that Claimant was too sick to leave the house on these three days.**

We believe the foregoing finding is patently illogical to the extent that it suggests it would have been possible and appropriate for a Carrier doctor to have attempted to establish retroactively that on December 8, 9, and 10, Claimant was too ill with a virus to perform clerical duties on his regular job during the hours 8:00 A. M. to 4:30 P. M. but was sufficiently recovered to perform service station work during the hours 7:40 to 11:00 P. M. on December 9.

Since Claimant predicated his entire defense to the charges on the express contention that he was too sick to leave the house on the date involved, we believe Carrier proved enough when it proved with three unimpeached witnesses that Claimant in fact left his house and worked at a service station for three hours and twenty minutes. We also believe it is irrelevant that the three witnesses who observed Claimant working at the service station did so at a distance, using binoculars, and refrained from going into the service station to have a personal confrontation with Claimant. Such conduct was unquestionably a matter of courtesy to the Claimant.

The claim should have been denied in its entirety.

G. L. Naylor

P. C. Carter

R. E. Black

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