

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19589
Docket Number CL-19777

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE:

(
(The Chicago Union Station Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7133)
that:

(1) The Carrier violated the rules of the effective Clerks' Agreement when following investigation held on March 31, 1971, it arbitrarily and capriciously dismissed Paul H. Parks from service.

(2) Paul H. Parks shall now be reinstated to the service of the Carrier with seniority and all other rights unimpaired and his record cleared of any charge.

(3) Paul H. Parks shall now be compensated for any and all wage loss suffered as the result of his dismissal from Carrier service.

OPINION OF BOARD: This is a dismissal case arising under Agreement between the parties effective November 1, 1955. When this dispute arose claimant, with seniority date of October 18, 1963, was listed as Mail Handler, Chicago Union Station Seniority Roster.

FACTS

On March 31, 1971 claimant was given a hearing "for the purpose of determining the facts and ascertaining your responsibility in connection with: Absent from assignment March 5, 8, 12 and 13, 1971. Failure to complete assignment February 22, and March 4, 1971".

Claimant admitted at the hearing that he had been absent and had left early on the dates specified in the charge. He testified that illness from an abdominal prostate condition was the reason for his absences and early departures; that he had given sick notice on the days of absence (which was confirmed by Carrier's records); that he had given notice of illness to his foreman on the days of early departures; and that on March 13, 1971, he saw his doctor and was given a prescription which was filled on March 14, 1971. He submitted two Veterans' Administration cards which were dated January 13 and March 26, 1970, and which contained a representation of transmittal to two Carrier officials; and an insurance claim for illness during November and December 1970. Claimant also submitted a statement "from my

doctor" which, inter alia, represented that claimant's absence during the period of February 15 - March 15, 1971 was attributable to illness, that claimant had been under such doctor's professional care during such period, had been advised to rest and take medication, and had been given prescriptions which had been filled and refilled.

Carrier introduced claimant's prior discipline record which showed five prior investigations of absenteeism resulting in four reprimands and one five (5) days suspension. Carrier also introduced its letter of December 8, 1970 which showed nineteen days of absences in September through November 1970, and which stated that:

"Such absenteeism on your part will no longer be tolerated and you are advised to take necessary steps to correct.

Such disregard of your responsibilities to your employer will not again be brought to your attention in this manner."

In connection with the absences covered by this letter Claimant stated that he had been examined by Carrier's physician and that his own doctor's statement was in the possession of the Carrier's physician.

(The record shows two of the prior reprimands were for chronic absenteeism, with number of days absent not specified; the other two reprimands and suspension involved fifteen (15) days of absence and four (4) early departures. Nineteen (19) days of absence were involved in the letter of December 8, 1970.)

Following the hearing the claimant received notice of his dismissal in a letter which also informed him that investigation, subsequent to hearing, had established that the person who signed the doctor's statement presented by claimant was not a licensed physician. The letter then stated:

"It is evident that a falsified statement was presented during investigation in an obvious attempt to justify your being absent without permission from your assignments with this Company.

As a result of the investigation held March 31, 1971 and in view of the foregoing and considering your past unsatisfactory absentee record since your employment with this Company, this will advise you are hereby dismissed from the service of this Company."

CONTENTIONS OF PARTIES

Petitioner contends that the claimant's absence was caused by sickness, which the Carrier failed to show was not genuine, and that revelation of an unlicensed practitioner physician does not place claimant in league with him.

In the main Carrier contends that it dismissed claimant for chronic absenteeism and that it was justified in doing so even though claimant may have shown justification for the most recent specific absences on which charges were brought. Carrier also contends that the revelation of the unlicensed practitioner wipes out any beneficial effect which the claimant's evidence might otherwise have had. Carrier also asserts a procedural point in that the claim is barred because of failure to file properly within the prescribed time limits.

RESOLUTION

On the record before us it is clear that Carrier has waived its procedural point, so we find that the dispute is properly before the Board for consideration on the merits.

We first address Carrier's contention that its dismissal for chronic absenteeism is justified even if the claimant showed justification for the specific absences subject to the charges. We believe this contention is based upon an improper view of the nature of the charges brought in the first instance. Carrier's March 31, 1971 charge specifically stated that the hearing was "for the purpose of determining the facts and ascertaining your responsibility in connection with" particular days on which claimant had been absent and/or had departed early. A charge in this form clearly signifies that if the person accused can show that he was not responsible for the absences because of reasons beyond his control, such as illness, or other excusable reasons, he would not be subject to discipline. Had the charges been brought in the first instance on chronic or excessive absenteeism, the case here might be in a different posture. However, Carrier brought charges on specific absences and we believe the first issue to determine is whether the record sustains Carrier's findings of guilt on the charges of specific absences. Thus we must deal with Carrier's contention that the revelation of the unlicensed practitioner wipes out the beneficial effect of the evidence offered by claimant to justify the specific absences.

We believe Award No. 2, Public Law Board No. 647 (Dolnick) involving these same parties and this same Agreement, bears directly upon the instant case. That Award concerned a Mail Caller whose prior record involved 375 days of absenteeism from August 4, 1964 to May 8, 1969. He was given a hearing on charges of nine (9) specific absences and one early departure in

February 1970. He admitted the specified absences, but said he was "off with a cold" and had so reported to the proper officials. He submitted a medical certificate showing he had been under a doctor's care; in addition, without contradiction, he said he had visited his doctor on three of the days covered by the charges. Carrier presented no evidence to challenge this evidence. In finding for claimant and reinstating him with back pay, this Board stated:

"Carrier presented no witnesses to challenge Claimant's testimony. There is no competent evidence in the record to refute Claimant's testimony that he was sick on or before the days of his absence. It is patently clear that he was discharged primarily because of his past absentee and discipline record, which the Carrier introduced in evidence at the hearing.

"A record of prior absences and disciplines may properly be considered only to determine an appropriate penalty. But first the charge itself must be sustained by a preponderance of competent evidence. Just cause for the discipline must be predicated on the evidence relating solely to the charged act. An appropriate penalty is applied only after the charge is sustained.

"Since the record in this case does not support a finding that the Claimant was absent on the dates charged without good and sufficient reason, Carrier had no right to arrive at its determination solely on claimant's prior work and absentee record. Excessive absenteeism is not to be condoned. At the same time absences for proven illness is not alone a basis for discipline."

Under the reasoning laid out in Award No. 2, as well as many other Awards, it is clear that the specific charges must be sustained in order to validate the use of a prior discipline record in determining the degree of discipline. An since the Carrier here presented no witnesses or other evidence to challenge claimant's evidence, the pivotal issue is whether Carrier's discovery of the unlicensed practitioner wiped out the beneficial effect of claimant's evidence. We think it did not.

Carrier's submission points out that claimant and the unlicensed practitioner had the same address and phone number. Obviously this information was sufficient to arouse suspicion, but, also obviously, it does not in

and of itself incriminate claimant in any wrongdoing. This information, plus the fact that the person was not a licensed physician, was but a cloud over claimant's evidence, which, upon further investigation might have established a damaging link between claimant and the unlicensed practitioner. On the other hand investigation might have established that claimant had been duped by the unlicensed practitioner by inquiring, for example, into whether pharmacists had honored prescriptions issued by the unlicensed practitioner and whether the unlicensed practitioner was the same person whose statement on claimant's September - November 1970 illness was in the possession of Carrier's physician. In short the discovery of the unlicensed practitioner was the kind of information which, upon fuller investigation, might have produced additional adverse information of sufficient strength to overcome claimant's evidence. In the present state of the record, however, the role of the unlicensed practitioner clearly did not overcome claimant's evidence, so we must find that claimant justified the absences covered by the specific charges and that Carrier did not sustain its burden of showing that claimant was inexcusably responsible for such absences. If Carrier did not place as much weight on the role of the unlicensed practitioner as we believe is reflected by the record, then it is all the more certain that Carrier did not sustain the specific charges. Having made this finding, it necessarily follows that Carrier's action was based upon the record of prior discipline and therefore cannot be sustained.

We have carefully studied all of the Awards cited by Carrier, but find that none of them are apropos to the instant case. The principle distinction is that in all of those Awards the specific charge against the claimant was sustained by the evidence, whereas we have reached a contrary finding in this case.

Other notable differences are that in two of those Awards, 5049 (Second Division, Johnson) and 15167 (Dorsey), the charge made in the first instance was "excessive absenteeism" and "being habitually late and absent"; the specific absence was premeditated and the claimant did not tell the truth about prior absences in 10974 (Moore); the claimant did not comply with rule requiring report of on-job accidents in 17240 (Yagoda); and the claimant did not appear at investigation in 18120 (Criswell). The file in another Award called to our attention, Award 1203 (Third Division, without Referee), shows that claimant, who was assigned to an excepted position, had a prior record involving a mixture of specific unauthorized absences and other kinds of improper conduct.

On the record as a whole, and in light of the foregoing, we shall sustain the claim. Carrier shall reinstate the claimant, with seniority and other rights unimpaired, and shall compensate claimant for wage loss during out of service period, reduced by any outside earnings of claimant during such period.

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.

A W A R D

Claim sustained as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1973.