

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19737
Docket Number CL-19780

Frederick R. Blackwell, Referee

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

PARTIES TO DISPUTE:

(
(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7096)
that:

1. The Carrier violated the rules of the Agreement extant between the parties when it held clerk R. P. Provencio out of service on October **3**, 1970, without investigation resulting in loss of opportunity to work two shifts on that day.

2. Clerk R. P. Provencio shall now be allowed payment of 16 **hours** at overtime rate for **8am** to **4pm** Interchange Clerk and **4pm** to **12mid** Yard Checker positions.

OPINION OF BOARD: Claimant was regularly assigned to the position of Train Desk Clerk, **10:30 P.M.-6:30 A.M.**, Saturday-Sunday rest days. On Friday, October 2, 1970, claimant called in sick prior to his regular assignment and was authorized **to** be absent for sickness. On October 3, 1970 at **6:15 A.M.**, he phoned in to mark up for work, but was told he would not be permitted to work until he talked with the Agent. Claimant then attempted to speak with the Agent, but did not do so until 4 P.M. on October 3, 1970. As a result of the **conversa-**
tion with the Agent, claimant was permitted to mark up at 4 P.M. on October 3, and he returned to work his regular assignment on Monday, October 5, 1970. No hearing was held or formal discipline dispensed. During the period that his **marking up** was held in abeyance, pending conversation with the Agent, claimant's seniority gave him rights of first call on a 8 A.M.-4 P.M. vacancy and also on a 4 **P.M.-12** A.M. vacancy. He claims 16 hours overtime for the alleged loss of his rights to work these vacancies.

Petitioner contends Carrier's action amounted to dispensing discipline, without **a** hearing, in violation of Rule 45 of the Agreement. Carrier's position is that a discussion of claimant's bad absentee record was the reason for Carrier's action and that such was justified by Rule 45. Carrier also contends that withholding an employee from service after sick leave pending preliminary investigation to determine physical fitness is not discipline.

On the whole record we conclude that Carrier's action amounted to a disciplinary measure and that the taking of such action without compliance with the investigation (hearing) provisions of Rule 45 constituted **a** violation of the Agreement. In denying the claim on the property the Carrier stated:

"...in view of Mr. Provencio's excessive absences from his regular assignment the Agent issued instructions that Mr. **Provencio** was not to be permitted to return to work until he could determine the reason for Mr. Provencio's **absences** and discuss the matter with him personally.

The Agent had previously admonished Mr. **Provencio** regarding his deplorable work attendance record. In the instant case Mr. Provencio's assurance that he would improve his attendance and the leniency extended by the Agent were the sole reasons **Mr. Provencio** was permitted to return to work."

The above statement leaves no doubt that, from its viewpoint, Carrier was dealing with a disciplinary matter. Carrier's interest in the reasons for absences was Carrier's express reason for refusing to permit claimant to mark up. Moreover, by stating it would not have permitted claimant to mark up at all, except for the "leniency" extended him after he promised to improve, Carrier further highlighted the fact that it regarded the **matter** as having a disciplinary nature. Obviously excessive absences was a proper subject for discipline. But, also obviously, the matter had to be handled under Rule 45 in compliance with claimant's rights thereunder.

We have carefully considered, but do not concur with Carrier's contention that its action was compatible with the suspension provision in Rule 45. The language of the Rule cited by Carrier is as follows:

"...He may, however, be held out of service pending such investigation if the gravity of the offense warrants, Within 48 hours after being charged with the offense, or within 24 hours after being suspended from service, he shall be apprised in writing of **the** specific charge against him...."

This language speaks solely about an employee who is "held out of service pending such investigation...". Self evidently, **then**, the Carrier's suspension rights under the language is limited to an employee who is given an **investigation or** the opportunity therefor. However, in the instant facts, **while** the prospects of an investigation appear to have existed, the record **shows** that an Investigation was never scheduled or held. Accordingly, the above **quoted** portion of Rule 45 has **no** application to this dispute.

We also conclude there is no merit to Carrier's contention that its action was justified by a Carrier's right to **determine** an employee's fitness to return to work after sickness. This right on the part of Carrier has been upheld in prior Awards of this Board. The right was sustained, for example, in Awards 6753 (employee found unfit due to mental condition), 7204 (employee failed to comply with request for his examination by Carrier's physician), 9421 (employee disqualified on basis of examination by Carrier's physician), and 11909 (employee failed vision requirement). These Awards patently dealt with matters **where** the employee's health was clearly the subject of the dispute, whereas, in the instant

dispute, the record affords no basis for concluding that Carrier's action was for the purpose of making a health inquiry, or that health was even involved in the inquiry.

In view of the foregoing we shall sustain the claim respecting the 8 A.M.-4 P.M. vacancy on October 3, 1970. The record shows, however, that claimant had opportunity to work beginning at 4 P.M. on October 3, 1970, but chose not to do so. Accordingly, there is no basis for his claim respecting the 4 P.M.-12 A.M. vacancy on October 3, 1970.

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.

A W A R D

Claim sustained for 8 hours overtime 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 11th day of **May** 1973.