NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22167

THIRD DIVISION

Docket Number CL-22078

Louis Yagoda, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship clerks, Freight Handlers, Express and Station Employes
(Southern Pacific Transportation Company
(Pacific Lines).

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood GL-8425, that:

"(a) The Southern Pacific Transportation Company violated the current Clerks' Agreement when it suspended Mr. L. R. Mello from service for a period of ninety (90) days following formal investigation at which it completely failed to sustain the charge brought against him; and,

(b) The Southern Pacific Transportation Company shall now immediately restore Mr. Mello to service with vacation, health, welfare and seniority rights unimpaired, and his personal record cleared of the charge."

OPINION OF BOARD: We do not find in the record a convincing showing that, as contended by Claimant's representatives, notice to Claimant of charge on which he was to be tried, did not comply with the requirements of Rule 47 that the accused be given a written notice of the precise charges against him. The fact that the notice used the language that Claimant "may be" in violation of Rule 810, did not leave any uncertainty concerning the exact occurrences to which he was requested to be answerable, inasmuch as the days of absence with which investigation was to concern itself were precisely stated (it is stipulated that the days involved totalled 38, not 39, the higher figure having been used because of a typographical error) and the Rule whose violation was to be investigated (Rule 810) was quoted in pertinent and applicable part.

In short, the notice was such as not to leave any doubt in Claimant's mind that he was to be tried for being "absent...from /his/ employment without proper authority" and "continued failure...to protect /his/ employment" arising out of absences on certain exactly identified dates.

As for the merits of the charges on which Carrier acted and the appropriateness of the ninety (90) days suspension imposed therefor, it must first be observed that the parties do not disagree on certain facts: (a) Over a period of 65 days covered by the charge, Claimant worked 12 shifts art of a total of 46 available shifts, (b) some of these absences ran consecutively for one to three workdays, others for six or seven consecutive workdays and one period, if rest days are included as well as one day taken for personal leave and two days for military service (inexplicably in the midst of a continuous span of absence attributed to sickness) during which Claimant was off from work for a period of 33 consecutive days commencing February 8, 1976, and 18 of 19 workdays in late February and early March, 1976, (c) for all but the few days for which personal business and military service were given as the reasons, Claimant called in that he was out sick, sometimes that he would be out continuously for a few days because of this, most times for one day at a time even though such days repeatedly followed each other for substantial consecutive periods, (d) on none of these occasions was Claimant either asked for or himself offered a doctor's statewnt to support his claim *of illness* (nor do we find in the record, including investigation hearing, any identification of said illness or illnesses).

Carrier cites a Company Rule which states, in pertinent part.:

> "Layoffs from seven to twenty-nine days must be requested in writing and be approved by immediate supervisor" and "...written authorization is not required for an absence when such absence is caused by an employee being under the care of a physician in such cases, the identification of the attending physician must be disclosed."

We agree with Carrier that Claimant was in violation of this rule, but we believe also that significant influence must be given to the evidence pointed out by Organization that during the entire period of these repeated and extensive absences, Carrier never questioned the good faith of Claimant's assertion that he was out for sick reasons or demanded medical certification therefor.

But we find two *other* factors in the record also of significant effect on the instant claim.

One of these is that prior to the series of absences on which Carrier acted in the instant matter and starting within a year after the commencement of his employment here, Claimant had been called to discussions with supervision for counselling and warning on five different occasionsconcerning his absences from assigned workdays and violations of Rule 810. It thus cannot be said (in spite of the silence of management during the latest span of protracted absences) that Carrier had not given due notice to Claimant of its expectations in respect to absences and Rule 810 observance.

Finally, we find determinatively influential on this matter the fact that Claimant refused at investigation to supply any support for the legitimacy of the absences for which he was being tried. He gave no answers or evasive answers to questions concerning the nature of his purported illnesses, whether he had had a doctor orwhohis doctor was, and refuaedto supply any evidence that he was Incapacitated from working on those days he had claimed so to be.

Although it is truethatthe burden for proving its case *falls* on the accuser, neverthel ess, when in the presence of such a prima facie shoeing of extensive and protracted absences (without having been backed up by showings of authenticity at the time of occurrences, and making due allowance for Carrier's sluggishness in not having demanded such authentication when they were occurring) evaluation of the case for the accused must take into consideration his failure to establish a contravening defenseagainatthe charge that these absences were unjustified when, at the time hefaces his accusers thereon, he offers no evidence of the validity of these absences for the reasons which had been asserted by him therefor. Such avoidance of self-defense necessarily weakens the credibility of Claimant's case.

We conclude that Carrier was justified in finding that a more credible case had been established in supportof the violations charged than by the denial efforts of Claimant. We believe, however, for the circumstances, that. the discipline imposed was excessive and will award thatitbeawnded to a more appropriate one for said circumstances.

The claim will be partially sustained in that the penalty shall be amended to a twenty (20)day suspension and any lost earnings (less income earned elsewhere) from the twenty-first (21st) through the ninetieth (90th) day of Claimant's suspension shall be paid to him by Carrier.

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 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 involvedherein; and

That the discipline was excessive and is modified.

A W A R D

Claim sustained per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1978.