

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24321
Docket Number MW-24114

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Illinois Terminal Railroad company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of hack Laborer Harry Thompson, Jr. for the alleged violation of Rule 'P' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File ITRR 1980-23).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered, including overtime pay, beginning April 16, 1980."

OPINION OF BOARD: On March 28, 1980, the Carrier directed a letter of investigation to the Claimant which read in pertinent part:

"You are hereby instructed to report for formal investigation at at the Maintenance of Way Office at Cut Street, Alton, Illinois, at 2 P.M., April 7, 1980, for the purpose of determining your responsibility, if any, for absents from work and your alleged failure to respond to certified letter dated March 21, 1980, instructing you to report for duty on or before 7:00 A.M., March 28, 1980."

The investigation was held as scheduled. On April 16, 1980, the Carrier directed a letter to the Claimant dismissing him from employment of the Company.

This investigation b-out that the Claimant had been absent for some time prior to March 21, 1980, when the Carrier instructed the Claimant by a certified letter to report for duty by March 28, 1980, or face a disciplinary termination. The record is clear that the Claimant constructively received the March 21, 1980, letter. The letter was delivered to the claimant's address on file, but the letter was signed for by his sister. The Claimant's testimony indicated that his sister had read the letter to him over the telephone. While there is some question if she read the entire letter, there is no doubt, based on the reading of the transcript, that he was informed that he was to report to work by March 28th.

The Carrier, in finding the Claimant guilty, relies on testimony of Mr. K. M. Oberkfell, track foreman, and Mr. T. Hitchcock, track supervisor. Both gentlemen testify that Mr. Thompson had not reported to work or contacted them to explain why he was not at work on or before March 28th. Mr. Hitchcock

also testified that his clerk, Mr. **Frank Bernsen**, who sits near him in the office, did not take a call from Mr. Thompson.

The **Organization** defends Mr. Thompson by arguing that his absence was permissible because the Claimant was **under** a doctor's **care** during this period. They produced a **note** at the investigation which read:

"**Harry Thompson, Jr., 4/2/80**, track laborer -- occupation, track laborer, injury, **Illinois** Terminal Railroad, place of employment, **A. O. Smith**, Granite City, date entered the hospital **4/30/80**, date outpatient clinic is **3/18/80**, and the doctor's name looks to be Richard Baldwin."

The Claimant elaborated on his medical condition as follows:

"They Said I got a cracked **bone** on my elbow, that **sometimes** my arm won't **straighten** all the way out unless it pops out. He said what they could do was cut it **and** cut the bone off, but I refused that. He Said I **can still work with that arm**. He said **just don't** let nothing fall on it."

The **Claimant** also asserts that he **called Frank Bernsen** "after the **21st** and prior to the **28th**" to **notify him** that he was sick.

In reviewing the evidence, it is the **Board's** conclusion that there is **substantial evidence** to support **the finding** of guilt. There was **no** doubt that the Claimant was absent, had notice to return to work, and failed to do so. The evidence does however conflict on whether he attempted to notify the Carrier that he was unable to return. Mr. **Thompson alleges** that he called the clerk; whereas, there is other evidence that he did not. While the absence of **Bernsen's testimony** is bothersome, there is substantial evidence to support the **hearing officer's** conclusion not to believe the Claimant. The **Board's** function is not to resolve conflicts in evidence or to assess **credibility**, but to determine if there was substantial evidence to support the hearing officer's **findings**. In this case, we believe there was. The **Claimant's testimony**, in **general**, was vague and confused in parts compared to that of **Carrier witnesses** which were **more** direct and more **certain**. Were-, even if we were to accept that he did call in, we **note** that the **doctor's** letter wasn't produced until **the hearing** and also note **that even a** liberal interpretation of the doctor's **letter would not** indicate the **Claimant was unable to work** during the period of **March 21 to March 28**. The **Board** also notes that the letter does **not make** any reference to the period between **March 12 and March 21** when the **Claimant** was also absent.

The **Board** has also considered whether the discipline was appropriate. Discharge for offenses such as **this is usually reserved** for an **employee who**, after the benefit of progressive discipline **remains** incorrigible. The Claimant had clearly distinguished himself as one of these **employees**. The record indicates that in the course of his relatively short employment, the **Claimant** received a written reprimand and a **30-day** suspension for exactly the **same kind** of offense, **being absent without authority**. It should also be noted that in this respect,

there is **little** foundation for the Organization's assertion that the Claimant was **unaware** of the rules requiring **regular** attendance at work. **Under** the circumstances, **discharge** is not **arbitrary**, capricious, or excessive.

FINDINGS: The **Third Division** of the **Adjustment Board**, after giving the **parties** to this dispute due notice of hearing thereon, and upon the whole record **and** all the **evidence**, finds and holds:

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order of Third Division**

ATTEST: Acting **Executive** Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at **Chicago, Illinois**, this 14th day of April 1983.