NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24338
Docket Number CL-23809

Robert E. Peterson, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Kentucky and Indiana Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9343) that:

(1) Carrier violated the Agreement when, without just cause, it dismissed from service Clerk Roy L. Sutton, Sr. effective Friday, November 16, 1979.

(2) As a consequence Carrier shall:

(8) Promptly restore Mr. Sutton to duty with seniority, vacation and other rights unimpaired.

(b) Pay Mr. Sutton the amount of wages he would have earned absent the violative action less outside earnings.

OPINION OF BOARD: Claimant was dismissed from service on the basis of charges he had failed to protect his assignment from September 17, 1979 to October 5, 1979, and had failed to comply with instructions issued by Carrier requiring a doctor's statement verifying medical treatment covering Claimant's entire period of absence from September 17 to October 5, 1979.

Twenty minutes before he was to report for his regular assignment at 11:00 P.M., Sunday, September 16, 1979, Claimant telephoned a Carrier supervisor, not his direct supervisor, stating he was sick and bad to be off work. The supervisor admonished Claimant about the short notice and informed him it would be necessary to furnish a doctor's statement supporting his absence. Claimant stated he was going to his doctor the next day, September 17, and it would be no problem for him to obtain such a statement from his doctor. The supervisor also instructed Claimant to report to his regular supervisor, Mr. Lens, when he reported back for duty. On Thursday, October 4, 1979, Claimant appeared at Carrier offices and informed the Secretary to the General Agent that his doctor was going to release him for work that afternoon. The secretary, in Claimant's presence, telephoned Supervisor Lenz, who in turn told the secretary to remind Claimant of the required medical statement, and the secretary so informed Claimant. Thereafter a dispute arose as to whether Claimant had returned in the absence of the secretary and placed a medical statement in a company envelope addressed to Supervisor Lens; it being Claimant's contention he had placed such document in a pneumatic tube for delivery to Supervisor Lenz at the Yard Office, and Carrier maintaining it did not receive it. Claimant was permitted to return

to his regular assignment Friday, October 5, 1979. However, when Supervisor Lenz continued to maintain that he had not received the medical statement, Claimant was directed by Carrier's Superintendent to have the medical statement in his office by 4:30 P.M., October 12, 1979. The following day, Friday, October 12, 1979, at about 2:00 P.M., Claimant telephoned a clerk in Carrier's IBM Department and asked him to notify the Superintendent that he was in the doctor's office and it would be impossible for him to get the required statement to the Superintendent by 4:30 P.M.. The next day Supervisor Lenz received in the mail a statement, dated October 12, 1979, from Dr. George R. Nichols, which related to the doctor's examination of Claimant. The statement reads:

> "The above named patient stated he did not work on 9/17/79 thru 10/3/79 due to a boil on his buttocks. The physical examination on the above named patient, Roy L. Sutton, on 10/12/79 was essentially normal. The patient is in excellent health and there are no restrictions."

As It was observed that the statement said nothlng about Claimant being treated during his absence, Claimant was in excellent health, and the doctor merely repeated what Claimant had told him, Claimant was directed to appear for formal investigation, which, following several postponements, was finally held on November 13, 1979. Thereafter, by letter dated November 16, 1979, Claimant was notified that he was dismissed from service on the basis of evidence brought out at the investigation revealing him to be guilty as charged and upon a review of his past record of service.

At the investigation Claimant had maintained that he had also gone to his doctor on October 4, 1979, a Dr. Chandra Mukherji, and had placed a copy of Dr. Mukherji's statement in the mall to Carrier. It was Claimant's contention the doctor's statement covered a period of treatment from September 17 through October 3, 1979. In an attempt to clarify the matter, the hearing officer suggested a shortrecess in order that someone contact Dr. Mukherji to verify the Claimant's statements. Thereafter, by agreement with all concerned, a telephone call was placed by the office secretary to Dr. Mukherji's office, with Claimant and the hearing officer listening to the conversation. Reportedly, when the secretary posed the question seeking information as to Claimant's visits to Dr. Mukheji's office between the period of September 17 and October 5, 1979, the response was that Claimant's last visit in that office was August 30, 1979. This was, of course, 18 days prior to Claimant laying off for the period at issue and was found to have been related to an earlier absence account sickness beginning August 25, 1979.

When the hearing resumed, and the nature of the conversation was entered in the record, and Claimant was asked as to whether he had an explanation to offer relative to the response that had been received from the doctor's office, claimant stated: "The only thing I can say to that Mr. Mason is that evidently they didn't put it down on record but I can obtain it from the doctor that I was there the 17 of September and was given medication for the boll that was on my buttocks." In this regard, Claimant's representative suggested the investigation be held in abeyance until such time as Claimant could personally contact Dr. Mukherji relative to having treated Claimant on September 17, 1979.

The request for a postponement was denied by the hearing officer, the latter stating, "I don't feel that the postpon (sic) until a later date could have a sufficient truthful value to what has already been established by the telephone conversation that Mr. Sutton was party to."

It is the Brotherhood's position that Carrier's failure to grant Claimant this opportunity to secure additional evidence during the course of the investigation denied Claimant of a fair and impartial hearing.

While it might appear in the first instance that Claimant should have been granted a reasonable opportunity to secure additional pertinent evidence, we believe under the circumstances of record that the hearing officer properly declined the request for a further postponement, especially in view of the fact that Claimant had been party to the conversation and, absent anything in the record to the contrary, had apparently not taken exception to the response from the doctor's office during the joint telephone conversation. We also find, as the Carrier set forth in its submission, that Claimant was notified by the statement of charges oa October 26, 1979 that he was going to have to answer the charge of not furnishing the requested medical statement, and since the investigation had been postponed until November 13, 1979, Claimant had ample time to have personally contacted Dr. Mukherji or his office. Also to be noted is that after the telephone conversation Claimant was no longer referring to a statement covering the period September 17 through October 3, 1979, as he stated h&d been previously provided Carrier, but limited his statement to being able to obtain a statement for treatment on but one day, namely, September 17, 1979.

It is the Brotherhood's further contentions that Claimant was guilty of prejudgment by reason of the hearing officer securing and attaching to the transcript of investigation copy of Claimant's past service record. It submits the fact thut the hearing officer had previously secured the service record indicates that he had reviewed same and that by such action was usable to consider all facts subsequently developed in an unbiased manner. Further, that with Claimant's record made a part of the transcript it was impossible for the hearing officer or anyone else reviewing and considering the transcript to avoid being impressed by Claimant's prior record in determining anything about the case, including the question of guilt or innocence. In support of its position, the Brotherhood points to past Awards of the Board which have held that an employe's past record had no place in the investigation of current charges so as to assure that any decision of the Carrier rests solely on the testimony pertinent to the charges and not on an employe's past record.

We have carefully considered the Awards cited by the Brotherhood, as well as those Awards which have been cited by the Carrier in support of it; position that the service record was only made a part of the transcript at the close of the hearing involving the charges of record. While it is

unquestioned that there are differing views as to the proper procedure to follow in giving consideration to an employe's personal record in arriving at the measure of discipline to be meted out, it is not necessarily treated as prejudgment for a Carrier to introduce the service record into the investigation, especially when it is done, as here, at the close of the investigation of the accused employe and it is announced that the record will have no bearing as to the guilt or innocence of the employe, but if found guilty it could be a factor as to the amount of discipline to be assessed. Actually, this manner of introduction of an employe's service record, in the presence of the employe, permits him opportunity to personally challenge any discrepancies or inaccuracies in the record as presented. We, therefore, do not find Carrier to have been guilty of prejudgment in this case.

The Brotherhood also contends that the Carrier failed to charge Claimant in a precise manner and that Carrier did not meet its burden of proof with a preponderance of evidence. It is the Brotherhood's position that the hearing notice represented the elements of a general inquiry rather than a trial related to a particular offense. In regard to the Carrier not meeting its burden of proof, it is the Brotherhood's position that as Claimant had called a supervisor prior to the starting time of his assignment to report off account of illness, and permission to lay off was granted, there is no basis for the charge he had failed to protect his assignment. Further, that since Claimant did furnish or produce a medical statement that charges related to his failing to comply with Instructions to do so are without basis in fact.

As concerns the hearing notice, we fail to find it was other than clear and precise. It properly informed Claimant of the misconduct that was to be the subject of the hearing, the time period involved, and the nature of the specific instructions he was alleged to have violated. There is no merit to the Brotherhood's contentions to the contrary.

We believe the record as presented and developed disclosed sufficient evidence to support a finding that Carrier has indeed met its burden of showing that Claimant was guilty as charged by substantial probative evidence of record. In this regard, we concur with Carrier that it is not necessary in disciplinecases to prove beyond moral certainty the truth of the charges; substantial evidence supporting the charges being sufficient, and with the Latter defined, "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." (Consolidated Edison Co. v National Labor Board 305 U. S. 197, 229) There is no question but that Claimant failed to protect his assignment when he absented himself from duty on the apparent pretense of being sick. Certainly, the supervisor had no alternative but to accept Claimant's lay off when he called in sick, but it then became incumbent upon the Claimant to support his extended absence by medical documentation. There is likewise no question but that Claimant was fully aware of the instructions directed to him that it would be necessary he furnish medical proof to verify the entire period of his absence, and not that he had visited a doctor

and been found to be in excellent physical health and there are no restrictions. He h&d besn given more than sufficient opportunity to produce the requested verification and he failed to do so both prior to and at the investigation.

Claimant was guilty of serious misconduct by his actions in absenting himself from duty Without proper justification. Coupled with a service record that shows he h&d been warned about his work record, administered progressive discipline, and even leniency, we are not in a position to hold dismiss&l was unwarranted or an abuse of Carrier discretion. The claim will be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record end all the evidence, finds and holds:

That the parties waived oral he˚

That the Carrier and the Employes involved inthis 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 h&s jurisdiction over the dispute involved herein; and

That the Agreement was not viol&ted.

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
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.