

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24637
Docket Number CL-24840

Paul C. Carter, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
PARTIES TO DISPUTE: {
(Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-9659**)
that:

Carrier violated the Agreement at Memphis, Tennessee, on July 2, 1981, when it dismissed Mr. C. R. **Elam** for an alleged failure to protect his assignment from April 14, 1981, to June 15, 1981, and his alleged failure to comply with instructions.

For this violation, Carrier shall be required to compensate Mr. C. R. **Elam** for all time lost, beginning June 15, 1981, and continuing until he is restored to service and allowed to resume Carrier service.

OPINION OF BOARD: Prior to the occurrence giving rise to the dispute herein, Claimant was employed as a clerk at the Carrier's Memphis, Tennessee yard, with seniority from December 3, 1969.

On April 14, 1981, Claimant marked off, alleging sickness. As of May 22, 1981, he had not reported for duty or furnished proof of a bona fide illness. On May 22, 1981, the following letter was sent to Claimant by Carrier's Superintendent of Terminals:

"Our records indicate that you have been marked off sick since April 14, 1981. A study of your work record for 1981 indicates that you have been absent a total of 64 work days out of a possible 102 days as of May 22, 1981. After subtracting your personal leave day and vacation taken, this amounts to 57% absenteeism.

Your services as a clerk are required and you are instructed to mark up and place yourself for service no later than midnight, June 15, 1981. Should you be physically unable to perform the services of a clerk, you are to furnish written confirmation from a physician verifying that you are incapable of performing such service and are under a physician's care.

"Since you have been off more than 30 days, prior to returning to service, you must be examined by a company physician. To minimize any delay, I attach a copy of Superintendent Montague's bulletin number 102 dated on March 18, 1981. You should read this very carefully and contact either, myself or Agent Terminal Control Wooley to make an appointment with the company physician."

Bulletin No. 102, referred to in the letter of May 22, 1981, reads:

'Superintendent, Tennessee Division, Knoxville, March 18, 1981. Bulletin No. 102 addressed to all concerned.

Bulletin No. 102

All Concerned:

Instructions contained in Bulletin No. 80 dated Janaury 22, 1980, reading as follows are hereby reissued:

To insure that everyone is aware of the proper procedure to be followed when returning to duty following illness or off-duty injury, your attention is directed to the 'NOTICE' quoted below as issued by the medical department:

NOTICE TO ALL EMPLOYEES

You should know that an employee who has been marked off for thirty (30) days or more must be examined and approved by a Company physician before returning to service. The return to service of employees who have been off because of illness or injury is often delayed because the Company physician has difficulty in obtaining a medical history relating to the history or injury. This plays a critical part in determining whether or not to approve the employee's return to service.

To eliminate the delay and to facilitate a prompt return to service, the employee, at the time his or her physician has approved the return to service, should obtain a statement from the physician containing the following:

- "1. The employee's physician has released the employee and has recommended return to service.
2. The physician's diagnosis of the employee's condition, a synopsis of treatment, and any medication prescribed for treatment of the condition at that time.

You will be helping yourself by having this statement available when you advise your supervisor of your desire to return to service. Otherwise, you will have to get it from your physician before your appointment with the Company physician.

If the above procedure is followed, the Company physician will know why the employee was off and will have the necessary medical information with which to make a proper examination, thereby expediting the return-to-work process.

/s/ G. B. Montague
G. B. Montague, Superintendent.

POST ALL BULLETIN BOOKS & BOARDS

cc: Division Staff
All Agents."

Claimant reported to the Carrier's yard office on June 12, 1981, and advised he was ready to go to the Company doctor for examination to return to service. When questioned by the Agent Terminal Control as to possession of a release and statement from his personal doctor as to his physical condition and treatment, Claimant stated that he did not have them. About 2:00 P.M. that day (June 12, 1981), Claimant telephoned the Agent Terminal Control and advised that he had a statement from a doctor dated June 12, 1981 reading:

"I have examined and treated Charles Elam today and he should be able to return to work on Monday, June 15, 1981."

The Claimant, however, refused to furnish any information, or authorize anyone to furnish information concerning his medical treatment during the period that he had been off. He did not furnish proof of illness during the period April 14, 1981, through June 12, 1981, and he did not furnish the required information so that he could be sent to the Company physician for examination to determine his ability to return to work. On June 15, 1981, Claimant was notified by the Superintendent:

"Arrange to attend an investigation to be held at 1:00 pm in the new intermodal office building, Forrest Yard, Memphis, TN, on Tuesday, June 14, **1981**.

You are charged in this investigation with failure to protect your assignment as clerk from April 14, 1981, to June 15, 1981. You are also charged with failure to comply with instructions in my letter to you of May 22, 1981.

You may have present at this investigation any witnesses and or representatives you so desire in accordance with your working agreement."

At the request of the Organization, the investigation was postponed to 1:00 P.M., June 30, 1981. A copy of the transcript of the investigation has been made a part of the record. A review shows that the investigation was conducted in a fair and impartial manner. Claimant was present throughout the investigation and was represented. None of his substantive procedural rights was violated. At the beginning of the investigation, several objections were raised by the Claimant and his representative. We have considered each of them and find no proper basis for any. The fact that Claimant may have called someone on April 14, 1981, and marked off sick, certainly gave him no right to be off indefinitely without evidence to support his claim of sickness.

In the investigation the Agent Terminal Control, Claimant's supervising officer, testified that Claimant informed him that he (Claimant) would not release any information as to his medical history to anyone; that such information was personal between him and his doctor. In the investigation the Claimant was adamant that he considered any medical information private between him and his doctor; that for the Carrier to insist on being furnished such information was an invasion of his privacy and a violation of **"my** Constitutional rights." This Board is not authorized to pass upon an alleged violation of constitutional rights.

Following the investigation, Claimant was notified on July 2, 1981, by Carrier's Superintendent of his dismissal from service:

"Reference is made to investigation conducted in new Intermodal Office Building, Forrest Yard, Memphis, Tennessee at 1:00 P.M. on June 30, 1981 concerning your failure to protect your assignment as clerk from April 14, 1981, to June 15, 1981 and your failure to comply with instructions in my letter to you of May 22, 1981.

"Evidence adduced in the investigation clearly developed that you did not protect your assignment from April 14, 1981 to June 15, 1981, and that you have refused to furnish any medical information that you were in fact sick and under a doctor's care. Further, you did not **comply** with instructions in my letter to you of May 22, 1981 or Superintendent Montague's bulletin number 102 which was part of the May 22, 1981 letter.

For your failure to protect your assignment from April 14, 1981 to June 15, 1981 and for your refusal to **comply** with instructions contained in my letter of May 22, 1981 **you** are dismissed from the service of Southern Railway Company.

Arrange to return to Agent **Terminal** Control's office at Memphis, Tennessee any Company property **you** may have in your **possession.**"

In the appeal of the dispute on the property, the Carrier's first appeals officer called attention to Claimant's prior record, which was far from satisfactory, and which he stated was given consideration in arriving at the discipline to be assessed after determining Claimant's guilt by a review of the evidence **brought** out at the investigation. A copy of Claimant's record was furnished to the **Organizatio** at that **time**. Such procedure concerning Claimant's prior record was entirely proper and has been upheld by awards of this Board too numerous to require citation.

In the handling of the dispute on the property, and in its submission to the Board, the Organization contended that Claimant was deprived of a fair and impartial hearing because the same officer preferred the charge, conducted the investigation, and rendered the decision. No agreement rule has been cited setting forth who shall prefer charges, conduct investigations or render decisions. **Furthermor** numerous awards of this Board have held it to be permissible for the same Carrier officer to prefer the charge, conduct the investigation and render the decision. These three roles are not viewed as precluding an **employee's** right to a fair and impartial hearing.

In its submission to the Board the Organization also alleges that it was the burden of the Carrier to prove the charge by a "preponderance of evidence presented in the hearing and he is guilty beyond a reasonable doubt." It is well settled that railroad disciplinary proceedings **are** not **criminal** proceedings; that strict rules of evidence do not apply, and the burden of proof is not the same as in criminal or civil cases. it is our understanding that in court proceedings, in a criminal offense the proof must be beyond a reasonable doubt, and in civil cases a preponderance of **evidence** is required. (Awards 13116, 13127)

Based upon the record before the Board, there is no proper basis for the Board to interfere with the discipline imposed by the 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 **Employees** involved in this dispute are respectively Carrier and **Employee** 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

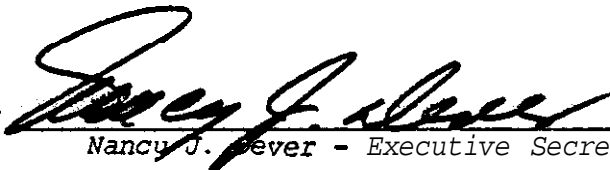
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Sever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984

