

The Third Division consisted of the regular members and in addition Referee W. F. Euker when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10206) that:

1. Carrier acted in an arbitrary, capricious, unjust, discriminatory, unreasonable manner when, without just cause, it dismissed Clerk, J. T. Morrissette from service of the Carrier on September 25, 1986.

2. In view of such arbitrary, capricious, unjust, discriminatory and unreasonable action of the Carrier, it shall be now be required to:

- '(a) Restore Clerk J. T. Morrissette to service of the Carrier with all seniority, vacation and other rights unimpaired.
- (b) Pay Clerk J. T. Morrissette for all time lost commencing with the date he presents Carrier with a return to work slip from his position and continuing from that date until J. T. Morrissette is restored to service.
- (c) Pay Clerk J. T. Morrissette any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under Group Policy No. GA-23000 and, in the event of death of Clerk J. T. Morrissette, pay his estate the amount of life insurance provided under said policy. In addition, reimburse him for premium payments he may have made in the purchase of substitute health, welfare and life insurance, as provided in Article V, Section 5 of the National Agreement effective December 11, 1981."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This case involves an Operator-Leverman who was charged with insubordination for failing to report for a physical examination on July 25, 1986, following a prolonged period of absence from duty, beginning April 14, 1986. After four postponements were granted a formal Investigation in absentia was held on September 17, 1986, resulting in Claimant's dismissal from service. The Claim was appealed in the usual manner on the property and is now presented for our consideration.

A threshold procedural question must be addressed before considering the Organization's arguments on the merits. As noted, the Investigation in this matter was conducted in absentia. The Organization asserts Claimant's contractual due process rights were abridged when Carrier failed to personally notify him of the time and date for the Investigation and then arbitrarily refused to grant an "indefinite postponement", because a Carrier official was aware Claimant was sick. The record facts disclose that Claimant was initially charged under date of July 29, 1986, for failing to appear for a physical examination which had been programed for July 25, 1986. The Claimant was personally notified of this examination on July 24, 1986, but failed to appear. As a result, Carrier attempted to notify Claimant by letter, to attend a formal Investigation scheduled for August 7, 1986, which was subsequently postponed, as noted above and finally held on September 17, 1986. The Carrier forwarded copies of the various letters by certified mail to Claimant's listed address. In addition, copies were dispatched to another address which Claimant occasionally used. Several of the letters were signed in behalf of the Claimant by other parties at the listed address. None of the letters were actually signed or accepted by the Claimant.

It is apparent the issue of postponement as well as the issue relating to notice are inter-connected. This Board has zealously guarded an employe's contractual due process rights particularly in those areas which impinge on his privilege of representation and appearance at the Investigation. On the other hand, the contract obligates the Carrier to hold an Investigation before disciplinary action is taken. The Carrier's compliance with the contract would be frustrated by granting an "indefinite postponement." The Awards of this Board referenced by the parties, dealing with similar contractual requirements, would appear to support Carrier's decision in this case to proceed with the trial after granting four postponements requested by the Organization. Conversely, none of the cited Awards justify a request for an "indefinite postponement." Under the facts presented, we see no procedural error in Carrier proceeding with the Investigation in absentia.

In reference to the merits, the Organization vigorously asserts that Carrier exceeded its contractual authority in ordering Claimant to submit to a physical examination, therefore, it is concluded, Claimant's failure to appear is not a disciplinary offense.

Even if the Organization's contention were correct, which under the circumstances need not be decided, the proper resolution of that issue would fall under the principle of "obey and grieve". The Board has held in countless Awards that except in matters concerning provable safety consequences, an employe is required to obey an order and file a grievance if he feels the Carrier's directive violates the contract. To require an ostensibly sick employe to take a physical examination would seem to be the normal and routine method for protecting his health and safety, rather than imposing a risk.

The narration of facts set forth hereinabove, and others sponged from the record, reveal that Claimant's failure to comply with instructions in this case, was not serious to warrant discharge from service. The Claimant should be restored to service with seniority and all other rights unimpaired, without compensation or other benefits claimed, subject to the Carrier's normal physical examination requirements.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.