

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32014
Docket No. MW-31976
97-3-94-3-331**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [sixty (60) day suspension to be served at a later date] imposed upon Mr. B. B. Aparicio, by letter of May 17, 1993, for alleged violation of Rule 604 of Form 7908, 'Safety, Radio and General Rules for All Employees' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-200/930731).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered as a result thereof."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

B. B. Aparicio (Claimant) was assigned to System Gang 9084, headquartered as Las Vegas, Nevada, with regular hours of 7:00 A.M. through 3:00 P.M., Tuesday through Saturday. At the time this dispute arose, Systems Foreman B. Burdick was Claimant's immediate supervisor.

On March 10, 1993, Claimant sustained an on-duty back injury while working in Los Angeles, California. On that day, Claimant did not want to fill out an accident report, however, two days later, on March 12, Claimant decided he needed to see a physician, and filled out the requisite Form. As a result, General Maintenance of Way Foreman Talmadge Dalebout took Claimant to a physician in Los Angeles, who placed Claimant on two weeks of light duty. When the gang moved from Los Angeles to Las Vegas, Foreman Dalebout made an appointment with a second physician to check Claimant's progress. The second appointment was scheduled for March 26. On that day, the physician advised that Claimant needed "one (1) to two (2) weeks of additional light duty." The physician suggested that Claimant return on April 5 for a follow-up examination. Claimant worked on March 26, and again on March 27. On March 28, Claimant went to his Ogden, Nevada home to observe his assigned rest days.

On March 29, the day Claimant was to report back to work, he asked his brother, F.B. Aparicio, also a member of gang 9084, to tell Foreman Burdick that he was "sick" and would not be at work. At approximately noon, Claimant left his home in Ogden, and drove to Beverly Hills, California, to see a Dr. Reese Polesky. A friend had suggested the name of a physician, Dr. Polesky, advising Claimant that he was "good with back problems, like yours."

According to Claimant, he arrived just outside of Beverly Hills at approximately 3:00 A.M., on the morning of March 30, and waited at a Denny's restaurant for his lawyer, who intended to accompany Claimant to his medical examination. Claimant was duly examined, after which Dr. Polesky declared that Mr. Aparicio was "under his care" and suffering from "back strain." Dr. Polesky advised that Claimant should be placed on "leave of absence status from March 30 through June 1, 1993."

Claimant left Dr. Polesky's office at approximately 6:00 P.M., and began the drive to his home in Ogden, via the Las Vegas motel where gang 9084 was currently

headquartered. Apparently due to a "breakdown", Claimant did not arrive at the motel until approximately 1:00 A.M., on the morning of April 1. After sleeping for a few hours at the motel, Claimant left for Ogden, asking his brother to deliver Dr. Polesky's "diagnosis" and "instructions" to Foreman Burdick. Again, Claimant instructed his brother to tell their foreman that he was "sick." Claimant then drove to his home to begin what he perceived to be a "medically approved" leave of absence.

In the meantime, however, General Foreman Dalebout had attempted, without success, to contact Claimant several times on March 30 and 31. Finally, late on the evening of March 31, Claimant's wife informed the Foreman that her husband's car had broken down "on his way back to work in Las Vegas." On April 1, Foreman Burdick called Mr. Dalebout to update him regarding the letter from Dr. Polesky which Claimant's brother had delivered. Foreman Dalebout continued with his attempts to speak to Claimant personally, however, it was not until April 5 that Mr. Dalebout actually spoke to Mr. Aparicio, the day Claimant was scheduled for a follow-up appointment with Dr. Dean at Southwest Medical Center in Las Vegas. During that conversation, Claimant declined to elaborate on the reasons why he asked his brother to mark him off "sick", and made no mention of his trip to the Beverly Hills physician. Indeed, Claimant stated: "They told me not to say anything"; later refining his statement to: "Dr. Polesky told me not to tell anyone anything."

On April 30, 1993, Carrier held a formal disciplinary Investigation into charges that Claimant's absences on March 30, 31 and April 1, 2, and 3, 1993, had been "without proper authority."

On May 17, 1993, Director, Track Programs-Ties informed Claimant that:

"Enclosed is the transcript of the foreman disciplinary investigation held on April 30, 1993 regarding your absenteeism without proper authority on March 30, 31, April 1, 2 and 3, 1993 indicating a violation of Rule 604 of Form 7908, 'Safety, Radio and General Rules for All Employees'.

I have now carefully reviewed and have considered all the testimony contained in the hearing transcript. I have found more than a sufficient degree of evidence was presented to warrant sustaining all charges brought against you.

In consideration of the severity of the offenses, I am hereby assessing you a 60 day actual suspension which will be served at a later date."

The Organization protested the discipline, premised primarily upon the language found in Rule 25(g) of the Agreement - Leave of Absence. In the letter, the Organization alleged:

- 1. Claimant notified Foreman Burdick, on March 30, that he was "sick." Foreman Burdick marked Claimant as being "sick" on that date.**
- 2. A letter from Dr. Reese Polesky, dated March 30, 1993, "supports" Claimant's "need" to be absent on March 30.**
- 3. Foreman Burdick forwarded the hand delivered note from Dr. Polesky to System Foreman Dalebout. Therefore, Claimant was not absent without authority on March 31, April 1, 2 and 3, 1993, because Claimant applied for a leave of absence and complied with Agreement Rule 25 (g). Because Claimant made in writing, properly documented and supported by a statement from his physician, which included a specific reason for the absence and the expected duration for the leave request, it should be allowed as submitted on March 31, 1993, proving the charges against him "invalid."**

The Organization went on to assert that Claimant was being "persecuted" because the Hearing Officer investigated Claimant's "choice of physicians and hiring a lawyer." The Organization alleged Carrier guilty of violating the U.S. Federal Employers' Liability Act (FELA) which "forbids Carrier from engaging in the practices of intimidation and disciplining as Mr. Jones prescribes." Finally, the Organization protested Carrier's introduction of Claimant's personal record at the Investigation, deeming it prejudicial.

Carrier replied to the claim in a letter dated August 6, 1993:

"You are first reminded that the U.S Federal Employers' Liability Act is not a matter which is subject to the Collective Bargaining Agreement, and it is questioned why you even bring this up. One can only surmise that this is an attempt to embellish or 'muddy' the facts surrounding Mr. Aparicio.

As to the introduction of the personal record into the transcript, this is admissible as it is only utilized in the determination of the degree of discipline to be assessed, if any. Mr. Aparicio was not investigated on his personal record. I am surprised that in light of all the Awards on the cases advanced, that you still make this argument.

As to the investigation, Mr. Jones, the Hearing Officer, assessed the discipline based upon Mr. Aparicio's violation of Rule 604. Rule 604 states, in part:

'They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority.'

By your own admission, Claimant's brother attempted to deliver some Doctor's statement. Mr. Aparicio's brother did not present a leave of absence request form at any time, nor did Claimant secure authority from his supervisor to be off. Therefore, the charges were substantiated, and the measure of discipline imposed is justifiable."

Regarding the portion of the claim concerning Rule 25 and its application, Carrier noted that "no where was there a leave of absence form requested." In fact, Carrier's records indicate that:

"(A) On April 21, 1993, a certified letter was sent to Mr. Aparicio along with the proper form requesting that it be filled out, and Mr. Aparicio was to have a statement from a physician. Claimant was given five (5) days in which to comply from the date of receipt of the Carrier's letter, or he would be considered in violation of Rule 25.

(B) On April 26, 1993, the U.S. Postal Service attempted to deliver the letter and it was returned with the notation 'REFUSED' on the envelope.

(C) On May 3, 1993, Carrier received the certified letter back marked 'REFUSED' and stamped 'RETURN TO SENDER'. So a letter was sent the same date advising Claimant that he had forfeited his employment relationship in line with Rule 25(g);"

Finally, Carrier asserted that: "Mr. Aparicio was the master of his own destiny and had a history of refusing Carrier's letters."

At the outset, the Organization's reliance upon the Federal Employers' Liability Act is misplaced. There is no evidence on this record which persuades us that Carrier attempted to "persecute" Mr. Aparicio in any way.

Turning to the merits of this dispute, Rule 25 of the Agreement states, in pertinent part:

"(g) MEDICAL LEAVE. Requests for leave of absence account sickness or injury which are of fifteen (15) calendar days or less duration need not be in writing, but such requests must be advanced by the employee, to the Carrier, in a timely manner, specifying the nature of the illness or injury and the number of days required.

Request for medical leave of absence account sickness or injury in excess of fifteen (15) calendar days must be made in writing and properly documented and supported by a statement from the employee's physician, which includes the specific reason therefor and the expected duration. Extensions thereof must also be supported by a similar statement from the employee's physician."

On the day Claimant was injured, Foreman Burdick offered Claimant immediate medical attention. Claimant denied that assistance, and it was not until two days later, that he admitted he had, indeed, strained his back. Foreman Dalebout immediately took Claimant to a physician at their work location in Los Angeles. Further, when the gang returned to Las Vegas, the Foreman took Claimant to a second physician to check his

progress, requesting, and accepting, the second physician's prognosis, which included an additional "one to two week extension" of light duty. The Foreman even went so far as to ask Claimant if he was "satisfied" with the medical treatment he was receiving. Although Mr. Aparicio replied in the negative, his only complaint consisted of the fact that he "wanted someone to rub (massage) my back." Based on that input, the Foreman believed that Claimant was "fairly satisfied" with the medical treatment he had been receiving to that point, and had every intention of returning for his April 5 follow-up appointment.

However, Claimant instead chose to drive an extraordinary distance, spending an inordinate amount of time in his automobile, to solicit a third opinion from a physician who was reputedly "good with back injuries, like yours." Further, Claimant admitted that he lied to Carrier on two occasions by instructing his brother to inform their Foreman that he was "sick." In fact, Claimant was not "sick", but was in his automobile traveling to and from Beverly Hills. Further, Claimant was perfectly capable of seeing his Foreman on the morning of April 1, 1993, rather than sending his brother to deliver a less than truthful excuse as to why he had not been at work.

Rule 25 is clear and unambiguous in its meaning. Claimant did not personally request a leave of absence. Claimant did not comply with the provisions set forth in Rule 25. The Organization's contention that he did so simply is not borne out by the evidence of record. Based upon Claimant's less than candid explanations for his absences, March 30-April 3, 1993, and his unmitigated failure to comply with Rule 25, Carrier had adequate cause for disciplinary action. Given the nature and circumstances of his offense, we find no basis for disturbing the discipline assessed by Carrier.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 6th day of May 1997.