

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39366
Docket No. MS-39831
08-3-NRAB-00003-060230
(06-3-230)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Michael Powell
PARTIES TO DISPUTE: (
(Southeastern Pennsylvania Transportation Authority

STATEMENT OF CLAIM:

- “1) The Carrier violated Article IV, Section 401(i)(a), (i)(b), (l), (n), (w) paragraph 1 and (w)(l), as well as other provisions of the Agreement between SEPTA and TCU when it improperly withheld Claimant Michael Powell from service beginning on April 11, 2005, on charges of feigning an illness and failure to complete his assignment.

The Carrier shall now be required to return [Claimant] to duty and make him whole for all losses including, but not limited to lost wages and overtime due to the Carrier improperly withholding claimant from service.

- 2) The Carrier violated Article IV, Section 401(i)(a), (i)(b), (l), (n), (w) paragraph 1 and (w)(l), as well as other provisions of the Agreement between SEPTA and TCU when it terminated Claimant Michael Powell on April 15, 2005, on charges of feigning an illness and failure to complete his assignment.

The Carrier shall now be required to return [Claimant] to duty and make him whole for all losses including, but not limited to lost wages and overtime due to the Carrier improperly withholding claimant from service.”

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.

At all times relevant to this claim, the Claimant, a Personnel Assignment Office (PAO) Clerk, was assigned to the third shift, with hours from 11:15 P.M. to 7:15 A.M. and Tuesdays and Wednesdays off. On April 4, 2005, he requested an Earned Excused Day (EED) for Saturday, April 9, but the request was not granted. On April 8, the Claimant and his co-worker were told that one of them would have to cover the first shift the following morning. The Claimant's co-worker, who was senior to the Claimant, had declined the assignment, so that the assignment fell to the Claimant. However, at approximately 6:30 A.M. on April 9, the Claimant told his co-worker that he had to leave early because his family was waiting to go on a trip to New York, and left work 45 minutes before his shift, without notifying his supervisor or manager. The Claimant's co-worker was forced to work the vacated first shift assignment that he had declined. The co-worker denied that he had agreed either to cover for the Claimant for the rest of his shift or to take the first shift. According to her the Claimant did not ask if she would, he simply told her he was leaving.

Later in the day on April 9, the PAO Manager learned of the Claimant's departure, and called the Claimant. The Claimant returned the call at 1:30 P.M. that day, and told the Manager that his co-worker had agreed to cover for him and that he assumed his EED for that evening had been approved because his request had been timely. The Manager told the Claimant that his request had not been approved and that he was expected to work that evening, if he could not find someone to cover his

shift. According to the Manager, the Claimant told him that he would drive back for work and return to New York the next morning, but said nothing during that phone call about having left early because he had been ill.

The Claimant called in at 9:27 P.M. that evening to mark off for his upcoming shift. At that time, he was told to report with a union representative for an interview with his Manager at 8:30 A.M. on April 11. When he met with the Manager on April 11, the Claimant admitted that he had left early without authorization from management, but said that his co-worker had agreed to cover for him. He also said that he had felt ill at the time, and explained that he did not mention it during his phone conversation with the Manager on April 9 because he was covered by FMLA. (In fact, the Claimant's FMLA certificate expired on April 9.) The Manager told the Claimant that he was being removed from service pending Investigation of feigning illness and failing to complete his shift.

A second interview was held on April 15, at which the Claimant had union representation. At that time the Claimant refused to give a statement or answer any more questions, in part because of his objection that he had been wrongly removed from service. Based on the information received from the Claimant, his co-workers, and the Claimant's record which included a previous interview and reinstruction for a similar infraction in 2003, the Manager found the charges to be true and dismissed the Claimant from service.

The Claimant grieved both being withheld from service and the dismissal. The Step 1 responses to the grievances were received by the Union on May 4. The Step 2 Hearing was held on May 18, and the answers received by the Union on May 19; the Step 3 Hearing was held on August 25, and the Authority's answers received by the Union on September 6, 2005. The suspension and dismissal were appealed together to Special Board of Adjustment No. 958 on September 30, 2005.

On November 7, 2005, the Authority sent a letter to the Claimant, with a copy to the Organization, demanding that the Claimant return by November 23, 2005, alleged overpayments totaling \$2,370.80 that he had received in error in May, June, and July 2005. On November 18 and 28, 2005, the Organization repeated its request for an SBA Hearing. On November 29, 2005, the Authority notified the Organization

that the Claimant had abandoned his claims under Article IV, Section 401(k) by refusing to return the overpayments. The Organization disputed this, but the claim was never submitted to the SBA, and on May 10, 2006, the Claimant filed a Notice of Intent with the NRAB. The claim is now before the Board for determination.

The first issue that must be addressed is the Authority's objection that, pursuant to Rule 401 (k)(2) the Claimant abandoned his claim. Rule 401 (k) states:

- “(1) In any case where an employee has been discharged, the hearing of the second step of the grievance procedure will not be held until the employee has turned in all Authority property theretofore delivered to him, and the hearing at the third step will not be held until the employee has settled all accounts.**
- (2) If an employee grievant fails to satisfy either of the requirements set forth in Section 401(k)(1) within fourteen (14) days following the receipt by the employee with copy to the Union of the Authority's response to the previous level hearing, it will be determined that the employee has abandoned his grievance. This grievance is finalized by the Authority's response to the previous level hearing.”**

The Claimant contends that Rule 401(k) is inapplicable to him because the Rule was intended only to insure the return of the Authority's physical property such as tools and supplies, rather than to facilitate the collection of overpayments. However, the requirement in paragraph (1) that an employee have “settled all accounts,” suggests that the parties intended that Rule 401(k) include the return of money as well as physical items. Nonetheless, the Authority failed to show that the Claimant knowingly violated the Rule. There is no evidence that the Authority did anything to notify the Claimant that he had received any overpayments until November 11, 2005, long after the third step Hearing had been held. Being unaware of the alleged debt prior to the third step Hearing, or even within the 14-day period after receipt of the Authority's response to either the second or the third step Hearing, the Claimant did not knowingly refuse to comply with Rule 401(k)(2) and cannot be held to have abandoned his grievance pursuant to that Rule. It is true that the Claimant continued

to refuse to return the alleged overpayment, and the Board does not condone this if the Authority's accounting is correct. However, that does not justify the Board's application of Rule 401(k) beyond its terms. The Authority may have other recourse to collect the purported debt, but a determination that the claim has been abandoned cannot be made in this case.

Turning to the claim itself, however, the Board finds that the Authority established by substantial evidence that there was just cause to dismiss the Claimant from service. In light of the undisputed facts that the Claimant had previously requested an EED for precisely the shift that he marked off sick, and did not mention feeling ill when explaining his early departure to his Manager on April 9, the Authority's acceptance of the account of the Claimant's co-worker as more credible than the Claimant's was neither arbitrary, capricious, discriminatory, nor retaliatory. The Authority reasonably determined that the Claimant, in order to make a trip to New York with his family, left work early without permission from management and without his co-worker's agreement to cover his work and take the extra shift that the co-worker had previously declined. The Authority also reasonably determined that the Claimant feigned illness when he marked off sick two hours before his next shift, in order to remain in New York, rather than returning to work as he had told his Manager he would.

Although the Claimant contends that the PAO had a procedure and document that was used by employees who had to leave early, the Claimant failed to prove that he followed the purported procedure, because he never obtained his co-worker's consent to cover his work. That the Claimant's co-worker did complete his work, having been left in the lurch, does not demonstrate that the Claimant obtained his voluntary consent. The only example offered by the Claimant is where an employee left several hours early due to illness, but the Authority reasonably determined that the Claimant left simply to attend a family event. Contrary to the circumstances described in Award 133 of Public Law Board No. 2971, Award 16 of Special Board of Adjustment No. 1024, and Third Division Award 21240, the Claimant failed to prove that he was treated more harshly than similarly situated co-workers.

The Claimant also contends that the Authority failed to conduct a fair and impartial Hearing, because the Manager who dealt with him while he was out of town

and then investigated the charges, and one of the witnesses against him, were biased due to the Claimant's pending EEO complaint. In fact, the August 2004 EEO complaint (which focused on another employee not involved in these events) April 2005 correspondence from the EEO/AA Department to the Claimant, and the Claimant's post-dismissal expansion of his charge, were not part of the record on the property, and therefore constitute new evidence that cannot properly be considered by the Board. More important, there is no evidence that either the Manager or the witness were aware of the EEO complaint prior to the Claimant's removal or dismissal from service. Thus there is no evidence that the Claimant's EEO complaint influenced those decisions in any way.

Nor does the record support the assertion that the Authority retaliated against the Claimant for his actual or attempted exercise of FMLA rights. The Claimant was dismissed not because of a legitimate use of FMLA leave, but because the Authority's reasonable conclusion that he knowingly had feigned a covered illness, in order to take time off to which he was not entitled. The record demonstrates that the Claimant was afforded a full and fair Investigation and fair and impartial treatment throughout the proceedings.

The Claimant contends that the penalty of dismissal was excessive in this case. However, the Claimant already had received reinstruction in 2003 for a similar incident, leaving work early without permission to attend to a family matter. Under all the circumstances shown, in particular the Authority's reasonable conclusion that the Claimant lied about the reasons for his early departure, his mark-off, and his interaction with his co-worker, the dismissal was appropriate and did not violate the principle of corrective discipline found in Rule 401 (w).

Finally, the Authority established by substantial evidence that its suspension of the Claimant pending further investigation of the charges was consistent with Section 401(m) of the Agreement, which provides in part that "an employee may be suspended or immediately barred from reporting for work in cases where the employee's retention in service would be detrimental to . . . SEPTA." The Claimant was accused of infractions that carried an implication of dishonesty. Because his duties as a PAO Clerk on the third shift involved an element of trust, the Board declines to second-

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guess management's assessment that his retention in service would have been detrimental to the Authority.

AWARD

Claim denied.

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 21st day of October 2008.