

Award No. 1491
Docket No. MW-1346

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

(J. M. Kurn and John G. Lonsdale, Trustees)

STATEMENT OF CLAIM: "Claim of E. L. Rigsbee, Section Foreman, Truman, Arkansas, dismissed from the service October 11th, 1939, that he be reinstated into the service as Section Foreman, with seniority rights unimpaired and paid for time lost."

OPINION OF BOARD: After the day's work of October 11, 1939, was completed Carrier's Roadmaster held Claimant E. L. Rigsbee out of service. On October 15, 1939, the Roadmaster conducted an investigation of Mr. Rigsbee "in connection with loafing on the job." On October 20, 1939, the Roadmaster's decision upon the investigation was given Mr. Rigsbee, to the effect that he was permanently discharged for loafing on the job and failure to see that the laborers under his jurisdiction properly performed their duties.

The investigation of October 15, 1939, was reported by a stenographer. A transcript is in the docket. It shows questions asked by the Roadmaster and answered by Mr. Rigsbee, and some questions by Mr. Rigsbee's representative, also answered by Mr. Rigsbee. The transcript shows that no other testimony, statements, records, or showing of any kind was offered by either the carrier or the employe.

From the Rules for the maintenance of way and structures the carrier cites Rule No. 353, which reads:

"353. Section foremen will have full charge of all forces under them, and shall employ the number of men the roadmaster directs, and personally assist in the work when they have a small number of men under them. They must see that employes properly perform their duties and shall discipline those who are incompetent or neglectful, in accordance with current instructions. They must keep the records and make the prescribed reports of the time of their men, and of the receipt, distribution and use of the material furnished them."

There having been but two men under Foreman Rigsbee, the provisions of Rule No. 353 that the foreman personally assist in the work had application. That is not denied. But as Petitioner does deny that violation of the provision was proven, we advert to what the investigation shows.

The questions and answers that constitute the investigation are almost completely confined to occurrences on a single date, October 11, 1939. Mr. Rigsbee was asked in detail concerning his activities beginning at 10:52

A. M. on that date and down to 3:16 P. M., same date, exclusive of the noon hour. He answered that he sat down twice on the rail but didn't remember sitting down anywhere else. He described using a fork to clean ballast, taking the car north and bringing back two ties, walking five poles to south end of section inspecting bond wires, and admits that he did no shovel work. He stated he did not do a hard day's manual labor, but stated he did do a day's work in overseeing. He estimated that he was performing manual labor about a third of the time. For this Mr. Rigsbee stated as an explanation that when he went out that morning (October 11) he felt bad and was "feeling pretty tough that day." When asked whether after the Roadmaster took charge of the gang at 4:00 P. M. he, Rigsbee, made a good hand, he answered "Yes sir I didn't feel like it but I worked."

Mr. Rigsbee's testimony as to the way he was feeling on October 11 is the whole of the evidence that was given on that question. This factual situation Carrier meets with the argument that such excuses are entirely unacceptable. The argument is not based on a claim that the intent and purpose of the Rule is to arbitrarily require of a foreman a full day of manual labor in assisting in the work regardless of his physical condition while he is on the job. What the argument is based on is the proposition that if such excuses were accepted the enforcement of compliance with the rule would be impossible. Just what would occasion the impossibility the Carrier does not specify. If the inference is that all claims of illness made by foremen would be false, the statement of such a theory carries its own refutation. If the inference is that statements of illness that are truthful can not be distinguished from those that might be false, and therefore to insure enforcement of the rule no showing of illness as an excuse need be accepted by the carrier regardless of the showing, it also is impossible of adoption. The Board is loath to argue that the truth in respect to a foreman feeling unable to do hard manual labor is indistinguishable from simulated illness. There may be cases in which there may be difficulty in distinguishing, but that would not warrant injecting into the rule an arbitrary manner of the rule's application without more of good reason than has been offered. The other reason the carrier assigns for the entire unacceptableness of excuses of illness is that it is the privilege and responsibility of employees to lay off and not turn in time when they are in such physical condition that they are not actually working. But this foreman's laying off meant cessation not only of manual labor on his part but cessation of the overseeing and directing of the laborers under him, and his superior was several miles away. Mr. Rigsbee was feeling in good condition on the day preceding the 11th of October. Under these circumstances the Board is unable to agree with the Carrier that the only discretion to be properly exercised by this foreman was to lay off.

The charge of failure to see that the laborers under Mr. Rigsbee's jurisdiction properly performed their duties, as stated in the Roadmaster's decision, was not sustained by the evidence at the investigation, in the Board's opinion. All that pertained thereto was the examination of Mr. Rigsbee. There may have been insinuations in some of the questions, but these were nullified by the answers.

In its showing after appeal the carrier presented statements and expressions of opinion of the Roadmaster already mentioned, and of others under whom Mr. Rigsbee had worked in previous years, also Mr. Rigsbee's service record, and perhaps other showings. But this did not remedy the failure to introduce evidence sufficient to establish the charges upon the investigation provided by the rules and growing out of which claimant was permanently discharged by the Roadmaster. None of this evidence submitted after appeal was presented at the original hearing appealed from, and no opportunity to meet this evidence was given at the original hearing where the Roadmaster decided claimant was guilty of what was charged against him. Upon the record shown in this docket the claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 Claimant was permanently discharged upon charges that were not sustained at the hearing thereon, in violation of Rule 1 of Article IV of the agreements in evidence.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of June, 1941.