

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5647) that:

1. The Carrier violated the Clerks' Agreement when, on May 25, 1964, it withheld from service Robert M. Winters, Rate and Tariff Clerk, General Office Building, St. Paul, Minnesota, and subsequently, on June 16, 1964, it summarily dismissed him.
2. Clerk Robert M. Winters shall now be reinstated to the service of the Carrier with all seniority and all other rights unimpaired.
3. Clerk Robert M. Winters shall now be compensated for all wages and all other losses sustained account of having been withheld from service and subsequently dismissed.
4. Clerk Robert M. Winters' record shall be cleared of all alleged charges of allegations which may have been recorded thereon as the result of the alleged violations named herein.

OPINION OF BOARD: Robert M. Winters was employed as a Rate and Tariff Clerk in the St. Paul Traffic Department from January 4, 1960 until he was withheld from service pending investigation on May 25, 1964. During that period he was absent because of illness on several occasions: June 27 - August 7, 1961 (ulcer), August 1 - 31, 1962 (nervous condition), September 16 - December 16, 1963 (nervous condition).

Carrier's May 25, 1964 notice to Mr. Winters stated that an investigation would be conducted on this matter:

"Your failure to report for work during the period May 18 to May 20, 1964, inclusive, and the erroneous statements made regarding your absence from the office."

The investigation was held on May 27 pursuant to the provisions of Rule 56:

"(a) An employe who has been in service more than ninety (90) days . . . shall not be disciplined or dismissed without investigation. . . ."

On June 15, 1964, Carrier dismissed Mr. Winters, stating, in part:

"The evidence introduced at the hearing on May 27, 1964 shows that the statements made on your behalf by your authorized agent to the effect that you were sick and that you were unable to report to work on the days involved were false and that, in fact, you were in the City Jail.

Under the facts developed at the hearing held on May 27, 1964, which clearly shows that you were guilty of unauthorized absence from employment, you are dismissed from service with the Great Northern Railway Freight Traffic Department, effective June 16, 1964."

The question before us, then, is whether the evidence adduced at the investigation demonstrates that Mr. Winters was guilty of an offense warranting discharge on May 18 to 20, 1964.

Chief Clerk H. Kirchoff, who supervises schedule employes with respect to attendance matters, testified at the investigation that:

- (1) It was general office practice for an employe unable to report for work because of illness to call in or have someone call for him.
- (2) It was general practice for an employe to secure approval of his department head before vacation leave was granted. Requests for days or parts of days for vacation are normally accepted if there is a good reason.
- (3) As of May 18, 1964 Winters had used up all his sick leave, but had three days of unused vacation leave.
- (4) Winters was absent from work on May 18, 19 and 20. On May 18 his wife called and said that he had an upset stomach and would not be in. (It was not unusual for Mrs. Winters to phone about her husband's illness.) On May 19, Mrs. Winters called with the same report. On May 20 she informed Kirchoff that her husband was under a doctor's care and would not be in the rest of the week. In light of these calls Kirchoff placed Winters on uncompensated sick leave.
- (5) On May 21, Mr. Winters phoned in the morning and reported that he had been in jail on May 18 through 20, had been released that morning on bond, and was going to be arraigned on May 22. Winters also mentioned a newspaper article about the arrest that had appeared that morning. Kirchoff informed Winters that he had no accumulated sick leave, and asked if it would be okay to use May 18 through 20 as vacation. Winters assented.
- (6) He did not know of any Rule which Winters had broken. (Presiding Officer V. P. Brown — Carrier's Assistant to Vice

President, Traffic— noted, however, that the Company felt “an unauthorized absence from work for a period of one or more days is a violation of the Clerks’ Schedule in its entirety.”)

Winters was not called as a witness. Mrs. Winters testified, however. At first she stated she had reported her husband sick although knowing he was not. Then she affirmed that “he was actually sick . . . even his father said, ‘Well, Bob is terribly sick down at the county jail’ . . . he said that Bob was sick, he was dizzy and that Bob had an upset stomach. . . . I knew he was sick on Monday morning . . . and Monday night his father told me he was sick.” Mrs. Winters said she had no direct communication with her husband while he was in jail, but, “knowing my husband, I knew he probably would be sick under this condition” because of the tension he would be under.

This evidence does not demonstrate that Winters was guilty of an offense warranting dismissal.

Insofar as the record reveals, Carrier does not have a rule calling for discharge if an employe is arrested. Nor would such a rule be proper. The principle that a person is deemed innocent until proven guilty needs no elaboration here.

There may be occasions on which an employer may appropriately suspend an employe who has been indicted for a serious crime pending outcome of the trial. But that did not occur in the instant case. On June 15, 1964, when it discharged him, Carrier obviously did not know whether Winters had committed a criminal act or whether he would be freed of the charges against him.

Since no evidence was brought forward at the investigation concerning the reason for Winters’ arrest, there is no basis for concluding that Carrier would have disapproved his absence, had it been informed of his incarceration on May 18. Information on this score which was submitted to the Board, but not made part of the investigation, cannot be considered now.

It is significant, moreover, that Carrier received timely notice of Winters’ absence. There was no violation of reporting rules (unlike the situation in many of the cited cases). Carrier was able to adjust its work assignments with a minimum of disturbance. Moreover, there was no effort to absent himself for some ulterior motive, to attend a ball game or a picnic, or the like.

What, then, of the reason given for his absence? First, it is important to note that from May 18 to 20 Winters had been incommunicado. But he called his superior immediately upon release from jail and reported where he had been. There was no attempt on his part to dissemble. Additionally, there is no evidence whatsoever that Winters instructed his wife to report that he was ill or to hide the fact of his arrest. The circumstances here were quite different from those in the usual situation where an employe must be held responsible for information furnished the employer by a member of his family.

The presence of some evidence at the investigation that Winters actually was sick, and the absence of any to the contrary, lends further support to the conclusion that the employe committed no offense against the Carrier on May 18 to 20.

Under all these circumstances, it must be found that since Carrier's dismissal decision does not find foundation in the record; it represents an arbitrary action, which should be set aside. In accordance with Rule 57 (a) an appropriate notation indicating exoneration should be placed upon the employee's record, and he should be reimbursed for any loss of compensation incurred, and returned to his former position.

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 Employee 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 violated.

AWARD

Claim sustained. Carrier shall reinstate Robert M. Winters to his former position, reimburse him for any loss in compensation incurred and place an appropriate notation upon his record indicating exoneration.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.

DISSENT TO AWARD NO. 13883, DOCKET NO. CL-15249

In Award 13883 the Referee is substituting his judgment for that of the Carrier—a function that this Board has many times held is not within its province and concerning which many citations were furnished the Referee. Such action is self-evident where, after summarizing the testimony taken at the trial, the following statement is made:

"This evidence does not demonstrate that Winters was guilty of an offense warranting dismissal."

Thus the Referee did not find that Winters was not guilty. He merely found that he was not guilty of an offense "warranting dismissal." Since Winters was found guilty, the Referee should not have substituted his judgment for that of the Carrier.

After summarizing the evidence and concluding that it did not demonstrate that Winters was guilty to the extent that dismissal was warranted the Referee thereupon proceeds to make some additional remarks in an effort to justify his ultimate conclusion. Among such remarks is the following:

"First, it is important to note that from May 18 to 20 Winters had been incommunicado."

The record may be searched in vain for any evidence, or even an assertion, that Winters was held incommunicado. To the contrary, it shows his wife testified to the effect that Winter's father had seen him in jail on Sunday night, May 17.

Next the Referee comments that upon release from jail, Winters called his superior and reported where he had been. The Referee fails to state that this call took place after the superior had become aware of the true reason for Winter's absence through newspaper publicity. But because Winters did call his superior, even though it was after the true reason for his absence became public knowledge, the Referee commends and rewards him on the erroneous basis that:

"There was no attempt on his part to dissemble."

The fact remains that concealment did take place, and any permission that may have been granted to be absent was obtained through misleading or incomplete representation.

The conclusion that the dismissal decision of Carrier does not find foundation in the record is not a finding that Claimant is free of responsibility. Rule 57 of the effective Agreement, and which was called to the attention of the Referee, provides that an employe will be reimbursed for any loss of compensation incurred only if he is found free of responsibility. As Claimant was not found to be free of responsibility, Award 13883 is in palpable error.

For these reasons, and others, we dissent.

G. C. White
R. E. Black
P. C. Carter
D. S. Dugan
T. F. Strunck