

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19807
Docket Number CL-20047

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7200)
that:

1. The Carrier violated the rules of the Agreement extant between the parties when it dismissed Mr. R. P. Provencio from the service of the Company.

2. Mr. Provencio shall be reinstated to service with all rights restored and shall be compensated for all loss of wages as result of said dismissal.

OPINION OF BOARD: This is a disciplinary case arising from claimant's dismissal from service on November 12, 1971. The dismissal was based on a November 4, 1971 hearing, following which, claimant was found guilty of failure to protect his assigned position on the night of October 28, 1971, and absenting himself from duty without proper authority. In considering these findings of guilt, along with the claimant's prior record, the Carrier determined that discipline of dismissal was warranted.

Petitioner contends that claimant's absence and actions on the date in question were beyond his control due to sickness and the taking of a strong medication which literally caused him to "pass out", thereby rendering him not in possession of his faculties until the following afternoon. The Carrier contends that, since neither the Organization nor claimant has come forward with a statement from the physician or other proof to show that claimant was truly ill and/or under medical care, Carrier could only conclude that claimant was not under medical care as he stated, but failed to report for work solely as a result of his careless and indifferent attitude.

A carrier witness and claimant were the only witnesses who testified at the hearing. The Carrier witness testified that claimant was absent from his 11:59 p.m. shift on October 28, 1971, and that claimant did not call in beforehand to mark off or advise that he would be absent. Claimant testified that this testimony was accurate and further testified that the reason for his absence and not calling in was that he took medication which rendered him unconscious from shortly after 9:00 p.m. on October 28, 1971 until the early afternoon of the next day. Specifically claimant testified that, as was reflected in the records in

Carrier's Medical Department, he was subject to severe migraine headaches which at times became unbearable and that he had left work a few times to go to the hospital for shots and then returned to work; that, according to the hospital records, he was injected with sixty milligrams of Talwin and thirty milligrams of Mellaril at 8:35 p.m. on October 28; that a Dr. John Keller who was "in partners" with Dr. Arismendi on North El Dorado had authorized the injections by a phone call to a hospital nurse who administered the injections; that, due to his not having any Talwin or Mellaril in his system since August 25, 1971, "this medication, as you can find out through any doctor or medical department or anything, has a tendency of giving you a severe blow and knocking you out sometimes"; that neither the doctor nor the nurse told him the injections would be likely to knock him out on the night in question, but he was told to have someone drive him home from the hospital; that a next door neighbor, Mr. Gary Hill, went with claimant to the hospital and drove him home at about 9:00 p.m.; and that he intended to work on October 28, but, after the injections, he went home, took off his shoes, sat in a recliner chair, and did not remember anything more until the next afternoon when a fellow employee called to say he, claimant, had been removed from service. Carrier did not offer any evidence at the hearing to contradict or impeach claimant's testimony; also, at no time during the hearing, did the Carrier request that claimant furnish statements from Dr. John Keller, the nurse, or the neighbor, Mr. Gary Hill.

Subsequent to the hearing, and during handling on the property, the Carrier stated the following in a March 30, 1972 letter:

"The record in the instant dispute fails to disclose whether or not Mr. Provencio actually received medication as he contended, and if he did, the effect such medication would have had on him. It is not reasonable to assume that Mr. Provencio was not able to notify his supervisor of his inability to protect his assignment or that he fell asleep in a chair and remained there for over 16 hours as he testified in the investigation."

Carrier also stated in its Submission that "It is inconceivable that Claimant fell asleep in a chair and remained there for over sixteen (16) hours without waking up."

These facts and the whole record make it clear that claimant's conviction was based on Carrier's not giving credibility to claimant's testimony and, hence, we must determine whether Carrier was justified in so doing. In dealing with credibility issues in prior disputes, this Board has ruled many times that credibility issues are for the determination of the Hearing Officer who heard the testimony of the witnesses and observed their demeanor and, further, that this Board will not substitute its judgment for that of the Hearing Officer. However, unlike most credibility issues, which arise from evidence

that contradicts or conflicts with a claimant's evidence, the instant record involves a credibility issue arising from the claimant's testimony only. And although we do not doubt that a credibility issue can arise from the testimony of a single witness, in appropriate circumstances, we also do not doubt that the testimony of a single witness does not create a credibility issue as surely and as certainly as does testimony which contradicts or conflicts with the testimony of a claimant. Thus, we have a threshold question of whether a credibility issue truly existed which the Hearing Officer was justified in passing on. If so, this Board will not disturb that determination; if not, the Carrier's action was arbitrary and cannot be sustained.

We note first that the quoted portion of Carrier's March 30, 1972 letter can be readily interpreted as an offer to consider further evidence in support of claimant's hearing testimony, or as a demand for corroboration of such testimony. Initially, we are confronted with the fact that this statement by Carrier was not made during the hearing, but rather, was made some four months after the hearing. If the statement had been made during the hearing, the case would be in an entirely different posture, because, then, the claimant would have been obligated to furnish corroboration or suffer the risks of having an adverse meaning put on his failure to do so. However, Carrier did not, during the hearing demand any corroboration from claimant and we must conclude that this omission was not rectified or rendered immaterial by the offer or demand published some four months after the hearing. In short, Carrier had opportunity during the hearing to demand corroborative evidence from claimant, but Carrier failed to do so and thereby left claimant's testimony of record unchallenged.

We come now to the narrow issue of whether the claimant's testimony at the hearing was of such nature that the Hearing Officer was justified in disbelieving it in the absence of any contradictory or conflicting evidence, or challenge thereof. We believe the criteria here is that evidence, which is not contradicted by positive evidence or testimony, must be inherently improbable, incredible, or unreasonable in order for a Hearing Officer properly to reject it on grounds of disbelief. Here, the claimant advanced testimony about two basic facts, namely, (1) that he went to a hospital at 8:35 p.m. where he was injected with a particular medication and (2) that the medication produced certain effects upon him. There is nothing inherently improbable, incredible, or unreasonable about the testimony on the first fact, so we hold that the Hearing Officer had no basis for disbelieving this testimony. In claimant's testimony on the second fact, he said that he was injected with sixty milligrams of Talwin and thirty milligrams of Mellaril; that any doctor or medical department could verify that the medication sometimes knocks a person out; that he was warned not to drive home by medical personnel; and that he was rendered unconscious for approximately sixteen hours by the medication. We think the testimony on this second fact could be properly evaluated, in terms of belief or disbelief, only by a person trained in the proper discipline of medicine and/or pharmacology and that it is not the kind of evidence which a lay person could reasonably reject on the mere

assumption or suspicion that the author of the testimony was lying. This is especially true in the circumstances here where the names and quantities of medication taken were in the hearing record; therefore, it was within the Carrier's interest and power to prove the falsity of claimant's testimony, if false it was, by having its own doctor submit an opinion as to the likelihood of the medication having the effects portrayed by claimant's testimony. But the Carrier did not check with its doctor, which affords further reason why a lay person such as the Hearing Officer could not reasonably reject claimant's testimony out of hand. The testimony did not deal with aspirin or some such non-prescription medication with which lay persons have at least some general familiarity and knowledge of its effects upon humans. The testimony dealt with a medication which, so far as the record tells us, can only be administered by medical personnel. Such being the case, a layman such as the Hearing Officer did not have the special training or background which was necessary to render a competent judgment on the medication's effects or likely effects upon claimant. Accordingly, on the whole record, we conclude that Carrier's rejection of claimant's testimony was unreasonable and arbitrary, and that the record does not contain sufficient evidence to support Carrier's action. We shall therefore sustain the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killam
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.