NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19905
Docket Number CL-20024

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7210) that:

(1) Carrier violated the Clerks' current Agreement when it arbitrarily terminated seniority of J. E. Coker, Memphis, Tennessee, and failed and refused to restore him to service of the Carrier after July 1, 1971.

(2) That Carrier now be required to reinstate Mr. J. E. Coker to the service of the Carrier with all his rights including seniority, vacation, sick leave, Health and Welfare rights, unimpaired, and be reimbursed for all hospital, medical and surgical expense incurred from July 1, 1971.

OPINION OF BOARD: Claimant had been in the service of the Carrier continuously since 1946 except for periods of furlough or sick leave. On June 1, 1970, he laid off sick. He was seen by a doctor on September 1, 1970 and admitted to a hospital from September 7, 1970 through September 19, 1970. Another doctor saw claimant on January 1, 1971 and stated in a letter dated October 1, 1971 that claimant had been in his care since January 1, 1971. In this doctor's opinion claimant, "has been totally disabled from his usual occupation since he was first treated by Dr. Semmes on September 1, 1970.", Exhibit A p. 3, of Organization's rebuttal, letter of Dr. Matthew W. Wood.

On July 1, 1971, claimant's name was dropped from the roster and his seniority terminated as of June 21, 1971, pursuant to Rule 26-2. (b), agreed to by the parties on January 13, 1969, effective January 16, 1969. This rule provides that: "An employee absent from work for ---, sickness, disability, --- will furnish to the supervising officer proof of right to continue absence within ten (10)days after having been absent ninety (90) consecutive calendar days, or give satisfactory reason for not doing so, and within ten (10) days following each ninety (90) day period thereafter, such proof to be in the form of a letter or statement from a reputable doctor to the effect that the employee's physical condition is such that he cannot perform his or her assigned duties. The supervising officer may, however, request such proof at any time to be furnished within ten (10) days following receipt of such request. An employee failing to furnish letter or statement from a reputable doctor as provided above will forfeit all seniority rights and be considered out of service."

The position of the Organization is that the Carrier wrongfully terminated the claimant in violation of Rule 16-1, which provides for the posting of a seniority roster, and Rule 23, headed Discipline and Grievances, which spells out the procedure for investigation of disciplinary action. This includes the right of an employe to a hearing of a claim of "Unjust Treatment." The Organization has argued that the Carrier failed to conduct an investigation under Rule 23, during which claimant could have offered a defense to the alleged violation of Rule 26-2. (b). The Organization has contended that the Carrier should have called upon the claimant for the required proof of reason for absence; that by failing to drop claimant's name from the seniority roster on January 1, 1971, the claimant was not alerted to his obligation to provide the required doctor's statement; that the doctor's statement of October 1, 1971 was sufficient to excuse the claimant's failure to comply with Rule 26-2.(b); that in any event the claimant was not in violation because he did not know about the rule as agreed in January 1969. An unverified statement signed by eleven employes was offered to support the last argument, Organization Exhibit 3.

The Carrier's position is that agreement was reached upon Rule 26-2., because both parties recognized the problems which had been created when employes had been absent for extended periods of time and had then either presented themselves for work as usual or had never returned, with no notice during such absence of their intentions. The Carrier argued that the rule is clearly stated and that there is no obligation upon the Carrier to seek out the employes for the required information. The Carrier maintained that the rule does not impose disciplinary action so that termination thereunder is not subject to Rule 23; that failure to comply with the rule automatically subjects the employe to termination as provided in the rule. The Carrier has rejected the Doctor's letter of October 1, 1971, as "too little - too late". The Carrier also contended that employes are presumed to know the rules and that in any event copies of Rule 26-2., were distributed to employes on the property and absent on leave in January 1969, Carrier's Exhibits, 5-10. As further evidence that claimant should have known about the rule, the Carrier attached to its rebuttal in the record a copy of a notice from the Organization to, "ALL SYSTEM: BOARD OFFICERS AND MEMBERS", dated January 22, 1969 which explained in detail the reason for the rule, its purpose and emphasized the following: "Under revised Rule 26-2 it will be the responsibility of the persons on sick leave, in excess of ninety days, to furnish their supervising officer proof of right to be continued on sick leave. Also, if persons on sick leave engage in other employment they will forfeit their seniority unless same is agreed to by this office and the supervising officer. Rule 26-2 was not revised for the purpose of - - - , and it now becomes such employee's responsibility to advise the Carrier not less than once each ninety day period as to their physical condition. The Carrier will no longer write them for such information, unless it desires same", Carrier's Exhibit 28. In addition, the Carrier has pointed out that claimant has forfeited his rights under Rule 26.2(c) by engaging in other employment without obtaining approval to do so. A telephone directory reference was attached to support this view, Carrier's Exhibit 27.

The Carrier also set forth in its submission a number of examples of action taken with reference to other employes which the Organization rebutted by contending that there were different circumstances in each case.

We have set forth the positions and arguments of the parties to the extent that we consider them material and relevant to the claim. In arriving at a conclusion, we have considered only those facts and situations set forth in the record which occurred after Rule 26.2 was agreed upon and information with reference to it was distributed in January 1969 by both Carrier and the Organization. We note from the Organization's rebuttal on pages 10 and 11, that the greatest emphasis is placed on the Carrier's failure to conduct an investigation under Rule 23.

On June 20, 1973, in Award 19806, this Division reached a decision as to the effect of Discipline Rule 23 with relation to Rule 26.2 We held that disciplinary action was not involved; that there was no need to conduct an investigation; that termination of the employe was "self-invoked" by the provisions of Rule 26.2, when the employe failed to comply with the requirements of the rule. Despite the Labor Member's dissent on the facts of that case, we shall follow our determination that Rule 23 does not apply and that no investigation is required.

We are of the opinion, also, that Rule 26.2 did not require the Carrier to request proof from the claimant at any time during his absence. This is demonstrated by the Organization's notice to its members dated January 22, 1969 referred to above, and from the clear language of the rule.

The doctor's letter dated October 1, 1971 is not only much too late to meet the requirement of Rule 26.2 but also, as in Award 19806, it falls far short of any evidence which would demonstrate that the claimant was unable to comply with the rule by reason of his illness or physical condition.

The claimant can hardly use as an excuse for his failure to act that the Carrier waited until July 1, 1971 to remove his name from the seniority roster. The result would be the same if claimant was terminated on the roster of January 1, 1971 because at that time he was in violation of the rule.

The action of both the Carrier and the Organization to give notice of the rule, to explain its purpose, requirements and the result of non compliance is thorough and sufficient to overcome the excuse that the claimant and some other employes were not aware of it.

The Carrier's introduction of a page from the telephone directory which included the name of, "Coker and Son Drafting, and Realty", is not sufficient evidence, standing by itself, upon which to conclude that claimant was actually engaged in other employment. However, this alleged violation is not material to the final result.

Upon the material and relevant facts of this case, and upon the result reached in Award 19806 between the same parties in a similar situation, we shall dismiss 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 Employes involved in this dispute are respectively Carrier and Employes 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

The Carrier did not violate the Agreement.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.