NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20197
THIRD DIVISION Docket Number MW-20183

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The suspension of four (4) days imposed upon Laborer Leon Leger was unwarranted and in violation of the Agreement (System File 013.31-114).

(2) The personal record of the claimant be cleared of said suspension and he be allowed thirty-two (32) hours of pay at his straight time rate in accordance with Rule 13-2.

OPINION OF BOARD: The Claimant, an extra gang laborer, was disciplined by a four day suspension for laying off without permission in violation of Rule 5.1 of the Agreement and Rule 25 of Carrier's Rules and Instructions. After a hearing, pursuant to the request of the Organization, and findings of guilt, the Carrier reaffirmed the discipline. The Petitioner asserts that the discipline should be vacated, because Claimant was not guilty of any misconduct under Rule 5.1 of the Agreement and because Rule 25, being one of Carrier's unilateral operating rules, is not controlling.

The involved rules read as follows:

Rule 5.1

> "Employees will not lay off without obtaining permission from their immediate superior, except on account of sickness or for other good cause, in which event they shall notify their immediate supervisor not later than the close of the third day they are unable to report."

Rule 25 of Rules and Instructions, Maintenance of Way Department

> "Employees must not absent themselves from duty without permission. They must not exchange duties with others or engage substitutes without proper authority."

The hearing record showed that Claimant worked his regular assignment on Friday, October 29, 1971; he observed rest days of Saturday and Sunday and, without notice to Carrier, failed to report for work on Monday, November 1. He reported for work on Tuesday, November 2, stating that he had visited a doctor due to sickness, and he was given a written notice of four days suspension for laying off without permission. At this time he did not have a doctor's slip, but he provided one the following day, Wednesday, November 3. Although the Claimant testified that he got the slip when he visited the doctor, i.e., on November 1, the slip was dated November 2. A Carrier witness, the Foreman of the Claimant's gang, testified that oral instructions had been given that Rule 5.1 referred to calendar days and, hence, the rest days of Saturday and Sunday plus the work day of Monday constituted three days under the rule; however, the Claimant said he understood the rule to mean three working days, as did another laborer who also stated that he had not received any instructions about calendar days.

On the basis of the foregoing, and the whole record, we conclude that Rule 5.1, being an Agreement rule freely entered into by both of the parties, takes precedence over Rule 25 which is a unilateral operating rule of the Carrier. We further conclude that Carrier's finding that Claimant violated Rule 5.1 is not supported by substantial evidence of record and, therefore, the discipline was arbitrary and unreasonable. The Carrier's hearing evidence did not establish the calendar theory as the intent of the parties and the text of Rule 5.1 contains not the slightest suggestion that calendar days, rather than work days, were intended by the three-day notice provision of the rule. Moreover, since Carrier's calendar day theory caused Claimant's three-day notice to fall due on Monday, November 1, the first and only day of his sickness, this means that Claimant was required to count backwards from the day of onset of sickness in order to know when to give notice under the rule. Such an unusual intent simply cannot be gleaned from the language of the rule and we conclude that a count of working days is the only intent which can reasonably be found in the rule.

We note Carrier's statement that the Rule 5.1 involved so much confusion, distortion, and abuse that the parties agreed to a new rule which eliminates the three-day notice provision. The parties of course can change the rule in whatever way they choose; however, this has no bearing on our obligation to interpret and apply the text of the rule as it existed when this dispute arose. We further note that Claimant's defense was not impaired by the discrepancy in his testimony concerning when he obtained the doctor's slip. The slip's authenticity was

not challenged, and the slip was delivered to Carrier within the time limits of Rule 5.1; thus, there is no significance in whether it was obtained on the day Claimant visited the doctor or on the following day.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1974.