

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20594
Docket Number TD-20386

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(George P. Baker, Richard C. Bond, and Jervis
(Langdon, Jr., Trustees of the Property of
(Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Penn Central Transportation Company, (hereinafter referred to as "the Carrier") (1) violated a long standing policy in refusing to allow Claimant Assistant Movement Director R. L. Shank sick-pay compensation for May 22, May 23 and May 24, 1971, and (2) violated the effective Schedule Agreement between the Pennsylvania Railroad Company (predecessor to Penn Central) and the American Train Dispatchers Association, Regulation 6-A-1 thereof in particular, by its action in assessing five (5) days' actual suspension against Claimant R. L. Shank following trial conducted June 4, 1971.

(b) Because of said violations, the Carrier shall now be required to (1) allow Claimant R. L. Shank sick-pay compensation for May 22, May 23 and May 24, 1971, and (2) remove said discipline from Claimant R. L. Shank's personal record and compensate him for all time lost in connection therewith.

OPINION OF BOARD: During the period involved in this dispute, May 22 to May 24, 1971, the Claimant held a regular assignment as Assistant Movement Director at Harrisburg, Pennsylvania, hours 11:59 p.m. to 7:59 a.m. He went on off-duty status due to sickness from May 22 to May 25, 1971 and thus, his absence from duty as pertinent herein covers May 22, 23, and 24, 1971. On May 25, 1971, he was noticed with charges of "Using sickness as a subterfuge to be absent from duty on Sunday, May 23, 1971; following hearing and findings of guilt, the Carrier assessed discipline of five days suspension.

The claim here seeks reversal of the discipline, as well as sick-pay compensation for May 22, 23, and 24, 1971, primarily on the grounds that the Carrier prejudged the case and that the Carrier's action is not supported by the hearing record. For its part the Carrier asserts that the claim should be denied in that (1) the part of the claim relating to sick pay was not handled on the property and thus, the claim should be dismissed because the claim now presented is different from the claim progressed on the property; (2) the sick pay should also be dismissed because the subject of sick pay compensation is a Carrier gratuity which does not come under the Railway Labor Act, and which has never been a matter of contract between the

parties; and (3) the hearing record contains substantial evidence establishing the Claimant's guilt of the charge.

We shall first consider the Employees' point about prejudgment, the Carrier's points (1) and (2), and then proceed to the merits. With respect to prejudgment, the Employees point to facts involving the use of the word "subterfuge" in the charge and to the summary removal of Claimant from service on the night of May 23 notwithstanding that he had not been charged with a "major offense." Conceivably, a single word such as "subterfuge" might suffice to evidence prejudgment in an exceptional case; however, this is not such an exceptional case and we find that the charge in its entirety was suitable for its intended purpose. As to the summary removal from service, since this was acknowledged as error on the next day, no finding of prejudgment can be attributed thereto. As regards the Carrier's first point, that a claim for sick pay was not handled on the property, we note that, although the Employees' correspondence on the property speaks more explicitly and more extensively about the disciplinary part of the claim than about the sick pay, this is not sufficient to show that sick pay was not handled. It is more significant that, in an October 26, 1972, letter by the Carrier's highest designated officer, we find the statement made that "the instant claim is considered as an abuse of a long-standing Company policy, wherein certain employees of the Carrier have received full pay, etc., while sick, as a gratuity." This statement can only fairly be read as evidencing that the sick pay claim was part of the parties' considerations on the property and, for that reason, the claim should be considered by the Board. We must also reject the Carrier's second point, that consideration of the claim for sick pay is barred because a sick pay compensation provision is not a matter of contract between the parties. The Carrier's own correspondence on the property, as well as Carrier statements in the hearing record, shows beyond dispute that a long-standing practice concerning sick pay compensation has remained in effect through revision of the Agreement and thus it constitutes a binding agreement between the parties. See Award Nos. 2061, 2062, 2064, and 2065.

We come now to the merits and to the question of whether the hearing record supports the Carrier's actions. The chronology pertinent to this question, as reflected by the hearing record, begins at about 6:00 p.m. on May 22, 1971, at which time the Claimant's wife phoned in to mark him off sick with laryngitis. This was Saturday. At about 8:10 p.m. on Sunday, May 23, the Supervisor of Train Operations, accompanied by a Road Foreman, went to the Claimant's residence but found no one at home. He was told by the Claimant's neighbor that the Claimant had been hauling cinder blocks during the day, that the Claimant's brother had arrived from Texas the previous day, and that the Claimant might be at his parents' home. The Supervisor and the Road Foreman then went to the parents' home, arriving there at about 9:20 p.m. The Supervisor's testimony on what happened then, and the next morning, is as follows:

"...We walked up on the porch and Mr. Shank was standing in the middle of the room taking pictures. I rapped on the door; Mr. Shank came to the door and out on the porch. I said to Mr. Shank - you do not look too sick to me. Mr. Shank asked Mr. Hanlin who he was and what his title was. Mr. Hanlin told Mr. Shank his name and title. I then told Mr. Shank that he was out of service, account using sickness as a means of being off duty. We went to our automobile, stayed there a few moments, departed there about 9:30 P.M., at which time we saw Mr. Shank and some other people coming out of the office and getting into a station wagon. The following morning Mr. Mix 'phoned me stating that I was wrong in telling Mr. Shank, he was being held out of service. I readily admitted my mistake and immediately told Mr. Hopwood, Movement Director, to call Mr. Shank and tell him he may come out on his own position that evening if he cared to. Mr. Hopwood returned the note to me and had written on the note that at 7:37 A.M., he contacted Mr. Shank and Mr. Shank advised him that he still had laryngitis, and would mark up when he was ready to come back to work. This is the first knowledge I had of Mr. Shank supposedly having laryngitis, because in his conversation the previous night there, it appeared to me that he did not have laryngitis...."

The Road Foreman, whose first acquaintance with the Claimant came from this incident, confirmed the Supervisor's testimony about the events of May 23, except for the part about the Claimant taking pictures, and also stated that the Claimant "appeared normal to me in all respects."

During the incident at his parent's home, the Claimant did not mention the nature of his sickness to the Carrier officials. In his hearing testimony the Claimant said that Mr. Hopwood phoned on the morning of May 24, stating that he could resume work that day if he cared to; however, the Claimant advised that his laryngitis was not any better, that he was going to see the doctor that day, and that he would not be back until his laryngitis was better. The Claimant acknowledged that he had hauled cinder blocks during the day on May 23, however, he went on to say that, although his laryngitis did not cause him to feel physically unfit, the condition presented difficulty in talking which, in turn, prevented him from handling his work which required a lot of talking. He also submitted a statement from his family physician stating that "Mr. Shank was ill from 5-22-71 to 5-24-71 (includes) due to Laryngitis." The Claimant's testimony about this statement, as elicited by his representative, is as follows:

"Q. You did not see the doctor until May 24th, Monday, would you tell us why that you did not see him on Saturday or Sunday?

A. Yes. There are no office hours on Saturday and Sunday.

"Q. You did see the doctor on Monday, the 24th at 10:30 A.M., is that correct?

A. Yes.

Q. And at this time, did the doctor make any statement regards to your Laryngitis or your throat condition, what I am getting at is could he tell that it was something that you had previous, a previous illness, from the date that you did see him, the reason that I am bringing this out, is that the doctor said - 'from the 22nd'. The point is how could a doctor know - 'from the 22nd' - with your throat problem?

A. Dr. Cooksey, after examining my throat noticed red spots in the throat and advised me to stay off work at least another day."

The Claimant's condition during his last tour of duty before marking off sick was the subject of a written statement by a Train Dispatcher who worked on the night of May 21 with the Claimant. In pertinent part the statement reads as follows:

"When Mr. Shank began work about 11 p.m., his voice was very strained. As his tour continued, his voice kept getting worse until it was barely audible. By morning, I don't know how the operators were able to hear him at all."

From our review of the foregoing, and the whole record, it becomes clear that neither the charge nor the Carrier's hearing evidence challenges the authenticity of the Claimant's asserted sickness with respect to the first day, May 22, and the last day, May 24, when he was seen by his physician. We therefore take as fact that the Claimant was properly off duty with laryngitis on these two dates. The remainder of the case thus narrows to the question of whether the hearing record contains substantial evidence to support the Carrier's conclusion that the Claimant was not sick on the evening of May 23, 1971. The testimony of the Carrier's two witnesses, the Supervisor of Train Operations and the Road Foreman, was to the effect that the Claimant had hauled cinder blocks during the day of May 23, that he appeared normal to them on the evening of May 23, that his speech was clearly understood by them, and that he said nothing about being sick or having laryngitis at this time. Thus, the Carrier's case in chief comes from two lay witnesses who concluded from observations and a sparse conversation that the Claimant was not sick when they saw him. Even though neither witness knew that a throat condition such as laryngitis was the sickness involved in their conclusion, we have nonetheless started with the premise that these witnesses made a prima facie case that the Claimant was not sick on the evening of May 23. In appraising the Claimant's rebuttal evidence we find the physician's statement to be especially significant because, absent a strong showing to the contrary, medical opinion normally prevails over lay opinion in regard

to fact issues concerning sickness. The Carrier asserts that the physician's statement is questionable because the Claimant did not see the doctor until after his encounter with the Supervisor on May 23, but this in no way amounts to an evidenciary or other appropriate challenge to the integrity of the statement. It is true that the Claimant did not see his doctor on May 22 and 23, because there were no Saturday and Sunday doctor's office hours; but when he did see him, a little more than 12 hours after the encounter, the doctor concluded that laryngitis was then present and had been for the two previous days. The basis of the doctor's conclusion about the two previous days is not clearly manifest of record, except for the Claimant's explanation relating thereto, but this is not pertinent because no contradiction of the conclusion was offered. Moreover, the co-worker's statement about the Claimant having difficulty in talking on the night of May 21 further corroborates the Claimant's asserted laryngitis during the period in question. On balance, then, we conclude that the Carrier's reliance on its evidence as prevailing over the Claimant's evidence, particularly the physician's statement, resulted in a hearing record which does not contain substantial evidence in support of the charge and the Carrier's action thereon. We further conclude that the Claimant's evidence was sufficient both to refute the charge and to substantiate his sick pay claim. Accordingly we shall 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 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

G.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1975.