

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22794
Docket Number MW-22857

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Port Terminal Railroad Association

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

(1) The dismissal of Machine Operator Jesus R. Perez for alleged violation of 'General Rule "B", and General Regulation 102' was arbitrary, unwarranted, an abuse of justice and discretion and on the basis of unproven charges.

(2) Claimant Jesus R. Perez shall be extended all remedies and benefits prescribed in Rule 11(E)."

OPINION OF BOARD: Claimant, a machine operator, had several years of service with the Carrier although there is some disagreement as to his continuous service. He was allegedly injured on February 16, 1977, but did not seek medical attention until March 24, 1977.

On October 26, 1977, claimant's personal physician advised the Carrier that claimant was able to return to work. On November 10, 1977, Carrier instructed claimant to report within ten days to arrange for an examination by Carrier's doctor.

On November 21, 1977, an attorney representing the claimant, advised the Carrier that claimant was not satisfied with his previous doctor; had secured an appointment with another specialist; that claimant had not recovered, and was not then able to return to work. On November 22, 1977, claimant was again notified in part:

"This is in reference to a letter from your representing counsel of November 21 advising us of your decision to change physicians following Dr. Puentes' letter of October 28 advising us of your ability to return to work.

* * * *

"You are hereby instructed to report to this office to secure the necessary papers and make arrangements for a physical examination within ten (10) days."

On November 23, 1977, the attorney wrote the Carrier that he had advised claimant to be examined by a doctor selected by the Carrier. Claimant did not comply with Carrier's instructions of November 22, 1977, and on December 5, 1977, the Carrier notified him that he was dismissed from service for insubordination.

Investigation was requested in behalf of claimant and scheduled for December 30, 1977, and later postponed and held on March 2, 1978. A copy of the transcript of the investigation has been made a part of the record. Following the investigation, claimant was notified on March 21, 1978, that he would remain dismissed from service in accordance with the letter of December 5, 1977. On March 29, 1978, Carrier's Engineer of Maintenance of Way was notified by the representative of the Organization that claim would be filed in behalf of claimant and appealed "in accordance with handling under the Railway Labor Act."

Based upon the record, we do not find Carrier's contention as to alleged violation of Article 11(c) to be valid. The Board concludes that claimant was subject to discipline for not arranging to report for a physical examination by Carrier's designated physician. However, permanent dismissal was excessive. We will award that claimant be restored to service with seniority and other rights unimpaired but without compensation for time lost, subject to satisfactory return-to-work physical examination by Carrier's designated physician.

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 discipline imposed was excessive.

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Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: AW. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1980.