

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23342  
Docket Number CL-23374

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: {  
(Brotherhood of Railway, Airline and Steamship Clerks,  
{ Freight Handlers, Express and Station Employees  
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-9280) that:

1. Carrier violated the effective Clerks' Agreement when, following an investigation on October 9, 1979, it arbitrarily and capriciously dismissed Clerk Michael R. Poer from its service effective October 11, 1979, without just cause.

2. Carrier shall now be required to reinstate Clerk Michael R. Poer to its service with seniority and all other rights unimpaired and his record cleared of any change.

OPINION OF BOARD: Claimant, Michael Poer, a Transportation Clerk, was hired on August 15, 1978 and commenced work on September 9, 1978. He was in an automobile accident on September 12, 1979. When called at home by Manager Smith on October 3, 1979 about not protecting his position, claimant said he was under the care of his personal physician, had crushed knees, was presently on crutches, used hot and ice packs, had seen his physician on September 28th and had an appointment the next week, and said that in his condition he could not be expected to come to work. During this conversation claimant was informed that his personal physician had written to the Carrier on September 25, 1979 that "I have released him for work."

On October 4, 1979 claimant was charged as follows:

"That at approximately 5:15 PM, October 3, 1979, you allegedly made false statements to Mr. J. E. Smith, Manager, INFO System, regarding the reasons for your absence from the service of the Carrier since September 25, 1979."

After a hearing on October 9, 1979 claimant was dismissed effective October 11, 1979. The Organization contends that all of claimant's statements that day were true and therefore there is no plausible evidence in the record that he made false statements.

Although claimant may have been telling the truth in a very narrow sense, e.g., he may well have been using ice and hot packs, the determination that he was not able to work was his alone and completely at odds with the repeated professional statements of his own personal physician whom he was seeing regularly, and of whose professional opinion he was aware. On September 12, 1979 the hospital he was taken to after the accident apparently prescribed routine care, including ice for forty-eight hours and released claimant with the recommendation that he see his family physician within 24--48 hours. On September 25, 1979 claimant's physician wrote to the Carrier that claimant's "X-rays are negative and I have released him for work. However, this man tells me that it's company policy that anyone hurt be given 30 days off. In my opinion this is not warranted in cases of this kind. If this is indeed a mandatory policy of your company, then I think it's okay for you to grant this type of leave and not I."

The doctor again informed the Company on October 5, 1979 that claimant was released for work on September 25, 1979, and that claimant volunteered that "he was not going back to work because his job includes walking 4 to 5 miles a day and climbing and should anything happen to his knees doing this, he will be suing someone. At this point I told him he was free to consult any orthopedic surgeon of his choice regarding his injury." The doctor went on to reiterate "My original release for work on the date mentioned above (September 25, 1979) still stands." On the Carrier's Verification of Private Medical Care form the doctor circled "Considered capable for said employment" on October 5th.

Thus consulting an orthopedic surgeon was claimant's own idea as was his lengthy use of crutches which he purchased without medical direction. Not only did claimant's personal physician seek to repeatedly disassociate himself from claimant's position that he could not work, but claimant would not explain at the hearing what treatment his doctor had performed on September 28th. From the foregoing it can be concluded that there is substantial evidence in the record that claimant was not honest about his ability to work when questioned on October 3, 1979 although aware that his own physician found him capable of doing so over a week earlier. From claimant's prior record which includes three Letters of Warning and two Suspensions within a rather short career with the Carrier termination is reasonable and justified.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:



Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1981.