

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23891
Docket Number SG-23277

George E. Larney, Referee

PARTIES TO DISPUTE: { Brotherhood of Railroad Signalmen
{ Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: "Claims of the General Committee of the Brotherhood of Railroad Signalmen on the Chesapeake District of The Chesapeake & Ohio Railway Company:

General Chairman file: 78-41-CD. Carrier file: SG-566

Claim No. 1

- a) That under the current C&O Signal Agreement, John A. Willey was unjustly dismissed and/or withheld from service beginning January 29, 1979.
- b) That as a consequence of such action, Carrier be ordered to make Claimant Willey whole for all wages and benefits lost, including all seniority rights unimpaired, all vacation rights, pay premiums for C&O Hospital Association dues and Travelers Insurance, and pension benefits including Unemployment Insurance.

Claim No. 2

- a) Carrier violated the parties' C&O Signal Agreement, as amended, particularly Seniority Rule 33, when Carrier refused to let John A. Willey return to work on January 29, 1979 after being released by his personal physician, Dr. J. D. Woodrum, M.D. As a consequence of such action,
- b) Carrier be required to restore Mr. John A. Willey to service with all seniority rights unimpaired and make him whole for all compensation and benefits lost, including all vacation rights, pension and unemployment benefits, and pay premiums for C&O Hospital Association dues and Travelers insurance.
- c) Inasmuch as this is a continuing violation, said claim is to be retroactive to January 29, 1979 and is to continue until such time as Carrier takes necessary corrective action to comply with violation cited in part (a) above."

OPINION OF BOARD: Evidence of record reflects that at approximately 9:30 a.m. on November 7, 1978, more than two (2) hours after the commencement of his tour of duty, Claimant, John A. Willey, a Signal Maintainer employed at Carrier's facility located at Thurmond, West Virginia, walked off his assignment, verbally indicating to his assistant that he "couldn't take it" and was turning in his keys. Claimant requested of his assistant that his action of turning in his keys be related to their supervisor, A. J. Goins, Sr.

Carrier interpreted Claimant's action as one of voluntary resignation, as it maintains Claimant never indicated he had marked off duty to illness until such a declaration was made in writing by letter dated January 13, 1979. As validation of its interpretation, Carrier cites two phone conversations Claimant had with Supervisor Goins on consecutive dates of November 9 and 10, 1978, in which Claimant failed to relate he had marked off his position account of incapacitating illness. Thereafter, Claimant was notified by Carrier on February 2, 1979 to attend a hearing for the express purpose of showing reasons why his name should not be removed from the Signalman's Seniority Roster. This seniority hearing was held as scheduled on February 14, 1979. On date of February 23, 1979, Claimant was notified by Carrier that based on the evidence adduced at the hearing it determined that no cause was given to show why his name should not be removed from the Hinton Division Department Seniority Roster. As a result of this determination, Carrier indicated to Claimant he had been found to have resigned on November 7, 1978.

The Organization on behalf of the Claimant initiated a claim relative to Carrier's determination he had resigned his position. It is noted from the record that Claimant, in a written communication to the Carrier on January 29, 1979, indicated he was ready to resume service. However, it was not until April 2, 1979, when in its appeal of the instant claim, the Organization tendered to the Carrier, a letter from Claimant's physician, dated March 26, 1979, releasing Claimant for return to service. Then on August 10, 1979, following a formal conference relative to the subject claims, Carrier agreed to reinstate the Claimant on the following basis:

"Without prejudice to our position above, and in view of Claimant Willey's expressed desire to return to the Carrier's service in his former capacity as signal maintainer, the Carrier is agreeable to reinstating Claimant Willey to his former seniority rights without pay for time lost, without prejudice to his right or your as his representative to pursue the instant claims further, with the understanding that before resuming duty he must first pass a physical examination so as to be qualified for Carrier service by its Chief Medical Examiner and with the further understanding that no claims will be made or entertained by any other employe by reason of Mr. Willey being reinstated."

The Organization on behalf of the Claimant accepted these conditions for reinstatement and on September 17, 1979, Supervisor Goins contacted Claimant for the purpose of setting up a date for a physical. Claimant, according to the record, requested a delay in taking the examination based on his desire to get his optical glasses repaired. Claimant also requested after receipt of the results of his medical examination, a further delay before returning to service, as he needed to give his present employer two (2) weeks' notice before resigning. Accordingly, Claimant was accommodated in his requests, taking his medical examination on October 1, 1979 and then returning to service as Signal Maintainer on October 22, 1979.

The issue before the Board is whether or not Claimant is entitled to be made whole for lost pay and other benefits between the dates of January 29, 1979 until his reinstatement on October 22, 1979. Based on a review of all the evidence of record we are persuaded the Claimant is entitled to be made whole for lost pay and other appropriate monetary benefits but not for the entire period claimed by the Organization. It is our determination that January 29, 1979 is an inappropriate beginning date as Claimant simply indicated he had been released to return to service but failed to provide any medical certification to this effect. Thus, we find that April 2, 1979 is the appropriate date on which to begin Carrier's liability as this was the date Carrier received the letter of March 26, 1979 from Claimant's physician indicating Claimant was released to return to service. With regard to an ending date we believe September 17, 1979 is more appropriate than October 22, 1979, as this was the date Claimant received call from Carrier to establish a date certain for the medical examination. It was only by request of Claimant that such examination was not held sooner than October 1, 1979 and again by request of Claimant that he did not return to service sooner than October 22, 1979.

In sum, the Board directs Carrier to make Claimant whole for all lost pay for the time period commencing April 2, 1979 and ending September 17, 1979.

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

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By

Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of May 1982.

CARRIER MEMBERS DISSENT
TO AWARD NO. 23891
DOCKET NO. SG-23277
REFEREE LARNEY

The cavalier attitude displayed by the Majority in this award is appalling and must not go unchallenged.

The Majority correctly points out that on November 7, 1978, claimant "walked off his assignment, verbally indicating to his assistant that he 'couldn't take it' and was turning in his keys." Carrier took no action to remove Claimant from service. Claimant himself initiated his own action of removing himself from service.

Nothing was heard from this delinquent individual until January 13, 1979 - more than two (2) months after he deliberately "walked off his assignment" - when he conveniently informed Carrier that he was "presently under the care of Doctor J. D. Woodrum - -."

The Majority recognized that Carrier properly scheduled an investigatory hearing on February 14, 1979 to permit Claimant to show cause why his name should not be removed from the seniority roster. The Majority, however, ignored Claimant's own testimony and admissions at that hearing where the following testimony is found:

"Q. Are you familiar with the procedure of leaving the property during the normal tour of duty?

A. Yes, sir.

Q. Did you comply with these instructions?

A. No, I didn't.

* * *

Q. Did you tell your helper to tell Mr. Goins that you were sick on November 7, 1978?

A. No, sir. I just said I couldn't take it. I have got to go home.

* * *

Q. Did you make any attempt to contact Mr. Goins on November 7th or 8th at his home to tell him that you were off sick?

A. No, sir, I didn't at home.

Q. Why did you wait from November 10, 1978 to January 13, 1979, to write Mr. Goins telling him that you were off sick?

A. I was instructed by Mr. Parker (General Chairman) to send a certified letter to Mr. Goins stating that I had been off sick since the 7th of November.

* * *

Q. When you filled out B&O - C&O form CDT-32 prior to being examined and given a motor car operator's card, you also answered questions pertaining to the general rules and additional general rules of the Chessie System, one of which is Rule 804 and Engineering Department Maintenance Rule 11 (1st paragraph) and I quote:

'No employe will absent himself from duty, nor engage a substitute to perform his duties without permission from the proper authority.'

How do you understand this rule?

A. You should not leave your job unprotected without contacting someone to let them know that you are not available. I understand the meaning of the rule, and I understand that I did the wrong thing.

Q. Did you comply with Rule 804 or Rule 11 on the morning of November 7, 1978?

A. No, sir. I did not."

(All underscoring is ours for emphasis)

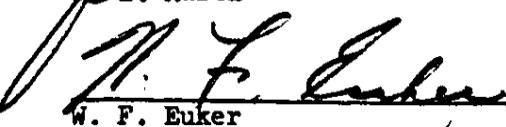
The Majority also conveniently ignored the General Chairman's statement at the end of the investigatory hearing where he said:

"I believe the record shows that Mr. Willey may have been in error for not making more effort in contacting his supervisor to inform him on November 7 that he needed to have some medical attention; however, I think the circumstances of this particular situation do justify that the Board give Mr. Willey an opportunity to return to work."

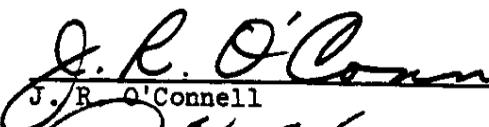
From this evidence it is inconceivable that any clear thinking neutral could conclude that the Carrier should now be required to reward an employe who knowingly walked away from his assignment without so much as a "by your leave" to anyone in authority; who stayed away for more than two (2) months and then, only at the urging of his General Chairman, came up with the "illness" excuse; who admitted at a properly convened investigatory hearing that he knew he was wrong; who didn't even bother to furnish any medical evidence to the Carrier until April 2, 1979 - nearly two (2) months after the hearing was concluded.

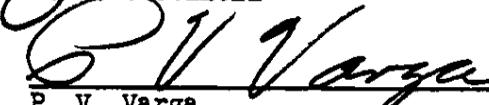
We realize that this dissent will have little, if any, effect on the outcome of this particular travesty. However, with the idea in mind that everyone should know the facts that existed in this case - facts which the Majority ignored in their zeal to impose their own brand of equity and justice - we are compelled to register this dissent in the hope that no similar miscarriage of justice will be permitted to occur in the future.


J. E. Mason


W. F. Euker


D. M. Lefkow


J. R. O'Connell


P. V. Varga