

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24321
Docket Number MW-24114

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Illinois Terminal Railroad Company

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

(1) The dismissal of Track Laborer Harry Thompson, Jr. for the alleged violation of Rule 'P' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File TTRR 1980-23).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered, including overtime pay, beginning April 16, 1980."

OPINION OF BOARD: On March 28, 1980, the Carrier directed a letter of investigation to the Claimant which read in pertinent part:

"You are hereby instructed to report for formal investigation at at the Maintenance of Way Office at Cut Street, Alton, Illinois, at 2 P.M., April 7, 1980, for the purpose of determining your responsibility, if any, for absenting from work and your alleged failure to respond to certified letter dated March 21, 1980, instructing you to report for duty on or before 7:00 A.M., March 28, 1980."

The investigation was held as scheduled. On April 16, 1980, the Carrier directed a letter to the Claimant dismissing him from employment of the Company.

This investigation bears out that the Claimant had been absent for some time prior to March 21, 1980, when the Carrier instructed the Claimant by a certified letter to report for duty by March 28, 1980, or face a disciplinary termination. The record is clear that the Claimant constructively received the March 21, 1980, letter. The letter was delivered to the Claimant's address on file, but the letter was signed for by his sister. The Claimant's testimony indicated that his sister had read the letter to him over the telephone. While there is some question if she read the entire letter, there is no doubt, based on the reading of the transcript, that he was informed that he was to report to work by March 28th.

The Carrier, in finding the Claimant guilty, relies on testimony of Mr. K. M. Oberkfell, track foreman, and Mr. T. Hitchcock, track supervisor. Both gentlemen testify that Mr. Thompson had not reported to work or contacted them to explain why he was not at work on or before March 28th. Mr. Hitchcock

also testified that his clerk, Mr. Frank Bernsen, who sits near him in the office, did not take a call from Mr. Thompson.

The Organization defends Mr. Thompson by arguing that his absence was permissible because the Claimant was under a doctor's care during this period. They produced a note at the investigation which read:

"Harry Thompson, Jr., 4/2/80. track laborer -- occupation, track laborer, injury, Illinois Terminal Railroad, place of employment, A. O. Smith, Granite City, date entered the hospital 4/30/80, date outpatient clinic is 3/18/80, and the doctor's name looks to be Richard Baldwin."

The Claimant elaborated on his medical condition as follows:

"They said I got a cracked bone on my elbow, that sometimes my arm won't straighten all the way out unless it pops out. He said what they could do was cut it and cut the bone off, but I refused that. He said I can still work with that arm. He said just don't let nothing fall on it."

The Claimant also asserts that he called Frank Bernsen "after the 21st and prior to the 28th" to notify him that he was sick.

In reviewing the evidence, it is the Board's conclusion that there is substantial evidence to support the finding of guilt. There was no doubt that the Claimant was absent, had notice to return to work, and failed to do so. The evidence does however conflict on whether he attempted to notify the Carrier that he was unable to return. Mr. Thompson alleges that he called the clerk; whereas, there is other evidence that he did not. While the absence of Bernsen's testimony is bothersome, there is substantial evidence to support the hearing officer's conclusion not to believe the Claimant. The Board's function is not to resolve conflicts in evidence or to assess credibility, but to determine if there was substantial evidence to support the hearing officer's findings. In this case, we believe there was. The Claimant's testimony, in general, was vague and confused in parts compared to that of Carrier witnesses which were more direct and more certain. Moreover, even if we were to accept that he did call in, we note that the doctor's letter wasn't produced until the hearing and also note that even a liberal interpretation of the doctor's letter would not indicate the Claimant was unable to work during the period of March 21 to March 28. The Board also notes that the letter does not make any reference to the period between March 12 and March 21 when the Claimant was also absent.

The Board has also considered whether the discipline was appropriate. Discharge for offenses such as this is usually reserved for an employee who, after the benefit of progressive discipline remains incorrigible. The Claimant had clearly distinguished himself as one of these employees. The record indicates that in the course of his relatively short employment, the Claimant received a written reprimand and a 30-day suspension for exactly the same kind of offense, being absent without authority. It should also be noted that in this respect,

there is little foundation for the Organization's assertion that the Claimant was unaware of the rules requiring regular attendance at work. Under the circumstances, discharge is not arbitrary, capricious, or excessive.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

A W A R D

Claim denied.

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 14th day of April 1983.