

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25942
Docket Number TD-25811

Marty E. Zusman, Referee

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company

STATEMENT OF CLAIM:

"Appeal of Train Dispatcher A. A. Sedillo, requesting that the notice of discipline dated November 20, 1981 be withdrawn from his record and that he be compensated for all time lost between said date and January 6, 1982. Carrier file A-LA-1-22."

OPINION OF BOARD: The thrust of this Claim is that the Carrier has not met the burden of proof in its disciplinary action against Claimant, but merely amassed hearsay, speculation and assumption in place of substantial evidence. The Claimant, Train Dispatcher A. A. Sedillo, requested both verbally and in writing to be absent account sickness beginning October 7, 1981 and continuing. The request was accepted and Claimant reported back for work on October 18, 1981 with no restrictions.

Claimant was notified by letter dated October 29, 1981 to report for a formal Hearing in connection with misrepresenting the cause of his absence and as such charged with a violation of the part of Rule 801 stating "Employees will not be retained in the service who are . . . dishonest . . ." and part of Rule 810 reading ". . . They must not absent themselves from their employment without proper authority." A Hearing was held on November 9, 1981 and the Claimant was notified on November 20, 1981 that he had been found guilty as charged. Claimant's suspension for ninety (90) days was later reduced by the Carrier without prejudice to this Claim now before the Board.

The Organization's position is that the Claimant received permission to be off due to illness. The Claimant had bronchitis and could control it through rest and fresh air. Such instructions had come from his medical doctor. The Carrier's case lacks any medical request or restriction upon return based upon medical evidence. In fact, the Organization maintains the Carrier lacks any substantial or relevant probative evidence to draw a conclusion of guilt. The Carrier has simply failed to satisfy its burden of proof.

This Board finds the Carrier's case substantial and directly to the charges. A careful review of the transcript indicates that the Claimant marked off on October 6, 1981 account of illness although he had been a consistently healthy employe for six (6) months prior to the incident at bar. Claimant wrote "R. B. Mark me off till reports acct. sick." The record shows Claimant's fiancée transferred from Los Angeles where Claimant was employed to Eugene, Oregon, leaving on October 7, 1981. On October 7 and 8, the Claimant drove with his fiancée approximately 1,000 miles to Eugene, Oregon. Claimant sought no medical treatment during his absence, but attended a wedding and a reception that followed on October 10, 1981. During that wedding he came in

contact with a Carrier Officer who saw no evidence of illness. Claimant reported later that he had no recollection of bronchial symptoms of coughing on that day. On October 13, 1981 Claimant attended a Union meeting in the home in which he stayed. He met at that time another Carrier Officer, who as a layman reported no medical problem, but did inform Claimant in a later conversation, around October 15th, to call Los Angeles. Claimant did not do so in a reasonably expeditious manner. On October 17 between midnight and 3 A.M. Claimant phoned from Oregon that he would be able to return to work the next day. Coincidentally, on the same day that the Chief Dispatcher returned from vacation, the Claimant returned to work. Claimant took an airplane from Eugene to Los Angeles and reported back on October 18, 1981, some eleven (11) days after marking off sick.

In the case at bar there is a mass of incidental and indirect evidence all pointing in the same direction to such a degree that taken together they support the Carrier's conclusion that Claimant was not sick and physically unable to protect his assignment. On the whole of the record, this Board finds that the Carrier has satisfied its burden of proving the disciplinary charge by substantial evidence. Substantial evidence, as understood clearly in this industry, has been defined as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. vs. Labor Board 305 U.S. 197, 229). In this Board's judgment, there exists sufficient probative evidence, albeit circumstantial, to reach a conclusion of guilt in the violation of Rules 801 and 810. The use of circumstantial evidence by this Board is consistent with numerous other Awards in this Division of the National Railroad Adjustment Board (See Third Division Awards: 20781, 22635, 16190, 15025, 14066). As such, this Board will not disturb Carrier's judgment in its disciplinary action and will deny 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 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

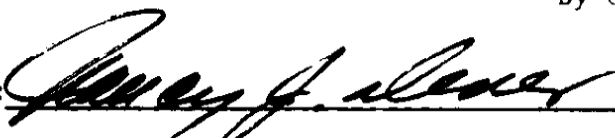
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.