

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railway Company (Southern Region))

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

(1) The ten (10) days of suspension (Appendix 'C' letter) imposed upon Trackman S. R. Thomas for alleged absence without permission from proper authority on August 8, 9 and 10, 1984 was unreasonable and unwarranted (System File C-M-2440/MG-4895).

(2) The claimant's record shall be cleared of the Appendix 'C' letter and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute arises under the parties' July 25, 1977, Memorandum Agreement concerning absenteeism. At the time of the incident, Claimant was a trackman. The record shows that on July 28, 1984, Claimant's foot began hurting while at work. Claimant sought medical attention and a small fracture was revealed. Claimant was advised to stay off his foot and the examining physician wrote an excuse which was delivered to the Carrier.

The Carrier concedes that Claimant was off from July 31 through August 7, 1984, with permission. The issue becomes whether Claimant had permission for absences after that period. A statement from Track Foreman R. Wright dated September 11, 1984, discloses the following:

"Steve Thomas was off from the 31st July, 1984 until August 7, 1984 with permission. He called me own [sic] Aug 6 and said he had to go back to the Dr. on Aug 7, 1984 and would let me know what the Dr. said. He didn't call back or let me know in any way.

On Aug 8, 9, 10 - 1984 he was away on account of this. He was also away own [sic] Aug 13-14, 1984 on this same account. He returned to work on the 15 of Aug. On Aug. 20 he came to work and I informed him he had be [sic] sent a letter giving him 10 days in the street."

By letter dated August 14, 1984, Claimant was issued an Appendix 'C' letter suspending him for ten days due to his alleged absence without permission on August 8, 9, and 10, 1984.

The Carrier's initial argument is that the Claim is moot. According to the Carrier, because of the passage of time wherein Claimant did not receive further discipline for absence related conduct (i.e., six months), the Appendix 'C' letter has been removed from Claimant's file in accord with paragraph 2 of the December 21, 1978 modification to the Memorandum Agreement and further, Claimant has been dismissed from service for absences unrelated to the instant case. We disagree and find that the Claim is not moot. As a result of the Appendix 'C' letter issued in this case, Claimant was suspended for ten days without pay and Claimant has not been compensated for that period. As the Organization correctly argues, the removal of the letter at issue and Claimant's subsequent dismissal do not negate the existence of the question of Claimant's entitlement to compensation for that ten day period.

With respect to the merits, two factual elements existent in this case require that we deny the Claim. First, the Foreman's specific assertion that he spoke with Claimant on August 6, 1984, and Claimant told him that he was going to the doctor and would let the Foreman know what the doctor said and thereafter did not do so is undenied in the record. Therefore, we must conclude that Claimant undertook an obligation to contact the Foreman concerning his status and did not meet that obligation. Second, although the Organization argues that the Carrier was aware of Claimant's status and that Claimant was absent from duty on August 8, 9 and 10, 1984, because he was instructed by Dr. Tomkins to remain off his injured foot pointing to the assertion in the on-property handling that "[o]n August 7, 1984 Mr. Thomas returned to Dr. Tomkins and as he still had pain in the foot, Dr. Tomkins requested that he remain at home and return to him on August 14, 1984," the record does not support that factual assertion. On the contrary, Dr. Tomkins record states that with respect to the August 7, 1984, visit:

"....foot improving nicely. He will try to go back to work now, I have instructed him in how to tape his foot to protect the area. He will also wear heavy shoes or boots while at work. Only minimal tenderness." [Emphasis added].

Thus, consistent with the Foreman's statement, it is fair to conclude that Claimant did not call the Foreman after the August 7, 1984 visit because Dr. Tomkins, in fact, told Claimant that he could go back to work. By failing to make the call to the Foreman as promised and by failing to secure the needed permission for absences after August 7, 1984, it is further fair to conclude that Claimant did not have permission to be off on August 8, 9 and 10 as charged.

The Organization's argument that the Carrier was on notice that Claimant would be off pointing to a statement signed by two employees that "we were present when Haywood Johnson presented Foreman Wright with a Doctor's excuse advising Mr. Wright that Mr. Thomas had been injured and when he could be expected to return to work" does not show that Claimant was excused for August 8, 9 and 10, 1984. At best, under the facts presented, this occurred immediately after the injury and covered the initial July 31 through August 7, 1984, period which the Carrier does not contest. Further, the assertion that Claimant was told by the Assistant Manager-Engineering on July 31, 1984, that Claimant could take whatever time was necessary for his injury to heal also does not require a sustaining Award in light of Dr. Tomkins' statement that as of August 7, 1984, Claimant could "go back to work now." That period to heal, assertedly given by the Assistant Manager-Engineering, was therefore over on August 7, 1984, and cannot be used to justify further absence after that date. Public Law Board 1582, Award No. 87 relied upon by the Organization is distinguishable. There, the roadmaster told the employee "not to worry and to come back when he could" after the employee told the roadmaster that the injury could keep him out of work from two to six weeks and further inquiry of the doctor concerning return to work resulted in a response that "he wasn't sure when the Claimant could return to work." Again, in this case, according to Dr. Tomkins record, as of August 7, 1984, Claimant could return to work. Claimant did not do so or seek permission to be off after that date or otherwise inform the Carrier of his status as he represented to the Foreman in this August 6, 1984, conversation.

Claimant previously received an Appendix 'B' letter dated July 19, 1984, for absenteeism. Under Section 5 of the Memorandum Agreement, the issuance of the Appendix 'C' letter with a ten day suspension was therefore appropriate.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.