

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc.
((former Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore & Ohio Railroad (B&O):

Claim on behalf of Signalman R. D. Cusimano, for payment of 15 days pay at his pro-rata rate of pay, account of Carrier violated the current Signalmen's Agreement, as amended, particularly Rules 50 and 51, when it failed to find him guilty and assessed him with excessive discipline at hearing held on July 15, 1987." (Carrier file 15-50 (87-56)

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.

Claimant is employed by the Carrier as a Signal Maintainer. His seniority dates from 1974. At the time of the incidents at issue, Claimant was assigned to a Signal Gang working four ten-hour days each week, Monday through Thursday. Claimant advised the Carrier that he had suffered an off-duty injury to his foot; and, on that basis requested and was allowed vacation time for the week of May 4, 1987. He then called in sick for Thursday, May 14, 1987 and was allowed vacation time.

On Monday, May 18, 1987, Claimant called the Tower Operator prior to the start of his tour at the tower and, at 8:00 A.M. on the Signal Gang Foreman's arrival, called him, requesting a day's vacation. The Supervisor denied his request for vacation, at which point he testified that Claimant advised him that he was sick with diarrhea and vomiting. He stated that he was not going to the doctor with his illness, at which point the Supervisor advised him that he would be marked unexcused if he failed to report. Claimant did not report for duty Monday, May 18 or Tuesday, May 19, 1987.

Claimant testified that the reason for his request for leave was that he aggravated the injury to his foot on the job on May 13, 1987, and that it had not improved, despite treatment, by May 18, 1987. There is no indication that he advised the Carrier of the fact of aggravation of his injury. Claimant denied having told the Supervisor that he was suffering from diarrhea and vomiting.

After issuance of the disciplinary notice described below, Claimant's physician issued the following note:

"[Claimant] was seen and treated in this office on May 4, 1987 for an acute injury involving the toes and metatarsal area of the right foot. X-rays did not reveal a fracture but his injury was compatible with a ligamentous strain. This may very well have required several weeks to fully heal.

It is my opinion that as of May 18, 1987, this could have been aggravated with very minor trauma, resulting in disability at that time."

The Claimant alleged car trouble on Thursday, June 18, and Monday, June 22, 1987. Again, he called to advise his Supervisors that he would be absent. Claimant produced bills for service calls and repairs for each of the two dates.

By notice issued June 23, 1987, the Carrier charged Claimant with being absent without permission on May 18, and 19, and June 18, and 22, 1987.

On April 2, 1987, Claimant had been assessed a five day suspension for being absent without authority on March 19, 1987. The discipline was protested, but not progressed off the property.

An Investigation of the charges was conducted on July 15, 1987, at which the foregoing evidence was adduced. On the basis of that evidence, the Carrier determined that Claimant had been absent without permission on May 18 and 19, 1987. He was suspended for a period of 15 days (actual), with the suspension served following his return from furlough. The charges for the June dates were dropped following Claimant's submission of documentation that he had car trouble and obtained repairs to the car on those dates.

The Organization appealed the Carrier's action. The Claim was properly progressed, without resolution, and was brought before this Board.

The Carrier argues before the Board that Claimant was afforded a fair and impartial Investigation and, in that Investigation, admitted that he was absent without permission of his supervisor. It asserts that Claimant's explanation at the Investigation for his absence, that he had reinjured his foot, is inconsistent with the explanation given at the time he requested time off, that he had diarrhea and vomiting. It asserts, in addition, that the doctors slip does not support either explanation and is not based on examination of Claimant at the time of his absence.

The Carrier argues that, in any event, Claimant's notice to his supervisor did not relieve him of the obligation to protect his assignment. It asserts that, to be excused, an employee's absence must be for good and sufficient reason and supported by competent and acceptable evidence. The Carrier urges that Claimant's weak and inconsistent explanations do not meet the tests applied by the Board.

The Carrier urges that, in light of Claimant's record and the nature of the offense, the penalty of a fifteen day suspension was appropriate.

At the Investigation, the Organization's General Chairman asserted the existence of an oral agreement between him and Carrier Labor Relations Officials that employees off work for illness for a period of up to five days could not be reprimanded so long as he notified his supervisor. It asserts that the Carrier did not deny the existence of that oral agreement; and it urges that the agreement precludes the Carrier from disciplining Claimant, since he clearly did contact his supervisor. The Organization argues that Claimant's supervisor easily could have let him off; and he urges that his refusal to do so was the result of vindictiveness. The Organization urges, in any event, that the penalty was excessive.

It is well established that an employee has an obligation to report for work as scheduled in the absence of good and sufficient reason to be absent. Upon appropriate challenge by the carrier, the employee is obligated to furnish appropriate, convincing evidence to establish proper reason for his absence.

Implicit in the Carrier's refusal to allow Claimant to be absent is its belief that he was not telling the truth. Claimant's past pattern of absences gave it reason to suspect Claimant's statements. His indication that he did not intend to go to the doctor increased those suspicions. Once reasonably challenged, it was Claimant's burden to support and document the basis for his absence with appropriate and credible evidence.

The explanations eventually offered by Claimant were inconsistent with his prior statement to his supervisor, whose testimony the Carrier credited. The explanation offered by Claimant at the Investigation presupposes, in addition, that he failed to report his injury on May 13, 1987, but continued to work that day, and said nothing about it to any Carrier official until the morning he was scheduled to return to work. The medical evidence which Claimant submitted does not support his actual injury on May 13, nor his medical treatment on or near May 18, 1987; it is simply the doctor's opinion of what could have happened.

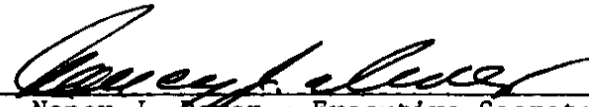
The Carrier established Claimant's absence from work without permission. The Organization failed to provide competent and acceptable evidence to support the existence of a valid reason for the absence. The Board finds that the Carrier's determination of guilt was supported by substantial evidence. The Board is also persuaded that the penalty imposed was not arbitrary or excessive, in light of Claimant's record and the offense.

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 28th day of August 1990.