

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34139
Docket No. MW-33415
00-3-96-3-938**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [two (2) day suspension] imposed upon Laborer R. Jorgenson for alleged violation of ‘ . . . Rules 3 and 13 of the General Rules and Code of Conduct, Rules of the Engineering Department, by absenting yourself without permission and failing to follow the instructions of your supervisor on October 23, 1995.’ was arbitrary, capricious and an abuse of the Carrier’s discretion.**
- (2) The Claimant’s record shall be cleared of the charges leveled against him 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 employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant has 22 years of service and holds seniority as a Track Laborer. The events giving rise to the instant claim occurred on October 23, 1995 when the Claimant told Foreman B. Goodell that he was not feeling well and requested permission to leave work. Foreman Goodell instructed him to see Supervisor of Maintenance R. Rohweder to request permission to leave. The Claimant complied with Foreman Goodell's request, but Supervisor Rohweder refused to give him permission.

The Claimant returned to work. As time passed and while working, the Claimant's condition worsened. At approximately 11:30 A.M., the Claimant informed Foreman Goodell that he was leaving work.

By letter dated November 30, 1995, the Claimant was charged with being absent from work without permission and insubordination in violation of Rules 3, 12 and 13, General Rules of Conduct, Rules of the Engineering Department. After an Investigation that was held on December 12, 1995, it was determined that the Claimant absented himself from work without permission and failed to follow the instructions of his Supervisor on October 23, 1995. As a result, the Claimant was withheld from service for a period of two days.

Supervisor Rohweder refused to give the Claimant permission to leave work because as he stated:

"... I told him there had been so many occasions leading up to this particular day where he had called early in the morning and said he couldn't make it in, wasn't going to come in, didn't want to come in, and I told him I was all done granting him any favors of giving him time off and I said no he can stick it out today and stay at work."

Thus, Supervisor Rohweder refused to grant the Claimant permission to leave the property because of previous occasions when he granted such permission which were "favors" in response to the Claimant calling in and seeking time off, because he "couldn't make it in, wasn't going to come in and didn't want to come in."

It is well established that an employee is not to be penalized for a past record of committing offenses unless he has committed a present offense. Similarly, in this case, Supervisor Rohweder's failure to give the Claimant permission to leave work was based upon giving him such permission in the past, which he characterized as "favors," rather

than confronting and evaluating the Claimant's most recent request on October 23, 1995. It was improper for Supervisor Rohweder to base his decision to reject the Claimant's request based upon previous requests by the Claimant to report for work.

This conclusion is supported by Foreman Goodell's testimony that when the Claimant approached him for permission to leave, he did not "think that he [the Claimant] was feeling well." Furthermore, Supervisor Rohweder also said that he would have granted permission for the Claimant to leave work "if I felt he was sick and he told him he was sick, I don't believe he told me that." [Emphasis added.] However, unlike Supervisor Rohweder's uncertainty about whether the Claimant told him that he was sick, the Claimant unequivocally stated that he told Supervisor Rohweder that he was "not feeling well." Foreman Goodell's testimony that he did not believe he [the Claimant] was feeling well, adds further support, albeit indirect support, in favor of the Claimant's statement that he told Supervisor Rohweder that he was not feeling well.

The Board does not find it unusual that the Claimant did not know "the particular reason" he did not feel well on October 23, 1995. As a matter of constructive knowledge, a person may be absent from work because he is not feeling well, without knowing the reason. Indeed, even a medical examination by a doctor may not necessarily reveal why the person who has been examined is not feeling well.

This does not mean that any time an employee requests to leave work early because he is not feeling well, the Carrier is required to grant the employee permission to leave. Our decision is based solely on the record in this case.

Although Rule 13 requires an employee to comply with the instructions of a supervisor, there are weighty and compelling circumstances in this case which establish that no discipline should have been imposed. It is important to point out that Foreman Goodell said that he did not think that the Claimant was feeling well. In addition, Foreman Goodell failed to instruct the Claimant not to leave or warn him that discipline would result if he did leave the property. In light of these circumstances, the discipline imposed against the Claimant is arbitrary, capricious and an abuse of discretion.

This case is not about an employee who has been charged with excessive absenteeism or been disciplined in the past about his absenteeism. Nor does the record indicate that the Claimant was required to be at work due to an emergency or other circumstances that required his presence at work.

Moreover, because of the Claimant's condition he cannot be "alert and devote [himself] exclusively to the Company's service while on duty" as set forth in Rule 3. Because Supervisor Rohweder would have permitted the Claimant to leave work, had he told him that he was not feeling well, the Board concludes that there was no factual and reasonable basis for his failure to grant permission to the Claimant.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of June, 2000.