

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36727
Docket No. CL-36606
03-3-01-3-98

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Canadian National Railway
(Grand Trunk Western Railroad Incorporated)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12703)
that:

1. Carrier unjustly assessed Troy, MI Clerk J. M. King with thirty (30) demerits effective January 28, 2000 which resulted in her dismissal from service effective February 22, 2000, as a result of an investigation held on January 19, 2000 in which it failed to prove the charges and failed to provide Claimant with a fair and impartial hearing and review of the record.
2. Carrier shall now be required to reinstate Ms. King to service with all rights unimpaired and remove any mention of this discipline from her record and pay her all lost earnings and benefits as a result of her suspension and dismissal on February 22, 2000.”

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.

This claim, initiated on March 24, 2000, protests the assessment of 30 demerit points to the Claimant as a result of an Investigation held on January 19 and 20, 2000 and a finding that the Claimant had feigned illness to avoid working on December 3, 1999.

The transcript of the Investigation reveals that the Claimant, a 30-year employee holding the position of Chief Crew Dispatcher in the Crew Management Center (CMC) at Troy, Michigan, between 3:00 P.M. and 11:00 P.M., had a conversation with T. Allen, Manager of Transportation Services, sometime after the Claimant reported to work on December 3, 1999, to discover a problem with a report generated by the computer being commingled. The Claimant explained the issue and was told by Allen to rerun the printout to see if the problem recurred. She returned to Allen's office for a second time after doing so, and, according to Allen, was visibly upset. The Claimant questioned Allen about why two of the other clerks were being given Notices of Investigation, and a lengthy conversation ensued during which the Claimant was reminded of the 25-day suspension she had previously served as well as a discussion about inappropriate conduct two days earlier and was told to focus on her own work, rather than others. The Claimant complained about her dissatisfaction with management and certain systems being used, but was unable to document any specific problems when asked to do so by Allen. The Claimant testified that she felt intimidated and threatened as a result of this conversation with Allen. Allen stated that the Claimant did not appear ill or mention any illness, but noted that she was obviously upset both when she entered and left his office the second time.

Allen testified that the Claimant passed his office two additional times within the next ten minutes but said nothing to him. He was informed by Dispatch Clerk Warren that the Claimant had marked off sick at 5:15 P.M. and was upset. Allen stated that employees are required to mark off with their supervisor before leaving the building, although they can talk to the crew office if they call in to mark off and the Clerk has authority to permit an employee to mark off. Allen testified that it was not the Claimant's failure to mark off with him that caused him to charge her

with feigning illness to avoid working that day, but that she offered no proof or explanation to anyone claiming she was actually ill prior to marking off, and he felt that being upset is not the same as being ill. Allen admitted knowing that there was a nurse on the premises that day to conduct voluntary blood pressure (BP) screenings. He was unaware of why this was occurring except to acknowledge that a few employees had heart problems within a short period of time. Allen did not know whether the Claimant had her BP taken that day or the results of such screening.

The Claimant testified that during that day there was a luncheon being run by the Safety Committee in an effort to reduce heart-related risks, because five employees had suffered heart-related problems, and that a free BP screening was offered. The Claimant stated that she initially had her BP tested by the nurse and it was 132/90, but that she returned to have it tested again after her conversation with Allen and it was 138/98. A form concerning hypertension screening was introduced into the record indicating these two numbers. The Claimant initially testified that the nurse told her to go home and that she was next in line for a heart attack and that she told this to Chief Clerk Rundel. After consultation with her representative, she stated that the nurse told her to settle down, and that she was a good candidate for a heart attack based upon the rise in her blood pressure within the hour, but that she did not recall if she was told to go home, and she did not tell this to Rundel. The Claimant explained that she felt very intimidated after her conversation with Allen, she was crying uncontrollably and went to the washroom to get herself together, and returned to her desk. The Claimant stated that she told no one from management that she was ill prior to marking off with Clerk Warren because she was unaware she was required to do so, and did not mention that she was feeling ill to anyone before leaving. The Claimant stated that after she marked off she went to talk to Senior Manager T. Gibson about feeling threatened and intimidated, and that he was on the phone, she waited for a period of time but he remained on the phone and she decided to leave because she was too upset to wait. Later during her testimony, the Claimant stated that after she had her BP taken the second time, she was upset and scared of the rise in pressure and about its possible consequences, was crying and went to the washroom where she had a bout of diarrhea which she was unable to control in time, thereby causing an accident. The Claimant stated that even if she did not have to leave work due to her BP, she could not remain after this occurred and was too embarrassed to go into details about it.

The record makes clear that Allen did not make any attempt to ascertain the condition of the Claimant's health after being told she had marked off sick, and did not suggest or require that she see a doctor or bring in a medical slip upon her return to work. The Claimant did not seek medical attention on December 3, 1999, and stated that she went home and laid down and stayed close to the toilet. The Claimant had first been diagnosed with high BP in November 1999, and intended to have it checked again the day following the Investigation when she was seeing her physician concerning a sinus infection. There was no medical documentation concerning the Claimant's condition entered into the record other than the hypertension screening record concerning the Claimant's December 3, 1999 BP readings by the nurse on the property.

The Carrier argues that there is substantial evidence in the record to support the charge that the Claimant was not ill when she marked off on December 3, 1999 to avoid continuing to work after her conversation with Allen, during which she became upset. It notes the inconsistencies in the Claimant's testimony during the Investigation concerning what the nurse told her and what she told others, the absence of any proof of illness or request that the Claimant "go home," the fact that the Claimant told no one of the nature of her illness prior to leaving, the incredulity of her changing story concerning having an accident as the cause for leaving when she admittedly sought out a Senior Manager after marking off to raise her own complaints about treatment and waited around for a period of time before leaving, the context within which her BP raised and her being upset with Allen's reference to her own and other employee's conduct, as well as Allen's straightforward recitation and notes of what occurred as supporting the absence of any illness when the Claimant marked off instead of working on December 3, 1999. The Carrier argues that the Board must not overturn its assessment of penalty in this case unless it finds that it is arbitrary and capricious and that there is no substantial evidence validating the charge, citing Third Division Awards 26152, 26153 and 26920. The Carrier asserts that it met its burden of proof, the penalty was reasonable based upon the seriousness of the charges, and that the Organization failed to establish that the Claimant was removed from service pending the Investigation in this case, which the Carrier had the right to do under Rule 26, because she was not removed until January 27, 2000 based upon the Investigation of a different charge heard in February 2000.

The Organization contends that the Claimant was denied a fair and impartial Hearing and that the Carrier failed to meet its burden of proving the charge of

feigning illness to avoid working for which the Claimant received 30 demerit points. The Organization argues that the Carrier's failure to require proof from a doctor that the Claimant was ill, which it was entitled to do if it questioned the Claimant's assertion of illness, forecloses it from challenging the bona fides of the Claimant's illness on December 3, 1999, and negates any need for the Claimant to provide documentation, citing Public Law Board No. 4772, Award 2. The Organization concludes that this was a legitimate absence for which the Claimant could not be disciplined. It also asserts that even had the Carrier proven the charges, this was a minor infraction which did not merit the imposition of such harsh discipline.

Upon a careful review of the record, the Board initially notes that we find no procedural irregularities in the conduct of the Hearing from which to conclude that the Claimant did not receive a fair and impartial Hearing in this case. With respect to the merits, the Board is cognizant of the fact that our function is to determine whether substantial evidence exists to support the Carrier's conclusion that the Claimant feigned illness on December 3, 1999 to avoid working, and, if so, whether the penalty imposed is arbitrary and capricious so as to constitute an abuse of discretion. See Third Division Award 26920.

On the record in this case, we are unable to conclude that substantial evidence exists to support the charge against the Claimant for the following reasons. First, the totality of the evidence Allen relied upon in charging the Claimant was the fact that she did not appear ill to him during their conversation, or report her illness to supervision prior to leaving work. He testified that, to him, being upset was not the same as being ill. However, in the case of an employee who suffers high blood pressure, as the Claimant apparently did, becoming upset and highly stressed can adversely affect one's health, as evidenced by the rise in the Claimant's blood pressure after her confrontation with Allen. Allen was unaware that the Claimant suffered from high blood pressure, or that she had her blood pressure tested that day on two separate occasions prior to marking off work. He did know, however, that there had been a Safety Committee initiative which resulted in the BP screening and that a number of other employees had suffered heart-related conditions at work.

Second, once Allen discovered that the Claimant marked off ill, and he questioned the veracity of such claim, he did nothing to obtain additional information concerning the bona fides of the Claimant's alleged illness. Despite his right to request medical documentation, he did not do so, nor did he request that the

Claimant provide a doctor's note upon her return to work, as he had done with other employees out for lengthier periods. Absent a Rule requiring the Claimant to provide medical documentation or a request that she do so, the Claimant is not obliged to provide it and there is no way for the Carrier to conclude that the absence was not the result of a bona fide medical condition.

See, e.g. Public Law Board No. 4772, Award 2. The only medical evidence in the record supports the Claimant's contention that the confrontation with Allen may well have caused her blood pressure to rise, and that continued presence in the work environment under such circumstances may have adversely affected her health.

In the face of such evidence, as well as the Claimant's obvious stress on December 3, 1999, and the fact that she suffered from high blood pressure at the time and that a number of fellow employees had suffered heart-related problems, the fact that the nurse may not have told the Claimant to "go home" but rather warned her to settle down, reduce her stress, and that she was a candidate for a heart attack, does not negate the existence of some medical basis for her marking off from work. The fact that the Claimant's credibility at the Hearing and her claim to have suffered from diarrhea were both found to be suspect by the Hearing Officer, a finding we accept for purposes of our limited review, does not strengthen the evidence upon which Allen based his conclusion that the Claimant feigned illness on December 3, 1999. On the record before us, we cannot find substantial evidence to support the Carrier's conclusion that the Claimant feigned illness on December 3, 1999 to avoid work, the basis for its imposition of the 30 demerit points. Accordingly, we will direct that those demerit points and reference to the charge herein be removed from the Claimant's record, and that she be made whole for any losses she may have suffered as a result of such penalty. Whatever impact that may have upon her ultimate reinstatement to employment must be determined by the parties upon remand of this matter to them and consideration of subsequent disciplinary action taken against the Claimant.

AWARD

Claim sustained in accordance with the Findings.

**Form 1
Page 7**

**Award No. 36727
Docket No. CL-36606
03-3-01-3-98**

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 17th day of September 2003.