

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. The Chicago and North Western Transportation Company violated the controlling agreement and the Railway Labor Act when it posted Bulletin dated May 16, 1979, File: 011.221.3, which is contrary to the provisions of Rules 20 and 35.
2. That the Chicago and North Western Transportation Company be ordered to rescind the bulletin of May 16, 1979, and instruct their supervisory personnel to conform with the provisions of the controlling agreement.

Findings:

The Second 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.

On May 16, 1979, the Carrier posted the following bulletin at the Carrier's M-19-A diesel facility and the California Avenue Car Shop both located in Chicago, Illinois:

That Bulletin reads as follows:

*ALL PERSONNELL
-M-19-A Diesel Facility
-California Ave. Maintenance Facility

Effective immediately, any absence of three days or more due to illness will require a medical statement from a doctor of medical facility prior to return to work.

Any reported illness of seven days or more will require medical examination by the company medical personnel and a return to duty approval.

Personal business will not be an acceptable reason to be absent in the future.

(signed): W. H. Wonnell
Manager Suburban Operations
-Mechanical

cc: R. M. Rambhajib)
D. J. Diesch) For necessary policing

FOREMEN: READ AT YOUR NEXT SAFETY MEETING"

The Organization protested the bulletin as an attempt to revise and abrogate Rules 20 and 35 of the current Agreement. Pertinent portions of the rules read as follows:

"Rule 20: "Employes wishing to be absent from work must obtain leave of absence from the foreman whenever applicable to do so, and foremen will endeavor to grant leave of absence when requested.

An employe detained from work on account of sickness or from any other cause shall notify his foreman.

Employes not in the habit of reporting late will be permitted to go to work on the first quarter hour and receive pay from the time starting to work."

Rule 35:

"The employes under the Shop Craft Organizations Agreement will not be required to submit to physical examinations unless it is apparent their health is such an examination should be made for the purpose of informing them of their disability, if any exists, in order that they may take treatment to improve their condition."

Special attention is directed by the Organization to the portion of the bulletin relating to personal business. This is directly in conflict with Rule 20 they contend. In respect to Rule 35 they note the bulletin is clearly in violation of this rule. They suggest the Carrier's motive in requiring the examinations set forth in its bulletin is to intimidate its employes into coming to work regardless of their health.

The Organization appreciates the Carrier's concern regarding absenteeism but they suggest that if an employe is abusing the Carrier by being absent without good cause, then the Carrier has the option of proving its charge through a fair and impartial investigation. That is the only manner in which the Carrier can discipline an employe. It cannot unilaterally change the provisions of the Agreement to suit its disciplinary purposes. They cite a number of cases which they believe hold that the Carrier is not privileged to add to or compromise the provisions of the Agreement. In particular they cite Second Division Awards 7632 and 8251 which dealt with similar bulletins.

The Carrier asserts that the bulletin was issued in conjunction with their fundamental right to control absenteeism. One means of controlling absenteeism is to request a doctor's certificate or physical exam. They note the right to request a physical had often been upheld by various tribunals.

The Carrier believes that the Organization is interpreting Rule 20 as giving the employes the unrestricted right to absent themselves from work. Rule 20 must be read--according to the Carrier--in conjunction with Rule 14 of the Carrier's General Regulations and Safety Rules. Moreover, they do not find anything in the Agreement which would bar the Carrier from requiring the information mandated by the bulletin. It is the Carrier's position that there is nothing arbitrary or capricious in requiring such a certificate. It is further contended that the Carrier has a special justification for requiring exams from employes who are absent for extended periods of time, who might have been absent as a result of illnesses or injuries which would preclude their returning to work. There is also the likelihood that such an employe is taking medication which would endanger his safety or the safety of his fellow workers when he returns to the shop. The employes affected by this bulletin are working in the motive power and car shops around dangerous and moving equipment. The Carrier suggests it has a right and an obligation to protect its employes.

The Organization in response to Carrier's contention that the bulletin is not arbitrary or capricious, believes it is, in that the bulletin arbitrarily demands that each employe who is absent for three days must have a doctor's statement before returning to work. This would mean that if an employe had the flu or a bad cold, or some other virus, that he would have to suffer the expense of a medical examination before returning to work. Furthermore, in all likelihood, he would have to miss an extra day of work in order to obtain that medical statement. An employe absent seven days would be required to submit to an examination by Carrier's medical department, according to the bulletin.

At the center of this dispute in general is the Carrier's right to make rules regarding the conduct of its employes at the work place and in specific the Carrier's right to require physical exams.

The Board and other tribunals have strongly stated previously that management has the clear right to make rules regarding the conduct of its employes and to require physical exams. Nothing in this award should be construed as making any implication to the contrary. However, while these rights have been endorsed it has also been stated that those rules of conduct must not be arbitrary or capricious, must be reasonably related to the needs and efficiency of the workplace and must not be in conflict with the contrary. In terms of physical exams the Carrier's right to require them has been upheld when there is a reasonable basis to require such an exam.

The Board has been faced with similar issues surrounding similar bulletins. Cited by the Organization are two such cases. The reasoning in these cases gives some overall guidance here.

A review of the bulletin in question relative to the contract and similar cases impresses us that portions of the bulletin are not only in conflict with the contract but are overly broad and unreasonable.

The bulletin has three facets and the Board will analyze them separately.

The first facet relates to absences of three days or less. This no doubt relates primarily to the Carrier's concern over absenteeism. As in Awards 7632 and 8251 the Board is sympathetic to the Carrier's efforts to combat chronic absenteeism. There is little doubt that where present such absenteeism poses a legitimate concern for an employer. However, the basic problem with this portion of the rule is its "blanket" nature. There is nothing wrong in our opinion in requiring such a statement on an individual basis where there is a clear absenteeism problem and a justifiable basis to question either the employe's ability to perform the work or the legitimacy of recurring absences. It is not reasonable however to subject all employes, including those who don't have an absenteeism problem to such a requirement. Thus, in respect to this portion of the notice, management's discretion must be exercised on an individual basis prudently and reasonably. Other preventative measures within the prerogatives of management may also be appropriate including discipline. Rule 35 does not apply here because such a statement doesn't necessarily require a physical exam. Moreover, it isn't clear if Rule 35 meant all physical exams or those strictly by Carrier doctors.

In respect to illnesses of seven days or more which under the bulletin would require a medical exam by the Company doctor, the portion of Rule 35 cited by the Organization is clear in its application. Rule 35 essentially recognizes the Carrier's right to require physical exams where there is reason to question the ability to perform their jobs. Thus, there is nothing in the Rule or this decision preventing the Carrier from fulfilling its obligation to provide a safe workplace. However, the rule also implies that such decisions be made on an individual basis. Therefore, again, the overly broad "blanket" nature of the bulletin is not only in contrast to the Agreement but to reason.

In respect to the mandate in the bulletin regarding personal business, its overly broad nature is also unreasonable. Rule 20 clearly requires that the Carrier will "endeavor to grant leaves of absence when requested." Therefore, the Carrier is contractually required to give reasonable consideration to individuals requesting to be absent. Therefore, a blanket ban on all personal leaves is contrary to the Agreement. While the Carrier must give consideration to leave requests, this award should not be interpreted to require Carrier to grant all such requests. The rule goes no farther than requiring the Carrier to consider such requests. The Carrier is within its discretion to deny such requests on an individual basis if such requests are not denied arbitrarily, capriciously or unreasonably. Moreover, there is nothing improper about not accepting unexcused personal leaves as legitimate absences.

In summary, it is found that the bulletin in question is a violation of the Agreement and the Carrier is ordered to rescind it.

Form 1
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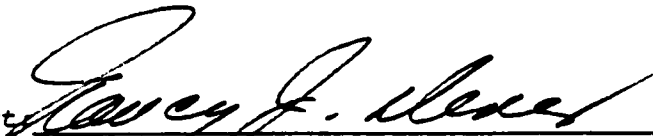
Award No. 9711
Docket No. 9069
2-C&NW-CM-'83

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November 1983.