Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3737
Docket Number 3727

Referee Richard R. Kasher

PARTIES TO DISPUTE: District Union Local 227, United Food and Commerical Workers, AFL-CIO, Agent for Employee Charles Cecil

Bourbon Stock Yard Co., Inc.

STATEMENT OF CLAIM: Has the company violated the agreement between it and the Union dated October 7, 1977, including but not limited to Section II (4) and the company's policy on conduct and discipline, by discharging employee Charles Cecil on or about August 17, 1979, without good cause? If so, what is the appropriate remedy?

OPINION OF BOARD: Claimant, employed by the Company for approximately six years as a cattle driver, was discharged on August 17, 1979, under Company Policy #2, which reads as follows:

"claiming and/or receiving sick pay as a result of falsification of an injury."

Policy #2 appears in the Company's Policy on Conduct and Discipline, under the heading of "Major Offense."

The incidents culminating in Claimant's discharge occurred on Thursday, August 9, 1979. It was a hot day, with temperatures ranging in the low-to-mid nineties. Claimant, whose shift began at 8:20 a.m., was assigned to clean out a bull pen. As a result of a combination of the mid-afternoon heat and the nature of Claimant's duties, he began to feel weak and dizzy, so he went to some nearby bleachers to lay down. His foreman discovered him on the bleachers and sent him to see the Superintendent. The Superintendent told him to go see a doctor.

According to the Organization, Claimant then went to the office of his personal physician and was given a quick examination. After the examination, the doctor reportedly sent Claimant to a nurse who filled out a return-to-work slip which the doctor had signed in blank. The nurse wrote in a date, was told by Claimant that the date she wrote in was wrong, scratched out that date, and wrote in Wednesday, August 15, 1979 for Claimant to return to light work. The Organization asserted that Claimant returned to the Company after leaving the doctor's office and gave the slip to his superintendent, who at the time, did not question it. When Claimant reported for work on August 15, 1979, he was told that he was discharged.

The Company's presentation of the facts is somewhat different. The Company asserted that Claimant, who had a problem with absence from work and tardiness, did not return to the Company after his examination, and that the Company did not receive the return-to-work slip until August 13, 1979. Upon receipt of the slip, a phone call was made to the doctor's office. It was determined that Claimant had checked in to the office but had not actually seen the doctor. On the basis of this call, the Company concluded that the slip had been falsified, constituting a violation of Policy #2, which calls for dismissal. The Company, alleges now before this Board, that Claimant violated two additional "Major Offense" policies. The Board dismisses these additional charges for being untimely.

This Board also finds that the Company has failed in its burden of proving a violation of Policy #2. We need look no furthern than the policy itself. Policy #2 prohibits "claiming sick pay as a result of falisification of an injury" (emphasis added). Claimant was not injured, he was ill. The proper charge here would have been falsification of illness, which is treated separately. Section C (1) of the Company's Policy on Conduct and Discipline provides that "falsification of an illness" is a "Less Serious Offense," for which discharge is the penalty only for the third offense. The appropriate discipline, if the charge could have been proven, should have been a one week suspension.

Accordingly, it should be noted that the record lacks any evidence of an attempt to obtain sick leave falsely. There was no showing that Claimant falsified his illness or that he altered the return-to-work slip. The Company's conclusion that Claimant did not see the doctor is not supported by the record. The only evidence suggesting such a conclusion is the fact that the doctor did not write Claimant's name down on his patient chart and that the doctor could not remember examining Claimant. The Company's call to the doctor's office was made four days after Claimant's alleged visit, and it is not suprising that the doctor did not remember Claimant, who was one of approximately forty or fifty patients that day.

Accordingly, Claimant should be reinstated to his former position with all rights unimpaired and with full back pay.

FINDINGS:

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

The carrier and the employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1980