

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25049

Docket No. 44690

99-1-98-1-S-6756

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Request for removal of unjust Record Mark, pay for time lost to attend investigation, expungement from St. Paul Switchman J. D. Faught's record of any reference to such discipline for allegedly laying off sick at approximately 2302 hours, December 20, 1995, after accepting call for assignment #4754 on duty at 2359 hours."

FINDINGS:

The First 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.

Following a formal investigation, Claimant was issued the following letter dated December 26, 1995:

"Dear Mr. Faught:

Notice of Formal Investigation was issued you under date of Dec. 15, 1995 in connection with the occurrence outlined below:

'to determine the facts and circumstances and to place your responsibility, if any, in connection with your allegedly laying off sick at approximately 2302 hours December 10, 1995 after accepting call for Assignment #4752 on duty at 2359 hours December 10, 1995 and causing the job to be blanked account no switchman available.'

Formal Investigation/Hearing was conducted by Hearing Officer R. B. Ryde on December 18, 1995 to develop all facts and circumstances in connection with the referenced charges. After conclusion and review of that investigation, Hearing Officer Ryde indicated his determination that the transcript of the investigation/hearing and the investigation/hearing record as a whole found you responsible when you failed to protect Assignment No. 4752 after having accepted call.

In consideration of the decision of the Hearing Officer stated above and upon review of your past personal record, you are hereby assessed a Record Mark for violation of Rule 1.15 of the General Code of Operating Rules. For future reference, if unable to perform duty because of sickness it is your responsibility to notify Crew Management Center before being called for work, instead of after wards. Please be governed accordingly."

In addition to arguing the Carrier has not proven its charge, the Organization raises two procedural arguments. First, it objects to the admission at the Investigation of a notarized copy of the crew dispatcher's records. Under Article 9, Section (g) of the Agreement, this is exactly the type of record that may be admitted without the necessity of having the crew dispatcher testify as to its authenticity. Article 9, Section (g) provides:

"Except as to records or documents or copies thereof which have been notarized, no oral or written statements or testimony taken at any time or place other than during the investigation will be recorded in the

transcript, nor will it be considered as evidence by reviewing agencies, unless the person or persons, making such oral or written statement is present at the investigation to testify that the statement made is his, and the signature, if any, or the written statement is his, thereby giving either the Carrier's representative of Employees' representative an opportunity to interrogate such witness."

The Carrier's argument that the presence of the Crew Dispatcher was unnecessary has validity in this case. Each and every question Claimant's representative asked in challenge of the proffered record was admitted by Claimant during his examination. There is no question that Claimant was rested, received a call to come to work, accepted the call, and then, approximately one hour later, called back to say he could not work because he was sick. Knowing that Claimant would make such admissions, his representative's demand that the Crew Dispatcher be called to testify had no valid purpose, except maybe to delay the process and cause unnecessary inconvenience and expense.

The Organization next objected to the fact that the Hearing Officer issued the discipline to Claimant. As this Board has noted on many occasions, the Hearing Officer is in the best position to make such a determination in that he has observed the demeanor of the witnesses. It is much more difficult to make decisions regarding the credibility of witnesses if it must be done based solely upon a written transcript.

Turning to the merits, we must question the Carrier's determination that Claimant called in sick to avoid working a yard job. The only uncontroverted evidence is that he called in sick, albeit after he had been ordered for the job. There is no basis for inferring he was only trying to avoid a lower paying job, as the Carrier does. If the Carrier doubted he was sick, it could have directed him to provide documentation from his doctor. While we are sure there are abuses, the fact remains that employees do get sick, and sometimes they may feel well enough to work when they are called, but become more ill as time progresses.

The Carrier has the burden of proof in this case. It has not cited a rule that specifically prohibits an employee from calling in sick after he has accepted a call. Absent some indication Claimant was not ill, he must be given the benefit of the doubt. The Carrier has not met its burden, and the discipline imposed must be rescinded.

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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 First Division

Dated at Chicago, Illinois, this 9th day of September 1999.