Award No. 1261

Docket No. 1182

2-K&IT-CM-'48

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

THE KENTUCKY AND INDIANA TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Carman Helper William Clayton Wells was unjustly deprived of his service rights from September 2nd until September 11, 1947, inclusive, and accordingly the carrier be ordered to reimburse him for nine days at straight time, $80.64, and one day at overtime rate, $13.44, or a total of $94.08.

EMPLOYES' STATEMENT OF FACTS: Carman Helper William Clayton Wells, hereinafter referred to as the claimant, entered the service of the carrier as such at Louisville, Kentucky, and was regularly employed on the 11 P. M. to 7 A. M. shift, seven days a week, with a seniority date of August 2, 1943, on the carmen helpers' seniority roster.

The claimant, early on the morning of September 2, 1947, reported the reason why his assignment from 11 P. M. to 7 A. M. was not filled on September 1, 1947. On September 2, 1947, the claimant was suspended from the service, and was summoned to attend a hearing at the general car foreman's office at 10 A. M., Saturday, September 6, 1947. This is affirmed by the submitted copy of letter addressed to the claimant by Mr. G. O. Prosser, dated September 3, 1947, identified as Exhibit A.

The hearing was held as scheduled, and a copy of the transcript record is submitted, identified as Exhibit B.

On September 9, 1947, the claimant was further suspended, with instructions to resume work at 11 P. M., Friday, September 12, 1947. This is affirmed by copy of letter addressed to the claimant by Mr. G. O. Prosser, identified as Exhibit C.

The agreement effective August 1, 1943, is controlling.

POSITION OF EMPLOYES: It is submitted that the claimant did not, as alleged by the carrier, violate any of the terms of the aforesaid controlling agreement, inasmuch as he was off duty due to circumstances completely beyond his control (over-sleeping) and upon awakening he reported to the carrier at 9 A. M. by telephone at the earliest possible time as he had no phone available at the time of awakening; therefore, he reported to the carrier in

question has been raised on the First Division many times, Awards 5185, 5199, 5397, 9542, 11820, and 11829 using unambiguous language to the effect that an employe's past record could and rightfully should be considered in determining the discipline to be administered.

What of organization's inference that the discipline administered in this case was "heavy handed" and out of proportion to the violation? Claimant failed to protect his assignment without explanation on two occasions within the year prior to September 1, 1947. For failure to protect his assignment on those two occasions (March 2 and August 17, 1947) he was not removed from the service but was cautioned and given leniency consideration by his foreman. Having failed to protect his assignment a third time within a span of seven months, carrier was of the opinion that suspension was the proper course to pursue in claimant's case, for missing assignments without explanation was becoming habitual with this employe.

Claimant here was treated no different from other employes. The discipline assessed was impartial. Carrier having pointed out that the claimant was indifferent to his obligations, he ought not, therefore, to be paid for the ten days' suspended.

CONCLUSION.

The transcript revealing claimant's failure to protect his assignment in the instant case and his record showing repetitions of offenses of the same nature in the preceding seven months, carrier is of the opinion that it has not acted unreasonable or unfair in declining to pay claimant for the ten days held out of service and urges the Board not to disturb the discipline administered.

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 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 were given due notice of hearing thereon.

Was this a proper case for suspension pending a hearing, as authorized by Rule 30 of the current agreement? This rule provides: "Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule."

This Division, in Award 724, construed this language to have the following meaning: "The rule does provide for suspension in proper cases. It does not give to the carrier the right to suspend in every case, but limits that right to proper cases. By proper cases must be meant cases of a serious nature, not a small infraction of the rules or the current agreement." See also Award 1158.

Under this interpretation we do not think the offense here charged was of such a serious nature that it was a proper case for suspension prior to the hearing. We therefore find that claimant was improperly suspended on September 2, 3d, 4th, and 5th, 1947, and that he should be compensated for those days.

Claimant failed to report for his regular assignment on September 1, 1947, due to the fact that he had overslept his reporting time. Since sleep is subject to regulation and control, an employe is not unavoidably kept from work when he oversleeps and because thereof fails to report and protect his assignment. Nor is it a good cause for failing to do so within the intent and meaning of the provisions of Rule 17 of the current agreement. Failure of an employe to protect his assignment because of oversleeping is ground for reasonable discipline, the extent thereof depending on the facts of each case.

The past record of an employe can rightfully be used in determining the discipline to be imposed. It is not proper for the purpose of determining the employe's guilt or innocence of the offense charged, and on which the hearing is being held, but to determine the extent of the discipline to be imposed in case he is found guilty thereof. It is not only proper but essential, in the interests of justice, to take the past record into consideration, for what might be just and fair discipline to an employe whose past record is good, might, and usually would be, inadequate discipline for an employe with a bad record. The discipline imposed, considering all of the facts, was reasonable.

AWARD.

Claim sustained for September 2nd, 3rd, 4th, and 5th, and compensation allowed for said dates at straight time. Otherwise the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary.

Dated at Chicago, Illinois, this 14th day of July, 1948.