Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6950
Docket No. 6850
2-CRR-MA-'75

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers A.F.L. - C.I.O. - Machinists
(Clinchfield Railroad Company

Dispute: Claim of Employes:

1. That under the terms of the Agreement, Machinist J. D. Kniceley was unjustly suspended from the service of the Clinchfield Railroad Company, on the date of July 24, 1973, pending investigation. Investigation was held on August 7, 1973, on the date of August 16, 1973, he was notified that he was dismissed from the service of the Clinchfield Railroad Company as of July 24, 1973.

2. That accordingly, the Clinchfield Railroad Company be ordered to compensate Machinist J. D. Kniceley in the amount of eight (8) hours at the pro rata rate for each day of his work week assignment beginning on the date of July 24, 1973.

3. And, further, that he be restored to service, with all rights unimpaired, health and welfare benefits restored and paid for during the time he is held out of service and all seniority and vacation rights restored as if he had continued in the employment of the Clinchfield Railroad Company.

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.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute is the fourth dispute before this Division in the past fourteen months involving the same parties. In Award 6746, rendered on July 30th, 1974, the Board held that there was no Agreement violation in the Carrier's

requiring a medical report or the Carrier's questioning of the physical condition of an employee: the Board required that an employee be given more than one hour's notice for a medical examination. In Award 6806 rendered on January 6th, 1975, the sole question decided by the Board was whether or not Rule 19 was violated when Claimant was suspended for 30 days (on the Carrier's allegation that the Claimant was seen working at a local service station on certain of the days he was absent, which Claimant denies) without an investigative hearing. This Board held only that Rule 19 allows the grievant to request an investigative hearing within certain time limits and the rule does not require Carrier to conduct one. In Award 6814 rendered by the Board on February 14th, 1975, the Board found that the Claimant had marked off from work under false pretenses on September 11th and 12th, 1972: a 60 day suspension was thus upheld. In the present case, the Claimant was suspended from service on July 24, 1973, for failure to detect and repair a worn out brake shoe, violation of Rule 802 and general unsatisfactory service because of excessive absenteeism and negligence of duty on prior occasions. An investigation was held on August 7, 1973; and the Claimant was notified of dismissal on August 16, 1973. None of the above-referenced Awards had been rendered at the time of discharge.

The Carrier contends that this Board is limited to the issue of whether or not the Claimant was unjustly suspended pending investigation. We disagree. While the notice of intent letter of the IAM to this Board is clearly deficient in certain regards, the initial claim was precise in content (see Employe Exhibit 3); and the Carrier officer's response (Employes Exhibit 4) is also clear that the issue of the Claimant's dismissal was the primary issue on the property. The submissions before the Board also bear this out.

We will first consider the charge that the Claimant failed to detect and repair a worn-out brake shoe; and the charge of negligence of duty on prior occasions. Concerning the brake shoe. Claimant worked the third shift, 11 P.M. to 7 A.M. Claimant made the inspection in darkness with a flashlight. The brake shoe in question was an inside shoe, and is partially blocked from view by the truck frame. The brake shoe, however, was inspectable with proper diligence. After the Claimant had left work, it was determined that the Unit in question would be used on Train No. 18. This train received special attention; and the usual practice is to advise the inspector concerning which unit will be used on Train No. 18. The Claimant was not so advised on the night in question. It was noted by the Claimant's foreman that had Claimant been advised the unit in question was to be used on No. 18, he believed the Claimant would have found the defect. The defense is raised that such a shoe could have made a normal pusher trip and that it was a judgement matter for the inspector who lacked clear standards from the Carrier. While much of the questioning is persuasive in this regard, ultimately from the testimony of Foreman Miller, and Machinists Sparks and Broyles, it becomes evident that the Claimant should have detected and changed the shoe. No train delay resulted from the changing of

the brake shoe. Certainly, by itself the failure to detect and change the defective brake shoe is not a dismissible offense. The Carrier's charge of negligence of duty on prior occasions consists of two letters relating to units dispatched to the Seaboard Coast Line Railroad. One letter dated June 18, 1973, charged the Claimant with failure to detect sharp flanges and a high flange on Unit 3602 on June 13, 1973. The second letter dated June 26, 1973, admonished the Claimant for failure to detect a sharp flange on Unit 3616 on June 15, 1973. The record is clear that it is the foremen's responsibility to keep a watch on the list of flanges approaching condemnable limits (too sharp or high) in selecting units to go down on the Seaboard. Unit 3602 was reported a total of five times on the Carrier's list. Unit 3616 was a new unit that the Carrier had significant trouble with its truck; and it admittedly developed a sharp flange extremely fast. From other factors as well, developed at the investigation, the Claimant was responsible for missing the defects in Units 3602 and 3616. But the Carrier's foremen were responsible as well for allowing the units to go down to the Seaboard. The Claimant's foreman, Mr. Bob Miller, testified that he considered the Claimant a good employee; and that considering the three charges of neglect of duty as well as his fourteen years of service with the Carrier, he nevertheless felt that his work record was satisfactory. We find that it is within the Carrier's prerogative to discipline the Claimant under the above circumstances; however, the discipline of dismissal for the above related work performance is excessive.

Carrier claims that the Claimant violated Rule 802. Rule 802 is a Carrier Rule and is not a rule contained in the Agreement of the Parties. It states in pertinent part: "Employees must not...engage in other business without permission from proper authority". The Claimant contends that other employees work an outside job without ever having received permission from the Carrier; Mr. Bowman, the General Locomotive Inspector, stated that no one has been charged with a Rule 802 violation except the Claimant. The Claimant further contends that he and Mr. Walker, a union official, talked with Mr. Ralph Miller, the Personnel Manager, about the Claimant's working in a service station and he claims to have been advised that it was not a violation of Rule 802 if it did not interfere with his railroad work: this claim is not rebutted. We find that Rule 802 is a valid rule and the employees are required to comply with this rule, where adequate notice of intent to enforce this long-standing, never-before-used rule is reasonably communicated to all employees. See Award No. 1581 of this Division. It should be noted in Award No. 1581 the Carrier issued a notice to all employees nine months before the discipline in question, calling attention to the rule and advising that "this rule will be strictly enforced and any employe who engages in other business... without first securing permission of the undersigned will be subject to disciplinary action". Further, fundamental fairness requires that rules be administered in a reasonably consistent manner. This Board does not require absolute consistency in the application of company rules, but just reasonable consistency. We find that charging the Claimant with a Rule 802 violation, under the narrow circumstances discussed above to be improper. We do not strike down Rule 802 but we admonish that Carrier communicate its intent to

enforce this rule to all its employees and specify the Carrier officers who have authority to grant or deny permission. Rule 802 is certainly a valid process for determining, on an individual basis, whether or not the outside employment in question will interfere with the employe's work for the Carrier.

The Carrier contends that the Claimant's excessive absenteeism is such that it, either alone or coupled with the other violations, is proper grounds for discharge. We disagree. The claimant underwent surgery in December 1970 for kidney stones and was forced to lose much time from work due to this operation. His body continues to manufacture kidney stones, but he is able to pass them, in significant pain. His record of absences from January 1, 1973 to the date of discharge is much improved over his past record. He missed 18 full days and went home early 13 days. Five of the full days were due to sickness from abscessed teeth, which is a non-recurring matter. Clearly the Claimant's medical problems are proving to be a hardship for the Carrier as well as himself. However, Rule 12 requires that if an employe is unavoidably kept from work, he will not be discriminated against. The Carrier does not allege or prove that the Claimant was marked off his position under false pretenses on any one of the absentee dates from January 1, 1973 to July 23, 1973. In Award No. 6814 we found that the Claimant had marked off from work under false pretenses on two dates, but he suffered a sixty-day suspension as a sanction for that conduct. Contrary to Carrier's rebuttal, Award No. 6814 made no finding on the charge of excessive absenteeism. In light of Rule 12, and absent any showing whatsoever that Claimant was absent under false pretenses, we cannot say that the Claimant's absentee record is a proper basis for his discharge either alone or coupled with the previously discussed charges.

We found above that discipline was warranted concerning the Claimant's work performance during June and July of 1973. In assessing discipline it is proper for the Carrier to consider the entirety of the Claimant's past record, including the discipline imposed in Award No. 6814. We find, however, the discipline of dismissal to be excessive.

We find that the Claimant should be reinstated, without back pay, but with all other rights unimpaired. Payment of health and welfare benefits during the period out of service is denied. We require that the discipline imposed be made part of his record. We find the Claimant shall be subject to Rule 802 as outlined in the Findings. We find further that the Claimant has an obligation to protect his assignment at all times unless unavoidably kept from work.

A W A R D

Claim sustained to the extent indicated in the Findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of September, 1975.