Award No. 4306
Docket No. 4021
2-SOU-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Carmen)

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the Current Agreement Carman W. C. Eubanks was suspended September 17, discharged from Carrier's service September 23, and reinstated to service without pay for time lost September 26, 1960.

2. That accordingly the Carrier be ordered to compensate the aforesaid employe for all time lost September 17-26, 1960, inclusive.

POSITION OF EMPLOYES: It is submitted the claimant was subject to the protection of the provisions of the aforesaid controlling agreement made in pursuance of the amended Railway Labor Act, particularly the terms of Rule 34, which reads in pertinent part:

> "An employe will not be dismissed without just and sufficient cause or before a preliminary investigation, which shall be held immediately by the highest officer in charge at the point employed. If, after the preliminary investigation the case is appealed, an investigation will be held within five days and if it is found that the employe has been unjustly taken out of service, he shall be reinstated and paid for time lost."

The employes submit the claimant was taken out of service and discharged without just and sufficient cause or a preliminary investigation.

and Rule 21, which reads:

> "In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible."

The employes further submit the claimant was unavoidably kept from work. He notified his foreman as early as possible, and explained his absence. A

Award No. 1275, Referee Sembower:

". . . we cannot interfere where no material error appears in the transcript of the proceedings and there is such basis for the discipline that it cannot be said to have been arbitrary, unreasonable, or in bad faith . . ."

Attention is directed to the following additional awards of the Fourth Division:

257	671	901	1124
264	677	912	1152
337	755	978	1201
375	796	1008	1218
401	804	1048	1241
574	844	1081	1268
622	899	1102	1270

The Board, guided by the principles of its prior awards, hereinabove quoted or cited, has no alternative but to deny the claim and demand here presented by the Brotherhood.

CONCLUSION

Carrier has conclusively shown that:

(a) The charge against Carman Eubanks was proven and he was dismissed for just and sufficient cause.

(b) The discipline administered was not imposed as a result of arbitrary or capricious judgment or in bad faith. Carrier's action is fully supported by the principles of awards of all four Divisions of the Board.

Carman Eubanks, having been dismissed for just and sufficient cause and having been reemployed on a leniency basis, does not have any contract right to be paid the compensation here demanded on his behalf. The Board cannot, in these circumstances, do other than follow its prior decisions and make a denial award.

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 were given due notice of hearing thereon.

Claimant was charged with failure to protect his assignment on September 16, 1960, when he did not report for work and gave no notice to his foreman as required by Rule 21 of the agreement of the parties. This rule reads as follows:

"In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account

of sickness or for any other good cause shall notify his foreman as early as possible."

From the record it appears that prior to the time for his shift as carman on the day in question, which was from 3:30 P.M. to 11:30 P.M., claimant, feeling ill, consulted a doctor who treated him and later made a written statement that claimant was suffering from acute tonsillitis and cold. The doctor's statement indicated he did not consider claimant able to work that day, September 16, 1960, however, claimant testified that nevertheless he expected to work but fell asleep at home after seeing the doctor and missed his shift. He also testified that when his wife came home she awakened and asked if he had called the shop. When told "no", she then tried to call but there was no answer. Incidentally, it does not appear that she tried to telephone more than once.

When claimant reported for work the next day, September 17, he was suspended and, following an investigation held on September 21, 1960, he was discharged. However, in view of his past record, he was restored to service, effective September 24, 1960, on a leniency basis, but without pay for lost time from September 17 through September 23, inclusive. As a consequence, the claim now before us was filed and was duly processed on the property in compliance with the current agreement but without settlement satisfactory to employes.

In the main, the material facts are undisputed and the issue is therefore whether claimant's dismissal was for just and sufficient cause as required by rule 34 of the applicable agreement and, in view of his reinstatement to service, whether the penalty assessed was so harsh as to be unconscionable or an abuse of discretion.

Certainly (as we said in Award 4133), claimant is entitled to protection of Rule 21, but did he comply with its requirement. Apparently he did not make timely effort so to do. It is of course regrettable that he was ill, that he became drowsy and fell asleep, but that does not excuse failure to comply with a rule which calls for early notification of his foreman. Nor was compliance effected by his wife's later and unsuccessful effort to telephone claimant's foreman. Neither did his intention and resolve to work his shift (as against doctor's advice) excuse his later failure to report for his assignment. Good intentions cannot excuse failure to follow a rule designed to protect both the employe and the work. Nothing less than actual notification of the foreman effectively serve the purpose of the rule.

We believe the record discloses just and sufficient cause for carrier's finding that claimant failed to protect his assignment, and, as was said in Award 3430: "We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty." Also, in the case now before us, we cannot find in the record circumstances which lead to a belief that the penalty assessed amounted to an abuse of discretion. It is therefore our conclusion that the claim before us cannot be sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1963.