Award No. 6237
Docket No. 6096
2-IC-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, T. E. Gibbs, Jr., Car Oiler, was unjustly dismissed from service of the Illinois Central Railroad on May 28, 1970.

2. That accordingly the Illinois Central Railroad be ordered to reinstate T. E. Gibbs, Jr., Car Oiler, to service with seniority unimpaired, paid for all time lost, and any other benefits he would be deprived of while being held out of service.

EMPLOYES' STATEMENT OF FACTS: T. E. Gibbs, Jr., hereinafter referred to as claimant, entered the service of the Illinois Central Railroad, hereinafter referred to as the carrier, in the year 1964. At the time of the incident giving rise to the instant claim, Claimant was regularly employed by carrier as a car oiler at Johnston Yard, Memphis, Tennessee, with work week Wednesday through Sunday, rest days Monday and Tuesday.

On May 8, 1970, Carrier's Shop Superintendent F. E. Collins addressed the following letter to claimant:

"Memphis, Tennessee
May 8, 1970
(Johnston Car Shop)
PR-7032

Mr. T. E. Gibbs, Jr.
708 Sims Avenue
Memphis, Tennessee 38106

Please arrange to be present in my office at 2:00 P. M., Friday, May 15th, 1970, for a formal investigation to determine your responsibility, if any, for being absent from your assigned duties as

Also see Second Division Awards 2087, 2769, 3874, 4000, 4001, 4098, 4132, 4195, 4199, 4693, and Third Division Awards 419, 431, 1022, 2297, 2632, 3112, 3125, 3149, 3235, 3984, 3986, 5011, 5032, 5881 and 5974.

The company was neither arbitrary nor capricious in dismissing the claimant in the face of his repeated disregard for the rules. The company suggests that the Board follow the long line of its awards and again refuse to substitute its judgment for that of the company.

D.

THE MONETARY CLAIM

The union is claiming all time lost in addition to reinstatement to service. Without prejudice to the company's position that the claimant deserved dismissal, the company wishes to point out that even if the claimant had not been dismissed for just cause, he would have been furloughed in a force reduction on June 17, 1970. This occurred little over one month after he was dismissed from service, and as of this writing he would not have been recalled to service. Therefore, it is clear that the claimant is not entitled to any compensation allegedly lost after the date upon which he would have been furloughed.

Secondly, if the Board should sustain this claim, the company requests that it follow the long line of awards which hold that the claimant would, at best, be entitled to recover net wage loss: time lost less outside earnings, if any.

The company has shown that the claimant did, in fact, absent himself from work on April 25, 26 and 27, 1970, without the permission of his superior, as required by the rules. This fact is both supported by company witnesses and admitted by the claimant. Clearly, he is deserving of some discipline.

The company has also shown that the claimant's past work record demonstrates a repeated disregard for the rules and excessive absenteeism. The company is not required to continue an unreliable employe in its service, and it is clear from the record that the claimant is unreliable. The company submits that the Board should not substitute its judgment for the company's in this case, because the decision was neither arbitrary nor capricious; to the contrary, the company has been most lenient for a long period of time.

Finally, even if the claimant was unjustly dismissed, the claimant is not entitled to any compensation after the date upon which he would have been furloughed had he not been dismissed for just cause. Therefore, the monetary claim should be limited to cover the period between the notice of dismissal and June 17, 1970, less outside earnings.

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.

The Claimant was dismissed from service for violation of Rule 23 of the Controlling Agreement on April 26, 1970.

The Claimant testified at the hearing on the property that his baby daughter was injured at approximately 2:00 P. M. that day, just about the time he was to leave for work. He took her for emergency treatment to a hospital. He alleged that as soon as possible he endeavored to contact supervision on the telephone to explain his failure to report for work at 3:00 P. M.

The Carrier did not controvert the fact that the Claimant's baby suffered an injury which required treatment at a hospital. It sought to challenge his claim of having made an effort to contact supervision. It is noted that April 26, 1970, was a Sunday, and it is conceivable that no one was answering the telephone at the number claimant had for the yard office. The hearing record indicates that Carrier's witnesses did not strongly contest claimant's inability to get an answer to his calls.

We have held that a rigid application of Rule 23 cannot be justified. See Award 4727 (Johnson). The proper concern of a parent for an injured child must permit a liberal approach to the requirements of the Rule. Claimant could not reasonably have been expected to disregard the cries of an injured baby, and coolly get on the telephone to seek out his foreman to apply for permission to proceed to have the child treated. The Carrier did not successfully establish a doubt as to whether claimant's efforts to contact supervision were made as soon as possible under the circumstances.

The Carrier, although it stated that its investigation was not based thereon and therefore the penalty it imposed did not directly stem therefrom, gave heavy weight to the employe's attendance record for the previous year in its refusal to reverse the decision of the Shop Superintendent to remove him from service.

We have held that if the alleged incidents which gave rise to the imposition of discipline did not warrant the action taken against an employe, we would not examine into his prior record.

We find that the charge of violation of Rule 23 by claimant on April 26, 1970 was not supported by the record herein and, therefore, the claim must be sustained. Pay for time lost shall be less any earnings which the claimant had during the period when he would have been employed by the Carrier herein.

AWARD

1. Claim sustained.

2. Claim sustained subject to limitations set forth in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of February, 1972.

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