

Award No. 4107
Docket No. CL-4082

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that The Ogden Union Railway and Depot Company and/or its Officers, after granting Mr. J. A. Allen permission to be absent from duty May 14, 1947, arbitrarily and capriciously imposed the penalty of dismissal upon Mr. Allen, withholding him from the service of the Company from May 19, 1947 until June 17, 1947, on which latter date they reinstated him to his position without prejudice to this time claim, which penalty was unreasonable, unjustified and wholly unwarranted; and

The Ogden Union Railway and Depot Company shall now compensate Mr. J. A. Allen for full wage loss suffered as a result of such dismissal.

OPINION OF BOARD: J. A. Allen had been in the Carrier's service since June 20, 1928. On May 14, 1947, he held a regular assignment as Embargo Clerk in the Carrier's Yards, his tour of duty being 4 P. M. to midnight. At the hour of 1:30 P. M. of such day he called W. C. Jensen, the Assistant Chief Clerk at the Yards, by telephone and asked permission to lay off on account of sickness. Jensen's statement as to what was said during such conversation, which is undenied, is in substance as follows: That he told Allen there were no extra men available to fill the job so he could rearrange; that Allen replied he was sick, had been in bed and that when he got through talking he was going back to bed; that he then questioned Allen about his statement as he knew it would involve overtime but finally told him he could lay off when he continued to insist he was sick. Allen's position was then filled by the Carrier at the overtime rate.

May 16, 1947, Allen was charged with having failed to protect his regular assignment at 4 P. M. on May 14th. On May 19th after an investigation and hearing, apparently conceded to have been in conformity with the Agreement, he was advised the charge had been sustained and was dismissed from the Carrier's service. Later, and on June 17, he was reinstated and assigned to his former position at the Yards.

The only essential differentiating features in this case and those involved in Award 4106, this day rendered, are to be found in the fact that the instant employee was permitted to lay off because of his representations as to illness and in the Brotherhood's additional contention, based on such fact, that when Allen called and advised the Carrier he was ill and on that representation procured authorization to lay off, he had protected his assignment regardless

of the truthfulness or correctness of the reason given by him for his absence. We refuse to subscribe to the view that a lay off procured by subterfuge and misrepresentation of an employe is to be regarded as having protected his assignment or that consent to a lay off so obtained can be successfully asserted as a ground for setting aside disciplinary action founded upon the premise such employe had failed to protect his assignment.

Having disposed of the additional contention involved it can be said that in the instant case there is ample evidence in the record to establish that Allen's illness on the evening of May 14, 1947 was feigned not real and that his representations regarding his condition were made for the purpose of enabling him to obtain a lay off so he could attend a party given on that evening by the Junior Old Timers Club, an organization of which he was an officer, which he concedes he did attend during some of the hours he would have been at work on his regular assignment had he not laid off. Likewise stated that such evidence is sufficient to sustain a decision, obviously predicated upon such facts, that he had failed to protect his assignment on the date in question.

Except for the foregoing, since essential facts, contentions and governing principles are similar, this case is decided by Award 4106, *supra*, to which we adhere. Therefore, based on what is there said and held, we hold that the record in the instant case fails to disclose any sound basis for disturbing the Carrier's action in dismissing Allen from its service or reveal any facts permitting the granting of an affirmative Award.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the record does not warrant an Award disturbing the Carrier's disciplinary action.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.