Award No. 5141
Docket No. MW-5121

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when it suspended B&B Mechanic J. C. Wilhoit from service for a period of thirty (30) days during June and July, 1949;

(2) That B&B Mechanic J. C. Wilhoit be compensated for the wage loss suffered because of his suspension during the period referred to in part (1) of this claim.

OPINION OF BOARD: J. C. Wilhoit, employed as Mechanic in B&B Gang, failed to report for duty or secure permission to be absent from duty, Monday, June 13, 1949, and continued to be absent from duty, without permission, until June 17, 1949, when he obtained a doctor's permit, which held that he should not return to work until his condition improved. On June 18, 1949, he was notified in writing he was being held out of service, pending investigation for absenting himself from duty, in violation of Carrier's General Rule I of the rules for the Maintenance of Way and Structures. After hearing on a charge that he had violated the subject rule, he was suspended for thirty days from June 13th.

The argument has been advanced that a suspension, based on charges brought under Rule I, is contrary to and in conflict with the rules of agreement between the Carrier and the Organization and must be set aside. Since the Carrier had been put on notice as of June 17th, that the Employe claimed his unexcused absence was due to illness, we are of the opinion that the proper charge should have been a violation of Rule 29. The record shows, however, that no objection was raised by the Organization to the charge, at the hearing, and further that the Organization was permitted to offer proof that Claimant's unexcused absence was due to illness. Accordingly, Claimant has suffered no prejudice by reason of the inaccuracy of the charge and the contention that the Board should enter a sustaining award because of the erroneous charge is without merit.

In conformity with the charge, Claimant was found guilty of violating General Rule I. There was some evidence that the Employe was ill on June

13 and the days ensuing between June 17, and on the last named date, a physician vouches for his illness and holds that he should not go back to work until his condition improved. Therefore, we think the question at issue was whether the Employe had complied with Rule 29, which requires of an employe that he report his illness, as soon as practicable. The Carrier would have been more accurate to have ruled in such terms.

A comparison, of Carrier's Rule 1 and Rule 29 of the negotiated rules of Agreement, will show that there is no grave conflict between the two, except in cases of illness. Therefore, both may stand, but in cases of conflict, the negotiated rules of Agreement must prevail, if the principles of collective bargaining are to be preserved.

Accordingly, we hold that Rule 29 takes precedence over General Rule I under the facts and circumstances of this case. We do not think, however, that this is fatal to the investigation and hearing on the property. The crux of the charge, and the decision based thereon, is whether Claimant was absent from duty without the Carrier being aware of the reasons. Under either or both rules, it is entitled to this information. The evidence shows that the Carrier was unaware of the reasons for Claimant's absence until he had been on unexcused leave for four days. Therefore, we think the Carrier's decision that Claimant violated General Rule I constituted harmless error, and again, this can't be the basis for a sustaining award.

Since the parties have put in issue, in this appeal to the Board, the two rules in question, and all the evidence of record, we believe the purposes of the Railway Labor Act will be best served by the Board reviewing the case on its merits, and by entering such award as it thinks proper under all the facts and circumstances. In so holding, we are not unaware that the Board does not have the power to disturb the action of Management, in discipline cases, merely because the Board thinks the discipline meted out is not what it would have imposed had it been in the position of the Carrier. Awards 419, 892, 4146. This does not mean, however, that the Board is powerless to act if the Carrier's action is arbitrary or capricious, or there is evidence which tends to show that the penalty amounts to "cruel" or "unusual" punishment. We shall limit our review accordingly.

We hold that the Carrier erred in suspending Claimant for violation of a rule not applicable under all the facts and circumstances of the case. We further hold, as a general proposition, that a thirty days' suspension for failure to report an absence, over a period of four days, is "unusual" punishment, where the Employe's absence is due to illness. On the other hand, there is some aggravation in this case, as shown by the transcript of the record. The Claimant's indifference to his obligation to report regularly for work has posed problems for the Carrier. Therefore, the Employe has not been as diligent as he might have been in protecting his employment from jeopardy.

The record further shows what is reported to be a thirty-day suspension, is not a suspension for thirty days in fact. For five days of the period the Employe lost time due to illness. It must be presumed that he would have lost additional time for the same reason, in view of the Doctor's statement that as of June 17th, he was not able to return to work, and would not be able to do so until his condition improved. While the unsettled state of the record leaves indefinite what further part of the thirty-day suspension covers a period when the employe was unable to work, we do not see in this any justification for leaving open for future determination by the parties such a controversial issue, if it can be avoided. To so rule, could only lead to further dispute, in our opinion.

On all the facts of record, we have concluded that the Employe's suspension was justified. There is evidence that the Employe did not report his absence as soon as practicable. Rule 29 is not a rule of convenience, but is a rule of reason. It is contemplated thereby, that employes off duty must

report their illness with all reasonable dispatch and must not procrastinate. The chief reason assigned by the Employe for not notifying the Carrier of his illness was that he thought, from day to day, that he would be able to return to work. This is not enough to excuse delay in reporting. See Award 5140.

The foregoing leaves at issue only the question of whether the punishment inflicted was just. Ordinarily, we would say a thirty-day suspension for failure to report an illness would amount to "cruel" and "unusual" punishment. However, for reasons heretofore assigned, there is no reason for holding that the Claimant has lost thirty days' work by reason of being off duty until July 13th. It is definite that the loss will be something less. Neither is it a violent presumption to hold that the Carrier took this into account in fixing the date when the suspension was lifted. Furthermore, there is some aggravation in this case due to the Employe's past conduct. We do not see how the Board can modify the punishment, without departing from principles established by Awards 419, 892, 4146. There appears no good reason for doing so and the suspension must stand.

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 Carrier did not violate the agreement as alleged in the claim.

AWARD

Claim (1) and (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of December, 1950.