Award No. 9216
Docket No.CL-11128

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carl R. Schedler, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) Carrier violated the Agreement between the parties effective October 1, 1940, as amended, when it arbitrarily dismissed Glen Wilkins on November 6, 1957; and,

(b) Glen Wilkins shall now be restored to service with all rights unimpaired and compensated a days' pay on October 28, 1957, the day he was suspended from service pending investigation, and each date thereafter until restored with all rights unimpaired.

OPINION OF BOARD: This is a disciplinary case culminating in discharge. The Claimant was employed as Engine Crew Dispatcher Position No. 102, Taylor Yard, and his usual work hours were from 12 midnight to 8:00 A. M. On October 14, 1957 Claimant notified the Assistant Chief Clerk that he was sick and would not report for work. On October 28 the Claimant notified the same officer that he would report for work at midnight that night. During the same day the Claimant was notified by the Carrier to not report for work as he was being suspended. A letter dated October 25, 1957 to the Claimant from the Carrier stated he had been absent from work since October 22, 1957, without proper authority and advised an investigation would be made. A hearing was held at Carrier offices on October 30, 1957 and the Claimant was notified by letter dated November 6, 1957 that he was dismissed from the service of the Company.

The record in this case is replete with conflicting testimony and inferences drawn from circumstances unsupported by facts. The basic situation which caused this dispute was a visit by two Carrier officials to Claimant's place of business during the noon hour October 24, 1957. It seems to have been common knowledge that the Claimant owned and operated a real estate business which had, in the past, been patronized by certain Carrier officials. The two Carrier officials testified that the interior of the building was under-

going remodeling and redecorating, and the Claimant was alone, dressed in work clothes eating his lunch, and they concluded he was working and that if he was able to do that work he was able to perform his regular tasks for the Carrier. This interview lasted about six minutes after which the Carrier officials departed. The weight of the evidence indicates that there was no remodeling, as the term is used in the usual building sense, but that a small room divider was being erected by two carpenters employed for that purpose. Furthermore the redecorating had been completed five months previously. A fair analysis of the evidence indicates that the clothing worn by the Claimant was not the usual work clothing worn by building mechanics but was more in the nature of fatigue or casual clothing which is almost the accepted standard of dress in Southern California. Moreover, the Carrier officials did not see the Claimant doing any work of any nature, and the Carrier produced no witnesses who could testify that they did actually see the Claimant working. The Claimant denies doing any work whatsoever and there is nothing in the record refuting this denial. This Board has held many times that an employe cannot be found guilty of an offense on evidence that is wholly speculative.

The Carrier asserted that the Claimant's absence from service was in violation of Rule 810 of the Rules and Regulations of the Transportation Department, and Item 1 of Section 8, Reissue of Notices, Los Angeles Division, dated January 1, 1957. Although the Carrier did not state specifically and precisely the part or parts of Rule 801 that were violated by the Claimant, the record discloses that the Carrier's case is predicated largely on the alleged violation of the first two sentences, namely: (1) "Employes must not engage in other businesses without permission of the proper officer." and (2) "They must not absent themselves from their employment without proper authority." The other portions of Rule 810 are not relevant to this dispute. It is our opinion that (1) supra, has not been violated by the Claimant as the conduct of Carrier officials in using the services of Claimant's real estate business constitutes a waiver of the requirement and amounts to tacit permission to operate the business. With respect to (2) supra, the Claimant reported his illness prior to his absence in the usual and customary manner so did not violate that part of the rule. The Carrier also relies on Section 8, Part 1 of the Re-issue of Notices which provides, in substance, methods for granting permission to be off duty. This notice enumerates the classifications to which it is directed. It does not include Engine Crew Dispatchers. It is our opinion that this rule and regulation is not applicable to the instant dispute for at least two primary reasons, which are: (a) the notice was not issued to Engine Crew Dispatchers and (b) it is designed to apply to employes who desire advance permission for planned or foreseen absences. It cannot be construed to cover employes who are off duty due to unexpected illness.

It seems to us that the relationship between the parties concerning such matters as absence because of illness and leaves of absence are adequately covered in Rule 26 (b) and Rule 39 (a) of the collectively bargained agreement then in force. Rule 26 (b) provides, in substance, that an employe who has absented himself without proper leave shall forfeit his seniority, except in the case of illness or other physical disability. The Claimant submitted a statement from a doctor certifying that he had been under his care because of flu and had been off work since October 14, 1957, and released him to return to work as of October 28, 1957. The Carrier made no effort to impeach this statement by the use of competent evidence, so we must accept it as true. If the Carrier was doubtful as to the illness of the Claimant it could have had its doctor examine him any of the days he was absent, but it did not do so

and chose to rely on the reports from laymen based on an interview lasting about six minutes. We do not believe that these lay conclusions contradict a report by a medical doctor that a patient had been under his care because of the flu.

Rule 39 (a), the pertinent part applicable herein, provides the method for granting of leave of absence without loss of seniority. This provision includes an exception in case of illness or disability. It is our opinion that the unambiguous language in this rule clearly provides for an almost unlimited period of absence in case of sickness or physical disability. Actually the rule seems to be concerned with the method to follow when an employe foresees in advance the necessity for an extended leave of absence without pay and without loss of seniority rights. On the basis of the whole we find that the Carrier has failed to prove that the Claimant had violated any applicable rules, and therefore a sustaining order is required.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, find and holds:

That oral hearing was waived by the parties;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was violated.

AWARD

Claimant to be reinstated to his former position with all rights reserved, and to be compensated for his net wage loss, in accordance with Rule 52.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinoi, this 26th day of January, 1960.

Serial No. 186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 9216

DOCKET NO. CL-11128

NAME OF ORGANIZATION: Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Southern Pacific (Pacific Lines).

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

This request for interpretation of Award 9216 concerns whether the Carrier is entitled to deduct Claimant's outside earnings in computing the money payment due him pursuant to said Award. In compliance with Award 9216 the Carrier is entitled to take credit for earnings of the Claimant in computing his net wage loss, and the Claimant must present satisfactory and acceptable evidence of his earnings in other employment from the date of his wrongful termination to the date of his reinstatement. This in accordance with Rule 52 and previous settlements. See Third Division Award 2941 and Interpretation No. 1 to Award No. 8807.

Referee Carl R. Schedler, who sat with the Division as a neutral member when Award 9216 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of October, 1960.