NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22172
THIRD DIVISION Docket Number MW-21971

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation (former Penn
(Central Transportation Company)

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

(1) The Carrier violated the Agreement when it removed Trackman K. D. Henman from service on September 17, 1974 without benefit of a fair and impartial investigation (System File M.W.-D.9A-98).

(2) Trackman K. D. Henman be restored to his former position with seniority and all other rights unimpaired and that he be compensated for all monetary loss suffered because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: The sole question in this case is whether in light of the undisputed facts Rule 34 is applicable. Rule 34 is the discipline rule and reads as follows:

> "(a) An employe who has been in the service of the company more than 90 days shall not be disciplined or dismissed without a fair and impartial hearing by his immediate superior. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this section. At a reasonable time prior to the hearing, such employe shall be apprised of the precise nature of the charge against him and be given a reasonable opportunity to secure the presence of necessary witnesses to testify in his behalf." (Emphasis supplied)

Specifically, the question at issue is whether Claimant was "disciplined or dismissed" by Carrier in September, 1974. It is not refuted that he was hired by the Company some four months prior to September 24, 1974 nor that Rule 34 was not followed by Carrier. Therefore, if the Rule is applicable to the facts surrounding September 17, 1974 then the violation is established. Our review of the record facts, however, convinces us that Rule 34 has no application in this case.

Claimant was employed by Carrier as a track laborer. Prior to August 29, 1974 he was assigned to a track gang headquartered near Indianapolis, some 70 miles from his residence in Fairmont. At the end of August he requested and was granted permission to transfer to Gang 831, a camp car gang headquartered temporarily at Alexandria, some 11 miles from his residence at Fairmont. The gang at that time was working at Summitville, a work site located about halfway between Alexandria and Fairmont. All of the other employes lived in the camp cars at Alexandria and that was the designated assembly point for Gang 831 at the starting time of 6:30 A.M.

On his first day on the new assignment, September 3, 1974, Claimant reported to the job site at Summitville. He was instructed by the Assistant Supervisor of Track to report to the headquarters point at Alexandria. Claimant ignored those instructions on September 4, 9 and 10 and was again ordered to report to Alexandria but he told the supervisor he would not do so because he did not want to use the gasoline to drive the extra 5 miles and he did not want to ride on the bus with the other employes which he alleged to be "lice-ridden and bug infested." Finally, on September 17 or 19 (the record is not clear) the supervisor refused to allow Claimant to work when he again reported to the job site instead of the assembly point. Claimant left but reported once again to the job site on September 23 or 24 and was told he would not be permitted to work until he reported to the Assistant Production Engineer. Claimant did not report thereafter and instead filed this claim.

We are not reluctant to apply discipline rules like Rule 34 and to strictly enforce them in true discipline cases. Carriers disregard their obligations under such rules at their peril. But it would be a misinterpretation and a misuse of Rule 34 to apply it in the instant case. Carrier herein did not "dismiss" Claimant when it refused to permit him to work on his own terms and conditions. The root cause of Claimant's cessation of service was his willful refusal to comply with a prima facie reasonable work order and report to work where he was told to. We have examined the record with care and are persuaded that Claimant held the key to his job and declined to use it. Each such case must turn on its own facts and the factual picture herein is not as sharply drawn as in some other cases; but the refusal to report as instructed is more like an abandonment by Claimant than a dismissal by Carrier. See Awards 9103, 10631, 10838, 11323, 12993, 13514 (Third); See also Awards 9652, 16521, 20469 (First). We do not consider dispositive the use of the term "dismissed" by Carrier's

second-level denial officer. We decline to be bound by the vernacular or semantic misuses of a technical term by either party on a crucial point of contract construction which is within our purview to determine. Nor in our judgment is the interpretation and application of labor management agreements aided by recourse to such courtroom artifices as "admissions against interest." In the final analysis we are persuaded that Claimant has not shown that he was "dismissed or disciplined" in September 1974, as those terms are used in Rule 34. The claim must be denied.

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

That the parties waived oral hearing;

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1978.