

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19734
Docket Number MW-19907

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(Northwestern Pacific Railroad Company

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

(1) The dismissal of Mr. J. R. Brown (by letter dated April 10, 1972) was without just and sufficient cause and was wholly disproportionate to the alleged offense (System File 011-181 **(B)**)

(2) Mr. J. R. Brown's record shall be cleared of the charge and he shall be compensated for net wage loss suffered all in accordance with the provisions of Rule 25.

OPINION OF BOARD: Claimant was dismissed from the Carrier's service, by letter dated February 1, 1972, for allegedly being absent from work without proper authority. A hearing was held but the Carrier failed to render its decision relative thereto within the prescribed time limits. Therefore, the Organization requested that claimant be reinstated to his former position with vacation and seniority rights restored and with compensation for all time lost at the applicable rate of pay. Carrier acceded to this request and so advised claimant by letter dated March 24, 1972 which letter stated, in part, "You should make yourself available for work immediately as compensation will not be allowed after receipt of this letter."

Claimant received the March 24 letter on March 27, 1972 but did not return to work, nor did he advise Carrier when he would be "available" for work. Testimony by the claimant, given at the hearing, reveals the following:

Q - "Did you report for duty as **instructed?**"

A - "Not as the letter stated, no."

Q - "Did you report for duty at all?"

A - "No."

On the contrary, claimant requested an attorney - not "the duly authorized representative of the Organization, or ***an employee coming within the scope of this agreement." (Rule 25 of the Agreement) - to ascertain whether claimant would be subjected to any harassment **or vexation** by the Carrier. Further testimony by claimant, given at the hearing, reveals the following:

Q - "What part does this attorney play in your returning to the service of the **NWP**?"

A - "Nothing **more** than to see that I don't have any harassment or vexation."

Nothing in the transcript of the hearing indicates that claimant did not understand the meaning of the phrase in the March 24, 1972 letter **"***make yourself available for work immediately***."** The only doubts expressed by claimant were whether he would be subjected to "harassment or vexation" and for how many months he would be paid. Carrier's dismissal **letter** to claimant, dated April 10, 1972, advised that he was dismissed account his being absent from his employment since March 28, 1972 without proper authority. Said letter quoted the applicable portion of Rule M 810 of the Rules and Regulations for the Maintenance of **Way** and Structures as follows:

"Employees must report for duty at the prescribed time and place, remain at their post of duty and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority." (Emphasis added)

Petitioner averred that the decision of the Carrier was "disproportionate to the alleged offense" and that the claimant's past record was improperly used in assessing the degree of discipline.

There is no claim before us that the claimant did not receive a fair and impartial hearing.

Award No. 16073 stated:

"This Board has held in numerous prior awards that our function in discipline **cases** is not to substitute our **judgement** for that of the Carrier *******but** to pass upon the question whether, without weighing it, there is some substantial evidence in the record to sustain **a** finding of guilty. Once that question is decided in the affirmative, the penalty imposed for the violation is a matter which **rests** in the sound discretion of the Carrier, and we are not warranted in disturbing the penalty imposed unless we **can** say that it clearly appears that the **action** of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion."

Also see Award No. 5032.

Further, Award 12126 states:

"An employee's past work record may not be considered in determination of his guilt of the charges brought against him, but it may be considered in assessing the penalty."

Therefore, it is the finding of the Board that there is substantial evidence in the record to sustain a finding of guilty and that consideration of claimant's past record in assessing discipline was not improper. We will deny the claim.

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 **Employees** involved in this dispute are respectively Carrier and **Employees** 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:


Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1973.