

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20171
Docket Number m-20363

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Norfolk and Western Railway Company
((A & P Regions)

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

(1) The dismissal of Section Laborer Leroy Mitchell was without just and sufficient cause and on the basis of unproven charges (System File **MW-NA-72-102**).

(2) Track Laborer Leroy Mitchell be reinstated with seniority, vacation, and all other rights unimpaired and that he be compensated for all **time** lost in accordance with Rule 32(c).

OPINION OF BOARD: This is **an** appeal from Carrier's action in dismissing **Claimant**, a track laborer. After being absent without permission on August 14 and 15, 1972, the Claimant **was** advised by letter dated August 16, 1972 that he was dismissed from service because of "being absent without permission" as covered by Rule 25 of the Agreement; an investigation was held on September 1, 1972, pursuant to the General Chairman's request; and Carrier upheld **the** dismissal by letter to Claimant dated September 18, 1972.

We have a threshold procedural issue arising from Carrier's contention that the **Board** is barred from considering the herein claim because it is **not** the same as **the** claim progressed on the property. **The** Carrier correctly states **that** the claim presented to the Board asserts that Claimant was dismissed without just cause and on the basis of unproved charges. Such a statement of claim obviously goes to the merits of whether Carrier's **permanent** dismissal of **Claimant** is supported by the record before **this** Board. However, the Carrier asserts that the Organization's sole contention **on** the property was that the Carrier's post-hearing decision was **improperly** rendered and that such contention has now been abandoned. The correspondence on the property shows that the Organization relied heavily on the contention that, since the General **Chairman requested** the **hearing in** Claimant's behalf, the **Carrier's post-hearing** decision should have been sent to the General **Chairman and not, as Carrier** did, to the Claimant with a copy to the **General Chairman**. The **correspondence also shows**, however, that the claim was discussed **in** conference **and we** are satisfied from a Carrier letter dated May **21**, 1973 that all **facets of the claim**, including the merits, were discussed **in** conference. **We conclude** therefore that the merits of the claim **must** be considered by the Board.

The rule under which Claimant "as dismissed reads as follows:

'RULE 25 - DETAINED FROM WORK

An **employee** desiring to be absent fro" service **must** obtain permission fro" his **foreman** or the proper officer. In case an **employee** is unavoidably kept fro" work, he will not be discriminated against. An **employee** detained from work on account of sickness or for any other good cause shall notify his for- or the proper officer as early as **possible."**

The hearing record shows that, without obtaining permission and without **communicating** any reason therefor, the Claimant "as absent from work on Monday and Tuesday, August 14 and 15, 1972. On Wednesday, August 16, the Roadmaster "rote to Claimant dismissing him from service for being absent from duty without permission as cowered by Rule 25. The **Claimant** testified that his absence "as due to sickness, and that his wife tried to notify the **Roadmaster's** office but could not because his, the **Claimant's, phone** was inoperative. Claimant also testified that his Assistant Section Foreman "as a next door neighbor and that he had seat notice of a prior sickness by the Assistant Foreman. He did not **mention** the August 14 sickness to the Assistant Foreman, nor did he offer a doctor's statement to verify the sickness. (An August 21, 1972 doctor's statement is attached to Petitioner's Submission; however, this certificate shall not be considered herein, because Carrier validly objects that such certificate was not introduced at the hearing). **The** Carrier offered two witnesses, the Roadmaster and the Claimant's Section For-. In response to the Hearing Officer's express question about Claimant's record since March 13, 1972, these witnesses testified that since such date the Claimant had worked only **48** days, had been absent 63 days **on** ten different occasions, and that Claimant had permission to be absent on only three of the ten **occasions.** **The** Roadmaster also testified that on April 12, 1972 he had written Claimant "a letter telling him he would have to **improve** his work record." This letter is as follows:

"In **viewing** your work record, since you return to work March 1, 1972 you **have** missed six days of work in the **month** of March and three days missed in first half of April.

This is a poor work record and should be corrected if at all possible, if this matter is not corrected in the future, action **will** have to be taken to correct it."

Nothing but this letter made any mention to Claimant about his absences from work. In this regard, the Section Foreman's testimony is pertinent:

"Q. Mr. Wall, during the period that you have heard mentioned in this hearing, did you or any of the men discuss with Mr. Mitchell the seriousness of being absent without permission or notifying someone?

A. No, I did not."

It is also noteworthy that, in denying the appeal on the property, the Carrier pointed **out** that, since entering service in 1946, Claimant's prior record included two dismissals for unsatisfactory service and one for insubordination. In each instance he was rehired as a new employee.

The Petitioner argues that, since Carrier did not dispute the fact of Claimant's **sickness**, and since Rule 25 does not require permission for absence in case of sickness, the Carrier's August 16, 1972 dismissal for absence without permission was not proper. **This** argument is not compelling. The Carrier had no knowledge of Claimant's sickness on August 16 and thus cannot be faulted for treating the situation as **involving** an absence without permission. When the matter **came** on for hearing the Claimant defended under the last sentence of Rule 25 by attempting to show an excusable reason for not giving notice of his **sickness** "as early as possible" as required by such sentence. However, even though the Claimant's testimony about his **sickness** and his phone being inoperative was not disputed by the Carrier's evidence, the Claimant's own testimony established that he could have sent notice of sickness by the Assistant Foreman **who** lived next door. **Thus**, although the Carrier's August 16 letter of dismissal was based on the first sentence of Rule 25 (absent without permission), the Claimant's defense under the last sentence of the rule was fully heard in the investigative hearing held on September 1, 1972. We are therefore satisfied that discipline was warranted for the two absences in mid-August and that the record contains substantial evidence to support a measure of discipline.

We are not satisfied, however, that the extreme discipline of permanent dismissal is appropriate in light of the whole record. While only two absences were involved in Carrier's stated reason for dismissal, the Carrier entered a substantial amount of testimony regarding prior absences of 63 days occurring on ten different occasions with permission existing on only three occasions. In its Submission the Petitioner attempts to justify these prior absences by sickness, awaiting Carrier's medical clearance to return to work, vacation, and having permission to be absent. In its Answer the Carrier says that

only four of the ten occasions **can** be explained and that the others lack justification. Whether or not the prior absences can be justified is **not** the pertinent consideration, however. **The** pertinent consideration is that the prior absences were not mentioned in the Carrier's dismissal letter. Moreover, the hearing testimony on the prior absences was not given spontaneously or to explain the two absences subject to charges; such testimony was expressly solicited by the Hearing Officer's question which called for a description of **Claimant's** record since March 13. We note, too, that the **Road-**master's letter to Claimant of April 12 was at most a mild admonition and, indeed, the letter did not even state that the absences therein mentioned were in fact without permission. The letter merely stated that Claimant's poor work record "should be corrected if at all possible" and if not, "**action** will have to be taken to **correct** it." This language falls far short of indicating that permanent dismissal would result from absence without permission. In similar vein, the Section Foreman's testimony was to the effect that there was no discussion with Claimant about the seriousness of being absent without permission or notifying someone. We therefore conclude that, in view of the nature of Carrier's evidence on Claimant's prior absences, and in view of the manner in which such evidence was developed at the hearing, **3**, the record **convincingly** establishes that the prior absences materially influenced Carrier's decision to dismiss Claimant. Yet, during the period when the absences **were** accumulating, the Carrier gave Claimant no clear indication of the seriousness with which it viewed the absences. In the final analysis the Carrier's stated reasons for the dismissal did not fully disclose all of its reasons for the dismissal **and**, accordingly, we conclude that the record, as a whole, does not support the supreme penalty of permanent dismissal. In reaching this conclusion we have not been unmindful that, in view of **Claimant's** prior record, the Carrier considered itself fully justified in denying Claimant's appeal for restoration to service. Nonetheless, the hearing record, and the record as **a** whole, presents reasons against permanent dismissal which cannot be ignored. We shall therefore award **that** Claimant be restored to service without back pay.

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;

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

The record does not support the discipline of permanent dismissal.

A W A R D

Part (2) of the claim is sustained as per Opinion, but without compensation for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

ATTEST: _____

A. W. Pauler
Executive Secretary

Dated at **Chicago, Illinois**, this **15th** day of **March** 1974.