

RATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20273
Docket Number MW-20393

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 Carrier arbitrarily and capriciously dismissed W. D. Terry without just and sufficient cause and on the basis of unproven charges. (System **File** MW-RO-72-100)

(2) The charge be stricken from the record; Laborer W. D. Terry be restored to service, with seniority, vacation and all other rights unimpaired and that he be paid for the assigned working hours **actually** lost as per Rule **32(c)**.

OPINION OF BOARD: This is a dismissal case in which the Claimant has already been restored to service. He was dismissed on January **26, 1973** and restored to service on October **30, 1973**. **Thus**, the sole issue is whether the original discipline should be set aside, thereby allowing the **Claimant** to recover for time lost.

The Claimant was dismissed for being absent without permission on January 22, 23, **24**, and 25, **1973**. According to the hearing **record** the Claimant had ten work days of earned vacation when he received permission to **take** two days' vacation, Friday, **January 12**, and Monday, **January 15**, to take a trip to Ohio. On Tuesday, **January 16, 1973**, he called the Carrier's Timekeeper to request permission to **take** additional vacation. The Timekeeper's statement about this conversation is as follows: "**..at 8:15 AM**, Mr. Terry **called**. His words to me were 'Mr. Manning, this is Terry. I got back late from Ohio and would like to have vacation today (which was Tuesday the **16th**) **through Friday**, the 19th.' (which would have been **January 16th, 17th, 18th and 19th**). I told him this would be **all** right. He said he would be back in Monday morning, **January 22nd**." A different version of the conversation **was** given by the **Claimant**. "I called Mr. Manning and was talking to him on the phone to tell him that I was late getting back in town on the 16th and that I would have to be off, I couldn't make it in that morning. He says 'OK'. I said 'I will try to get in tomorrow or by Friday.' He said, 'I will just hold you on vacation until you return back to the job.' I said, 'OK', then." Counting from the first day the Claimant was off to take the Ohio trip, **January 12**, the Claimant's ten work days of **earned** vacation expired at the end of work on Thursday, **January 25**. He reported for duty on Friday, **January 26**, but was given a dismissal letter due to unauthorized **absence** from January 22 through 25.

The foregoing, and the whole record, **makes it clear that** the Claimant used the first two days of his vacation with the Carrier's consent. Thereafter, he requested and was granted permission to **use** additional vacation time, but a conflict exists as to how much. The Timekeeper **says** the second request resulted **in** permission for Claimant to remain **on** vacation until the beginning of work on Monday, January 22; the Claimant says until the beginning of work on Friday, January **26**. Despite this conflict, the testimony of the Timekeeper and the Claimant is quite similar, except for the Timekeeper's statement that Claimant referred to returning to work on 8 specific date, January 22. Thus, the Timekeeper and the **Claimant** could be said to **have** reached different conclusions about **essentially** the same facts, **i. e.**, an honest difference of opinion. However, this is a matter of subjective judgment and the Carrier has made the contrary judgment that Claimant was given a clear direction to return to work on January 22, and that he failed to do so. On the record before us, we conclude that the Carrier's judgment **was not** arbitrary or capricious in determining **that** the Claimant **was** absent without permission. However, we are concerned that the discipline was excessive **in** the total context of the **case**. It is clear that the Claimant obtained permission from the Timekeeper for some further absence beyond the two **days** granted for the Ohio trip. Thus, at worst, the Claimant's situation is that he misconstrued the length of the authorized absence and has not been able to offer an excusable reason for doing so. This is not flagrant misconduct, however. Also, the Claimant's earned **vacation** expired on Thursday and he reported for duty on Friday, the last work day in the work week. This coincides with the **Claimant's stated** belief that his absences were being charged **against** vacation and that he was due to report when the vacation expired. In **view** of these mitigating facts, and since the record strongly indicates that the **Claimant** had an honest, though erroneous, belief that he had permission to be **absent**, we conclude that a thirty (30) day suspension is the appropriate discipline for the **Claimant's** unauthorized absence of four days.

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 **Employee** involved **in** this dispute are respectively Carrier **and Employee** within the meaning of the Railway Labor Act, 8s approved June 21, 1934;

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

The discipline was excessive.

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The discipline is reduced to ~~8~~thirty (30) day suspension,
with pay ~~for time~~ lost beyond the suspension period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.