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20P
NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24288
Docket Number MW-24125

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Kansas City Southern Railway Company

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

(1) The fifteen (15) day suspension imposed upon Laborer R. C. O'Neal for alleged violations of 'Rule Q' on January 15, 29, 30, 1980 and February 1, 1980 was unwarranted and without just and sufficient cause (Carrier's File 013.31-233).

(2) The dismissal of Laborer R. C. O'Neal for alleged violation of 'Rule Q' on February 22, 1980 was without just and sufficient cause and wholly disproportionate to the offense with which charged (Carrier's File 013.31-234).

(3) Trackman R. C. O'Neal shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claim involves two separate incidents of discipline. The first was based on an investigation held on February 25, 1980. The letter of charge read in pertinent part as follows:

"You are instructed to appear at an investigation that will be convened commencing at 11:00 A.M., Monday, February 25, 1980, in the K.C.S. General Office Building, 4601 Blanchard Road, Shreveport, Louisiana, to ascertain the facts and determine your responsibility in connection with your unauthorized absences from work on January 15, 29, and 31 and February 1, 1980.

I remind you of the following from the Rules and Regulations for the Maintenance of Way and Signal Department of this Company, effective March 15, 1979:

Rule Q - 'Employees must report for duty at the prescribed time and place, remaining at their post of duty, and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their performance of service with the Company unless advance written permission is obtained from the proper officer.'

Subsequent to this investigation, the Claimant received a 15-day suspension. The evidence adduced at the hearing shows that according to the Carrier's records, Mr. O'Neal was absent on January 15, 31, and February 1. Mr. Ingram, Foreman, also testified that Mr. O'Neal failed to contact him for authority on these dates. Regarding January 29, the Carrier doesn't dispute that the Claimant reported for

his assignment, but contends that at one point during the day, he spent 45 minutes in the bathroom talking to other employees, thus was unattentive to his duties.

Mr. O'Neal claims that he was not absent on January 15 and relative to January 31 and February 1, he asserts that he obtained permission from Foreman Ingram to be off. In respect to January 29, the Organization asserts that there is no proof that he was absent from his assignment for 45 minutes and, moreover, they assert that he had permission to go to the bathroom.

Regarding the 15-day suspension, it is the Board's conclusion that the evidence supports the Carrier's charge *against the Claimant*. Though the evidence against the Claimant relative to the 29th is not *strong*, there is substantial evidence to support the Carrier's conclusion that Mr. O'Neal was absent without permission on the other dates. It is noted that the evidence conflicts, but because of our appellate nature, the Board cannot resolve credibility issues or conflicts in evidence. Our function is to determine if the Carrier's conclusion on the whole, including decisions relative to conflicts in credibility, is supported by substantial evidence. In this case there is substantial evidence to support the Carrier's decision to believe Mr. Ingram's testimony that Mr. O'Neal had not requested permission to be absent January 31 and February 1 and moreover, to believe that he was absent on the 15th. In respect to January 31 and February 1, it is observed in the transcript of the hearing that when asked for a third time if Ingram gave him permission to be absent, the Claimant testified as follows:

"Mr. Stout - In other words Foreman Ingram gave you permission to be off January 31 and February 1

Mr. O'Neal - I guess you could say that, I told him I was taking medicine on those days"

The testimony forms a substantial basis for the Carrier's conclusion not to believe O'Neal. It would seem in light of the above testimony and the testimony of Ingram that the Claimant did not ask permission to be absent. It would appear at best he only mentioned to Ingram that he was taking a prescription drug. Certainly informing a supervisor that he was taking a prescription drug does not establish *that* he requested permission to be absent. Relative to January 15 there is no evidence to support the Claimant's self-serving assertion that he worked on that day. The Company's records clearly indicate that he received no compensation for that date; therefore, it is reasonable to conclude that he was absent. Thus, all things considered, the 15-day suspension is justified.

The dismissal was imposed based on investigation held on March 17, 1980. The basis of the charge was detailed in the letter to the Claimant dated February 26, 1980. The letter read in pertinent part as follows:

"You are instructed to appear at an investigation that will be convened commencing at 9:00 AM, Monday, March 17, 1980, in the KCS General Office Building, 4601 Glanchard Road, Shreveport, La. to ascertain the facts and determine your responsibility in connection with your unauthorized absence from work on February 22, 1980, when you left your job at

approximately 12:30 PM and were absent until you were found at approximately 4:15 PM in the outfit cars by Assistant Foreman E. Payton.

I remind you of the following from the Rules and Regulations for the Maintenance of Way and Signal Department of this Company, effective March 15, 1979:

Rule Q - Employees must report for duty at the prescribed time and place, remaining 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, nor exchange duties with, or substitute others in their place, without proper authority. They must not engage in other businesses which interferes with their performances of service with the Company unless advance written permission is obtained from the proper officer.

Continued failure by employees to protect their employment shall be sufficient cause for dismissal.

Employees must not sleep while on duty. Lying down or assuming a reclining position with eyes closed or covered or concealed, will be considered sleeping.

Employees, while on duty, must not read magazines, newspapers or other literature not concerned with their duties, or use radios or televisions *other* than those provided by the Company.

Failure to comply with the above rule may result in disciplinary action."

A reading of the transcript establishes to the Board's satisfaction that the charges were supported by substantial evidence. The Claimant admits leaving his assignment at lunch time and going to the camp cars; however, he claims that he was sick. It is the Board's opinion that there is no evidence that he was sick and assuming that he was, there is no evidence that he sought permission to leave his assignment. In fact the Claimant admits that he did not have permission to return to the camp cars.

Regarding whether dismissal for this offense is appropriate, the Board notes that the Claimant had been in service less than one year and had a past record that would indicate *that* he was either unwilling or unable to fulfill his employment responsibilities. Therefore, the discharge cannot be found to be arbitrary, capricious, or excessive.

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: Acting Executive Secretary
National Railroad Adjustment Board


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April 1983.

