

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24658
Docket Number MS-25054

Tedford E. Schoonover, Referee

(George H. Ligon

PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"This is to serve notice as required by the Rules of the National Railroad Adjustment Board of my intention to file an **Ex-Parte** Submission on 15 January, 1983 covering an unadjusted dispute between me and The Union Pacific Railroad Company involving the question: of my discharge from the employment of The Union Pacific Railroad Company as a centralized traffic control **leverman** on May 23, 1980. It was alleged and investigated through the means of a formal hearing that I absented myself from duty without proper authority from April 12, 1980 through April 25, 1980 and that I failed to protect my **assignment** at this time. I deny that the alleged period of absence from April 12 through April 25, 1980 was in excess of ten (10) working days that requires a written leave of absence and further deny that my assignment was unprotected at that time. I challenge the interpretation of the employer that any leave of absence of over ten (10) days requires written authorization as being in contravention of the provision in the Agreement requiring that written authorization be **obtained** only for absences in excess of ten (10) working days. It is my contention that during this absence my position was protected at all times. Additionally, I contend that my rights were violated during a hearing conducted by the employer on May 9, 1980 wherein my representative was not allowed to ask questions concerning whether my position was in fact filled on a day to day basis from the extra board during the period in question."

OPINION OF BOARD: The essential circumstances which gave rise to **this** dispute are set forth in Carrier letter of May 6, 1980 charging Claimant and setting a hearing date as required by Rule 45 of the labor **agreement**. That letter is quoted as follows:

"Please arrange to report to the office of the Terminal Superintendent. Kansas City, Kansas, at 9:00 A.M., Friday, **May 9**, 1980, for investigation and hearing to develop the facts and determine your responsibility in connection with failure to secure proper leave of absence, resulting in failure to protect your assignment and absenting yourself from duty without proper authority during the period of April 12, 1980, through April 25, 1980, while employed as Centralized Traffic Control **Leverman #23**, 8:00 A.M. to 4:00 P.M., indicating a violation of Superintendent's Bulletin Notice, dated September 21, 1978, concerning leave of absences; General Notice, General Rules 'B' and 'E', and General Regulations 702 and 702(B) of Rules Governing Duties and Department of **Employees**, Safety Instructions and Use of Radio. Form 7908.

"This investigation and hearing will be conducted in conformity with Article 45 of the Agreement, effective June 1, 1975, between the Company and Brotherhood of Railway and Airline Clerks, **and** you are entitled to representation as provided in that Rule.

You may produce such witnesses as you desire at your own expense.*

The hearing was held on May 9, 1980 as **scheduled**. Claimant together with his Brotherhood representative attended and participated therein. Carrier's termination letter of May 23, 1980, follows:

'Please refer to notice of investigation and hearing sent you under date of May 6, 1980.

Having carefully considered the evidence adduced at the hearing held May 9, 1980, I find the following charges stated in the above mentioned notice have been sustained:

'Violation of Superintendent's Bulletin Notice, dated September 21, 1978, concerning leave of absences; General Notice, General Rules **"B"** and **"E"**, and General Regulations 702 and 702(B) of Rules Governing Duties and Department of **Employes**, Safety Instructions and Use of Radio, Form 7908, for your responsibility in connection with failure to secure proper leave of absence, resulting in failure to protect your assignment and absenting yourself from duty without proper authority during the period of April 12, 1980 through April 25, 1980, while employed as Centralized Traffic Control **Leverman #23**, 8:00 A.M. to 4:00 P.M.'

Therefore, in accordance with Rule **43(g-1)** of the Agreement Between the Union Pacific Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, effective June 1, 1975, your service and seniority rights are terminated and you are dismissed from **service**."

One of the controversial points in this dispute is Carrier reference to Rule **43(g-1)** in the Agreement of June 1, 1975 as the basis for its dismissal action. This agreement rule was in effect from June 1, 1975 until amended by revisions which became effective June 1, 1980. The events causing the dismissal action occurred during the period prior to the effective date of the new agreement. Accordingly, the rules in effect at the time of the events are applicable, not the later revised rules as contended by Claimant.

At the hearing the Brotherhood representative acknowledged the applicability of the 1975 rules at the outset of the hearing as follows:

"The only rule in the June 1, 1975 Agreement between the **BRAC** Organization and the carrier is 43 - Rule 43 is the only rule pertaining to failure to get a leave of absence. "

The provisions of Rule 43(g-1) are as follows:

"(g-1) An **employee** voluntarily leaving the service, or who has been absent from duty, except in case of illness or other physical disability, without proper leave of absence, which must be in writing if in excess of ten (10) working days, shall terminate service and seniority rights."

The evidence is clear that Claimant voluntarily left the service and was **absent** from duty without a proper leave of absence. Neither sickness nor physical disability was involved. Reporting on his conversation of March 31, 1980 with J. A. Wagner, Manager of Yard Operations, Claimant admitted Mr. Wagner did not authorize his leave of absence. He was told by Mr. Wagner that leaves of absence could not be granted on the spur of the moment. They would have to be in proper form and processed up to and through the Superintendent's office for approval. He was also told he would be expected to protect his assignment on April 1, the first day he was due back from vacation. **He** was asked how he could be reached later that day and, according to Mr. Wagner his reply was, "**he** was going out of town and could not be reached." In addition, he informed Mr. Wagner, "**You** can fire me or whatever you have to do, but I will not work tomorrow, meaning April 1st."

The Bulletin, rules and regulations cited by Carrier in its dismissal notice quoted above pertain to requirements for proper leaves of absence and the duty of **employees** to obey the rules and protect their job assignments. For ready reference the General Notice and General Rules are quoted as follows:

"GENERAL NOTICE

'Safety is of the first importance in the discharge of duty.

'Obedience to the rules is essential to safety.

'To enter service or remain in the service is an assurance of willingness to obey the rules,

'The service demands the faithful, intelligent and courteous discharge of duty.'

"GENERAL RULES

'B. Employees must be conversant with and obey ~~the~~ rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the Railroad for explanation.'

'E. Employees must render every assistance in their power in carrying out the rules and special instructions, and must report any violation thereof to the proper officer.'

'702. Employees must report for duty at the designated time and place. They must be alert and attentive and devote themselves exclusively to the company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority.'

'702(B). Employees must comply with instructions from proper authority.'

The Bulletin Notice of September 21, 1978, cited in Carrier dismissal notice, deals generally with the requirement for leaves of absence and concludes with the following:

"Any ~~employee~~ who is absent from duty in excess of 15 days or more in all crafts, except Clerks, which is 10 days, without proper authorization or approved leave of absence, will be considered out of service and forfeit all rights and seniority."

Based on our review of the evidence we conclude Claimant showed reckless and defiant disregard of the rules in failing to get proper authorization to be absent from his assignment.

Claimant points out the period of absence did not exceed ten working days. From this, he concludes that a leave of absence is not required by the rules. The rule does not support this conclusion. It specifies that absences of more than ten days require a leave of absence to be in writing and is silent on absences of ten days or less. It might be argued that by implication a verbal leave of absence would suffice for leaves of ten days or less. It also should be noted, however, that Rule 43(c) states that leaves of ten days or less may be required in writing. And certainly there is no excuse for absences without authority and it is on this point that Claimant is particularly vulnerable. He arrogantly defied his superior, Mr. Wagner, in stating he would not work tomorrow and added there was no way he could be contacted.

Claimant argues that he was denied due process **and** a fair and impartial hearing because the hearing officer ruled out questions as to qualified and available relief employees. Such an argument misses the point of the charge which was failure to have proper authority to **be** absent from work or a proper leave of absence. The fact that others **were** available to fill his job may argue for granting his requested leave of absence. But that was not the problem. The problem was his unwillingness to wait for an answer to his leave request or even give his supervisor a contact where he could **be** reached. **He** flatly told his supervisor. **"I** wont be at work. And you can fire me if you want **to.**" In the circumstances we do find that questions as to relief employees were not relevant to the charge and thus the hearing officer was not in error in -ruling out questions on this subject. Therefore, it must be concluded that the contention he **was** denied due process or a fair and impartial hearing falls for lack of convincing support.

In failing to secure authorization to be absent from his assignment when told he was expected to protect his assignment by his superior, Claimant was in clear violation of the rules and regulations cited by **Carrier** in its dismissal notice. The evidence supports a finding that his violations were deliberate and his attitude uncooperative. While we are concerned that an **employee** with 29 years service would be terminated in such a set of circumstances his violations of established rules is well documented. This, together with his **arrogance** and defiant **manner** no doubt resulted in Carrier taking extreme measures of discipline. In the circumstances we find Carrier action was for just cause.

As stated by Referee Ives in Third Division Award No. 14272 -

"Unauthorized absences from duty, if proven, are serious and often result in dismissal from service. The punishment cannot **be** said to be arbitrary, capricious or unsupported by the record and in accordance with the broad latitude given Carriers by this Board in the matter of assessing discipline, we will not upset the discipline decided upon by the Carrier. (Award No.12438 and others cited therein.)"

Carrier's dismissal action was appealed numerous times by the Brotherhood to higher officers of the Carrier in accordance with the requirements of the Railway **Labor** Act. In the course of the various appeals both sides contended the other side had violated time limit requirements. Apparently, however, such differences were settled in conference since it is noted on May 26, 1982, an arrangement had been made for a **6-month** extension to prepare the case for further adjudication. It is also noted that late in the appeals process the Carrier agreed to reinstate Claimant on a leniency basis provided he passed the required physical examination.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984

