NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25190
Docket Number MW-25263

THIRD DIVISION

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The dismissal of Welder M. E. Roberts for being absent *without proper authority March 30, 1982" was excessive and wholly disproportionate to the offense with which charged and on the basis of a hearing which was neither fair nor impartial (System File MW-82-141/353-66-A).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: Claimant, a Welder, had been in Carrier's service about nine years. It is not disputed that Claimant was absent from his assignment on March 30, 1982. On April 8, 198.2, Claimant was advised by the Carrier's Regional Maintenance of Way Manager, A. J. Orphan:

> "You were absent from your job assignment without proper authority March 30, 1982, which is in violation of Rule M810 of the general rules and regulations of the Southern Pacific Transportation Company, as posted by General Notice. Rule M810 reads in part as follows:
>
> 'Employes must report for duty at the prescribed time and place.... They must not absent themselves from their employment without proper authority...'
>
> For your violation of Rule M810, you are dismissed from the service of the Southern Pacific Transportation Company and are instructed to return any company property which may be in your possession to District Maintenance of Way Manager R. L. Gentry at Eagle Lake, Texas..

The Carrier states that the letter of April 8. 1982, was returned by the Post Office Department and remailed on April 22, 1982, to Claimant's address furnished by the Organization. Claimant requested a hearing, the Carrier says, by letter dated April 20, 1982, which letter was received on April 26, 1982, and on that date Claimant was advised by certified mail by the Regional Maintenance of Way Manager:

'Pursuant to your request dated April 20, 1982, hearing is granted and will be held at 9:00 a.m., May 6, 1982, in Room 907, S. P. Building, 913 Franklin Avenue, Houston, Texas."

The hearing was held as scheduled and on May 11, 1982, Claimant's dismissal was affirmed. A copy of the transcript of the hearing has been made a part of the record. While there was considerable give and take between the conducting officer and Claimant's representative in the hearing, and we may not consider it exemplary, at the same time we consider that Claimant was given ample opportunity to explain his side of the case and that there was substantial evidence that he was absent from his assignment without proper authority on March 30, 1982.

Carrier's Rule M810 of the General Rules and Regulations of the Southern Pacific Transportation Company, referred to in the Regional Maintenance of Way Manager's letter of April 8, 1982, and further letter of May 11, 1982, reads:

"810. Employes must report for duty at the prescribed time and place, remain at their post of duty, arid devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority. They must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer.

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

An employe subject to call for duty must not leave his usual calling place without notice to those required to call him."

There was evidence in the investigation that Claimant was absent from his assignment without permission on March 30, 1982. The Claimant testified in part:

"Are you familiar with the rule that has been quoted and read into the record?
Yes.

Were you absent from your job on March 30, 1982?
Yes.

Did you have authority to be absent on that date)
I assumed everyone thought that I might not return to work on March 30.

* * *

"Did you specifically request from anyone permission to be off on March 30?
I spoke with the welders on Welding Gang 21 and Welding Gang 16.

Are the welders on Welding Gangs 21 and 16 authorized to give you permission to be absent?
I couldn't find Willie Iverson.

• * •

Why didn't you call on the morning of March 30 prior to reporting for duty?
I couldn't get to a phone.

• ✉ •

Why were you absent from work on March 30, 19821
I was involved with some personal business which had me incapacitated, and I couldn't qet to a phone."

We find that there was substantial evidence to justify the Carrier in 'concluding that Claimant was absent without permission on March 30, 1982, in. violation of Rule M810. In the on-property handling, the Carrier's highest designated officer of appeals advised the General Chairman of the Organization OR August 17, 1982, that:

"Mr. Roberts' previous discipline record reflects he was given forty demerits for violation of Rule M810 on July 1, 1982, and forty demerits for being in violation of Rules 802 and M530 on March 13, 1979."

However, in its Submission the Carrier points out additional disciplinary actions against Claimant, stating that he had previously been disciplined four times, and had been suspended from the service for seven days. Except for matters of public record, the Board is restricted to issues that were handled on the property. We will, therefore. disregard the additional disciplinary cases mentioned by the Carrier in its Submission.

The record also shows that on October 29, 1982, the Carrier's highest designated officer of appeals wrote to the General Chairman confirming a conference held on October 28, 1982, and also advised the General Chairman:

'Additionally you were advised that Mr. M. E. Roberts was absent without authority on September 30th (sic) account incarcerated in the county jail. Records indicate that Mr. Roberts was charged with aggravated kidnapping and sexual assault. The Harris County Sheriff's Department indicates that Mr. Roberts was incarcerated from March 30, 1982 until released on bond on April 9, 1982. Mr. Roberts did not report for his pre-trial hearing and as a consequence, his no-arrest bond was revoked and increased to $50,000.00 and a warrant for his arrest was issued by the 230th District Court. It is my understanding that Mr. Roberts has posted the higher bond and is now out of jail awaiting trial.

In any event being in jail is not sufficient reason for being absent without authority.

Under these circumstances permanent dismissal is appropriate, and your claim as presented is without basis and respectfully declined."

With its Submission the Carrier presented to the Board a notarized copy of the 177 District Court Judgment, in which Mr. Roberts received 12 months sentence in Texas Department of Corrections on January 19, 1983, which was subsequently appealed, sentence being deferred pending appeal, Generally in disciplinary cases this Board has held that the parties to the dispute and the Board itself are restricted to evidence introduced at the investigation. This Referee has participated in such holdings; however, we do not consider such restriction applicable to court records, which are matters of public record, and as such are admissible in proceedings before this Board at any time, and the Board may take judicial notice of same. See recent Award No. 24989, and Fourth Division Award No. 2239. We do not consider the reports of Carrier's Special Agents as matters of public record. They are not properly before the Board and will not be considered.

The Board has issued numerous awards to the effect that incarceration is not a proper or valid excuse for unauthorized absence. See Awards Nos. 12993, 19568, 21222, 22868, 24606 and 24760.

After reviewing all the facts of record, we are of the considered opinion that Carrier's dismissal of Claimant was not arbitrary, capricious or in bad faith.

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 Employes involved in this dispute are respectively Carrier and Employes 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 11th day of January 1985.