NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25410

THIRD DIVISION

Docket Number MW-25341

Paul c. carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Chesapeake and Ohio Railway Company

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

(1) The dismissal of B&B Mechanic Garry Cook for allegedly having 'been absent without permission from proper authority on the following date, Friday, December 4, 1981" was arbitrary, capricious, without just and reasonable cause and on the basis of unproven charges (System File C-D-1312/MG-3546).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired, the charge leveled against him shall be cleared from his record and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: The record shows that Claimant was previously employed by the Carrier as a B&B mechanic and had been in service some six and one-half years.

There is in effect between the parties a Memorandum of Agreement, dated July 25, 1977, which Agreement dispenses with the usual form of disciplinary handling in cases of absenteeism and establishes a progressive system for handling such cases, beginning with a warning letter, a five-day overhead suspension, a ten-day actual suspension, and finally dismissal. The Memorandum of Agreement is set forth in full in the record. We are concerned with Sections 5, 6 and 7 of the Agreement that provide:

> 'Section 5. An employee who is absent from duty without permission from proper authority and who has been given the warning letter prescribed in Section 2 hereof, who has been assessed five (5) days' overhead suspension by a second letter as provided in Section 3 hereof and who has been assessed ten (10) days' actual suspension by a third letter as provided in Section 4 hereof will be given a final letter in the form attached as Appendix D to this Agreement and will be dismissed from the services of the Railway Company.
>
> Section 6. An employee who has been disciplined under this Agreement who feels he has been unjustly treated may progress a claim or grievance on this account through the regular claimant grievances handling procedure provided he does so within the time limits prescribed in the Schedule Agreement for handling claims and grievances.
>
> Section 7. The discipline rules, Rule 21 of the Southern Region Agreement, Rule 24 of the Northern Region Agreement and Rule 18 of Addendum 3 to Northern Region Agreement will not apply to employees disciplined under this Memorandum of Agreement.*

The Carrier contends that on December 4, 1981, Claimant left his assignment at 11:00 A.M. without obtaining permission, and on December 11, 1981, he was notified that he was dismissed from service pursuant to Section 5 of the above-quoted memorandum of Agreement, the letter of dismissal reading:

> "You have been absent without permission from proper authority on the following date, Friday, December 4, 1981.
>
> Rules and instructions governing Maintenance of Way Employees require that no employee absent himself from duty, nor engage a substitute to perform his duties without permission from the proper authority. Employees must report for duty at the designated time and place.
>
> As you have previously been given a warning letter on August 21, 1978, were assessed five (5) days' overhead suspension on June 29, 1981, and was assessed ten (10) days' actual suspension on July 7, 1981, account your unauthorized absences, you are now being dismissed from the service of the Railway Company effective the close of business, December 11, 1981, pursuant to Section 5 of Memorandum of Agreement dated July 25, 1977..

Claim was filed in behalf of Claimant by the Organization on December 21, 1981, and a grievance hearing requested. The claim was denied on January 22, 1982, and a grievance hearing was arranged for February 9, 1982. The hearing commenced on the date scheduled, was recessed and completed on February 19, 1982, following which the Claimant's dismissal was affirmed on March 10, 1982. A Transcript of the hearing has been made a part of the record.

The record shows that Claimant reported for work at the usual time on December 4, 1981, and worked until about 11:00 A.M. The Claimant contends that about 11:00 A.M., December 4, 1981, while working with another employe, he became ill to the extent of vomiting blood; that he and the other employe returned to the location where the Foreman was; that he told the Foreman that he was sick and vomiting blood; that the Foreman told him "he could not say if I was sick or not but if I had to go I had to go". He stated that he made one attempt to call the Supervisor but the line was busy, and he then called a Doctor and made arrangements for an appointment for December 7, 1981, which was the following Monday, and arrangements were made for X-rays on December 9, 1981. There was introduced into the hearing in behalf of Claimant a statement signed by Dr. Hugh Warren, Jr., of Newport News, Va., dated December 15, 1981:

"This patient was taken sick on 12-4 at work and vomited blood and had to leave work. I examined him 12-7-81, got Xrays of his stomach and duodenum on 12-9-81 and proved that he had duodemitis that was causing his symptoms. Is now under treatment and is doing well."

The Carrier contends that Claimant did not obtain permission from either his Foreman or his Supervisor to be absent from duty on December 4, 1981. There was substantial evidence in the grievance hearing to support the Carrier's position in this respect. It is, however, a matter of common knowledge that persons suffering from ulcer conditions may have frequent episodes of bleeding. Claimant should not have left his job on December 4, 1961, without permission of his Foreman or Supervisor. He was subject to discipline for his actions in this respect. However, permanent dismissal under the circumstances of this case constituted excessive discipline. We will award that Claimant be restored to service with seniority and other rights unimpaired, but without any compensation for time lost while out of the service. He should understand, however, that it is expected that his attendance record will improve.

In the handling of the dispute on the property, and in the Submissions to this Board, each party has commented at length on alleged procedural defects. We do not consider that either party has been prejudiced by the manner in which the present case was handled and our decision on the merits has been reached without passing on the procedural issues. We suggest to the parties, however, that they agree on just how appeals are to be handled in such cases. So far as the Board is concerned, the positions of the parties as to proper appeal procedure in such cases are irreconciliable. Sections 6 and 7 of the Memorandum of Agreement of July 25, 1977, appear to be in contradiction. Section 6 recognizes the right to appeal *through the regular claimant grievances handling procedure-. Section 7 excepts the application of Rule 21. Rule 21 is captioned "Discipline and Grievances*. The Board is in no position to say what Sections of Rule 21 are applicable in such cases.

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 discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1985.