

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25627

Docket Number NW-25898

John W. Gaines, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(National Railroad Passenger Corporation (**Amtrak**))

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

(1) The dismissal of Mason W. C. Hampton for alleged violation of the October 26, 1976 Absenteeism Agreement on March 25 and 30, 1983 was without just and sufficient cause and on the basis of unproven charges (System **Docket** NEC-BMWE-SD-6070).

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

OPINION OF BOARD: Claimant was absent from work on the above-specified dates of March 25 and 30, 1983. He was instructed by notification dated April 5, 1983, to appear for trial scheduled for April 27, 1983 which was held as scheduled, and the outcome was that Claimant was dismissed from service by notification dated May 9, 1983.

One ground of dismissal was absenteeism directly covered by the Absenteeism Agreement which is dated **10/26/76** as noted above, and a separate ground was Claimant's failure to follow Carrier's standing instruction to give advance notification to his Supervisor.

The initial three Items thereof are on point and so the Agreement dated **10/26/76** is reproduced to that extent:

- '1. Maintenance of Way Employees absent from work without permission **or** legitimate cause shall, on the first offense, be served a written notice advising them that unauthorized absences from work will not be tolerated and could subject them to discipline. A copy of such notice will be furnished the General Chairman of the area involved.

"'Legitimate cause' is interpreted to mean illness of the employee, or of a member of his household requiring his personal attention; or attendance in court. In cases where the employee reports off ill, resulting in absence of three (3) or more days, a doctor's certificate of treatment or examination by a Company physician will be required before return to duty is permitted.

- "2. Maintenance of Way Employees who are found guilty of unauthorized absence from work on the second offense shall be subject to discipline of ten (10) working days' suspension.
- "3. Maintenance of Way Employees who are found guilty of unauthorized absence from work for the third time within a 12-month period shall be subject to dismissal from service. The 12-month period shall start as of first offense as indicated under Item 1 of this Agreement."

At the trial, Claimant was his own witness, he represented himself, and he cross-examined Carrier's witnesses. At the outset he was clearly advised of his rights to be represented and to call witnesses in his cause and, so advised, he waived his rights. The trial time was devoted mainly to Claimant's alleged attempts without success to telephone his Supervisor on March 25 and 30, 1983, also to his proven and readily admitted to absences on the two days, and to the reading, into the record 'only for the purpose of assessing should any discipline result', of Claimant's past discipline record with its history of absentee problems. Claimant took exception as to how one could add that (past disciplining) in this trial. He stated yes, I do, in response to the question do you feel this trial was conducted in a fair and impartial manner.

The transcript under painstaking scrutiny sheds no light on whether or not Claimant on either of the two days had permission or legitimate cause for not reporting to work. That he had the two absences was factually never in dispute. So, from the Carrier, the burden thereby shifted to Claimant to prove that the absences did not fall within the unauthorized absence prohibition of above Item 3 of the Agreement dated 10/26/76.

We conclude that the two unexplained absences were as charged in direct violation of the Agreement. The conclusion is unavoidable, and we hold specifically that Claimant's guilt of this third time absenteeism under Item 3 thereby subjected him to the dismissal permitted by Item 3.

Carrier gave Claimant written instructions in the month preceding March 25 and 30, 1983, that he was required to telephone his Supervisor in the morning prior to work, that he would not be at work. If he made efforts to contact his Supervisor, his efforts were inadequate and always unsuccessful. This violation of a standing instruction is cumulative, lending further support to imposing severe discipline.

Claimant's consistently poor attendance leaves no room for mitigation. To the contrary, the record shows Claimant received **excessive** absenteeism warning letters in both 1978 and 1980, with five days discipline imposed for absenteeism in 1981. Carrier's letter of warning of July 2, 1982, lists instances of Claimant being absent without permission both on, and in time between, **May** 17 and July 26 of that year, followed by a ten-day suspension without pay in January, 1983, for not reporting to work in instances within November of 1982. And, as already indicated as stemming from the two days' absence in March, 1983, Claimant was thereupon found guilty of unauthorized absences from work for the third time within a year. **An** employee's prior record may always be thusly considered in arriving at the discipline to be imposed for a proven offense. The Absenteeism Agreement actually mandates taking cognizance for 12 months prior.

On basis of the proven charges against Claimant in the trial record, viewed against his overall record, we find the disciplinary action was for just and sufficient cause, and we will deny the claim.

Some months subsequent to trial the Organization, in the matter of the absences being for legitimate cause or not, raised the contention that an employe who had been providing Claimant transportation to work did not provide it on the two days. That contention even if viewed, **arguendo**, as a valid excuse for otherwise unauthorized absences may not properly be then raised for the first time before the Board. Organization relies on Second Division Award 8647 from which the following quotation is set out in their **Ex Parte** Submission: **"In** disciplinary cases all parties, including the Board are restricted to the evidence adduced at the investigation in determining whether the charge **or** charges against the employe are supported....'

The Carrier's position on time limits is not well taken. Claimant has procedurally complied, in the respects objected to as not being timely filed.

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.

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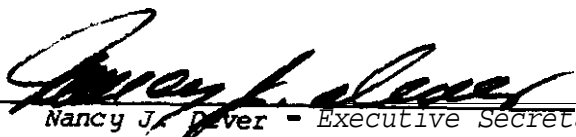
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1985.

