

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25809
Docket Number MW-25439

Nicholas Duda, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Seaboard System Railroad

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

(1) The dismissal of Trackman K. L. Allen for alleged violation of 'Rule 17(b)' and 'Safety Rule 18' effective September 7, 1982, was without just and sufficient cause [System File C-4(13)-KLA/12-39(83-2) J3].

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

OPINION OF BOARD: Claimant was hired by the Carrier as a Trackman on March 30, 1977. He was regularly assigned on Extra Gang 5171 under the direction of Foreman J. E. Alston. After working on June 10, 1982, Claimant was scheduled to work Monday, June 14, 1982, but did not appear. Instead, he sent word to his Foreman by Trackman Hannah that he was taking the week of January 14 off as vacation to move his home. When given that message, Foreman Alston told Trackman Hannah that Claimant's attempt to take vacation was improper and would not be allowed; Alston asked Hannah to communicate that information to Claimant.

Claimant did not report for the rest of the month of June and did not communicate with the Carrier. On July 1, the Division Engineer sent him a certified letter instructing that he immediately advise the reason for his absence. Claimant next contacted the Division Engineer on July 15; he was instructed to report to the Assistant Division Engineer the next day. On July 16, the Assistant Division Engineer told Claimant his actions concerning his schedule were highly irregular and improper and as a result, formal charges would be made and a hearing scheduled. He instructed Claimant to report to work Monday July 19.

On July 20, 1984, the Assistant Division Engineer sent a letter to Claimant's supervisor for delivery to Claimant at work. The letter notified Claimant that he was charged with violation of Rule 17(b) of the Agreement and also with Rule 18 dealing with desertion. "These charges result from your absence from work June 10, 1982, until you reported to me on July 16, 1982". The letter also instructed Claimant to attend a hearing on the charges scheduled for July 29, 1982.

The July 20 letter was not delivered by the Supervisor because Claimant did not report the week of July 19, 1982, or the next week. When he learned on July 27, 1982, that Claimant had not been given the letter, the Assistant Division Engineer sent a certified letter mentioning the contents of the July 20 letter, including the charges and the sentence "Those charges result from your absence from work on June 10, 1982 until you reported to me on July 16, 1982". The letter also charged Claimant with violation of the same rules "for your failure to report to work on July 19, 1982 . . . for your subsequent actions from July 19th until July 27th". Claimant was notified that a formal hearing would be set "as soon as you contact the Division Engineer's Office. At that formal hearing, you may have representation . . . and you may have present any witnesses who have knowledge of this matter." By arrangement with the Organization, the hearing was set for September 2, 1982. At the hearing Claimant did not have any witnesses or evidence other than his own testimony to explain his absences and behavior.

On September 8, 1982, the Division Engineer notified Claimant "after reviewing the transcript of the hearing, it is my decision that your employment . . . will be terminated". The Organization contends that decision violated the Agreement. In its submission the Organization made several Claims which merit specific consideration:

1. Whereas the charges of alleged rule violation were based on absence from work "on July 10, 1982 . . . until July 27th . . . the Carrier found Claimant guilty in respect to absence "from July 10, 1982, until . . . September 2, 1982 . . ." To the Organization, the Carrier dismissed Claimant based on a period that began after, and extended beyond, the period specified in the charges.

"On" preceded "June 10, 1982" in the July 28, 1982, letter. According to that wording, Claimant's absence on June 10, 1982, was being charged as a violation of the specified rules. In the first letter, "from" preceded "June 10, 1982"; use of that preposition excluded June 10, 1982, from the charge period. A clear intention of the July 28th letter was to repeat the charges in the July 20, 1982, letter. Furthermore, at the hearing, the Hearing Officer read both charge letters. The statements by Claimant and the Organization show they understood that the absence in question was "from" June 10, 1982. The use of the preposition "on" rather than "from" caused no confusion as to the issues and did not prejudice Claimant. For all these reasons, it is clear that use of "on" instead of "from" in the July 28, 1982, letter was a typographical mistake which should be disregarded.

In his letter of September 8, 1982, one of the statements made by the Engineer was "after reviewing the transcript of this hearing, it is evident that you did not report to work from June 10, 1982, until the date of the hearing on September 2, 1982". The Organization suggests that the statement meant the Carrier dismissed Claimant for violation of the specified rules throughout the period ending September 2, 1982.

That Claim is not accurate. Other statements in the letter make clear that the Carrier concluded that Claimant had violated the rules for his absence in the charged period, from June 10, 1982 to July 16, 1982 and from July 19, 1982 until July 27, 1982; for such violation, Carrier dismissed Claimant.

In any event, the specific dates of absence are not the primary issue in this case. All parties agree that Claimant worked on June 10, 1982, but was absent thereafter. The question is whether Claimant's absence after June 10, 1982 until July 27, 1982 was justified or should be excused so that the Carrier did not have just cause to dismiss him.

The Organization contends that Claimant "had not been made aware of said rules". At the hearing Claimant acknowledged the recitation of his discipline record which reflected that he had been disciplined on a number of occasions for violation of the absenteeism rules. As a matter of fact, Claimant was suspended for ten days for the period May 17, 1982 through May 28, 1982 for the very same reason, being absent from work without permission. Furthermore, the Assistant Division Engineer explained the Rules on July 16, 1982.

3. The Organization correctly points out that the Agreement provides that "due regard consistent with the requirements of service shall be given to the desires and preferences of the Employees when fixing dates for their vacations". However, that provision can not excuse Claimant's absence. In his testimony, Claimant showed that he had merely sent word at the beginning of work on July 14, 1982, that he was not reporting and was "taking" his vacation. He had made no request and expressed no desire in advance in relation to fixing vacation dates. He was not even present to discuss preferences.

4. Rule 17(b) provides:

"An employee desiring to be absent from service must obtain permission from his foreman or the proper officer. In case an employee is unavoidably kept from work, he must be able to furnish proof of his inability to notify his foreman or proper officer."

The Organization contends that Claimant had justifiable reasons to be absent and those reasons unavoidably kept him from work. At the hearing there was no corroboration for the reasons alleged. Assuming however that the stated reasons were true and unavoidably kept Claimant from work, the Carrier was clearly justified in finding that Claimant did not furnish proof of his inability to notify his Foreman as provided by Rule 17(b). That is true in respect to the absence beginning on June 14, 1982, as well as the absence beginning July 19, 1982.

In his short tenure of employment, Claimant disregarded the rules of absence and attendance despite counseling and discipline. He did not even follow the advice of the Organization during the period in question in this case. There is substantial evidence in the record to support the dismissal of the Claimant and no basis for this Board to find that Claimant's absences were justified or should have been excused.

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.

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 12th day of December 1985.