

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25913

Docket Number MW-25986

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of B&B Carpenter S. K. Anderson for alleged 'insubordination, and your willful neglect of duty as evidenced by your habitual and continued absenteeism from duty without permission, the most recent being your failure to protect your assignment as B&B Carpenter on Gang 6002 on May 28, 29, and 30, 1983' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File D-34-83/MW-23-83).

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

OPINION OF BOARD: At the time of the occurrence giving rise to the dispute herein, Claimant was employed by the Carrier as a Bridge and Building Carpenter, assigned to B&B Gang 6002, working under the supervision of Supervisor of Structures P. C. O'Brien, Assistant Supervisor J. R. Sprouse, and B&B Foreman W. McCloskey. His assigned work week was Monday through Friday, with Saturdays and Sundays as designated rest days. On June 2, 1983, Claimant was notified:

"Formal investigation will be held at 10:00 A.M., Tuesday, June 7, 1983, in the Superintendent's Conference Room, North Yard, 901 West 48th Avenue, Denver, Colorado, to determine facts and place responsibility, if any, in connection with your alleged insubordination, and your willful neglect of duty as evidenced by your habitual and continued absenteeism from duty without permission, the most recent being your failure to protect your assignment as B&B Carpenter on Gang 6002 on May 28, 29 and 30, 1983.

Your presence as principal is required at this formal investigation, with a representative, if desired.

If you desire any witnesses to appear on your behalf, notify the undersigned promptly."

The letter was written to Claimant by Carrier's System Superintendent A. L. Marzano.

At the request of Organization, the Investigation was postponed and rescheduled for 10:00 A.M., June 14, 1983, at which time it was conducted. A copy of the transcript of the Investigation has been made a part of the record. Claimant was present throughout the Investigation and was represented by the Vice General Chairman of the Organization. Some question was raised at the beginning of the Investigation as to whether the charge of June 2, 1983, heretofore quoted, constituted proper notice. We find that the charge was sufficiently precise to put Claimant and his Representative on notice as to what was being investigated. The notice met the requirements of the Agreement. From our review of the transcript, we find that none of Claimant's substantive procedural rights was violated. The refusal of the Conducting Officer to permit Claimant to introduce into the Investigation written statements from Claimant's wife and mother, was not in violation of the Agreement, or of sufficient significance to invalidate the proceedings. The statements have been made a part of the Organization's submission to the Board. On June 21, 1983, Claimant was notified of his dismissal from Carrier's service.

In the Investigation conducted on June 14, 1983, there was substantial evidence that B&B Gang No. 6002, to which Claimant was assigned, was instructed to work the weekend before the Memorial Holiday and on the holiday because of an emergency situation facing the Carrier, resulting from a mountain slide causing continuing mud slide activity onto the tracks. There was also evidence that Claimant was personally instructed by the Assistant Supervisor of Structures to work May 28, 29, and 30, 1983, with his Gang at the location of the mud slide. The Assistant Supervisor and the other men assigned to Gang 6002 did work at the mud slide site on May 28, 29 and 30. Claimant did not report, nor did he have permission from Supervisory personnel to be absent.

Carrier's Operating Rules 802-B and 801 read:

"Rule 802-B: Employees who are guilty of acts of insubordination, incompetency, willful neglect of duty, making false reports or statements or concealing facts concerning matters under investigation will be subject to dismissal.

Rule 801 - Employees must report for duty at the designated time and place, attend to their duties during prescribed hours, and obey promptly instructions of executive and general officers, heads of departments and other proper authority in matters pertaining to their respective branches of the service. They must not absent themselves from duty, exchange duties with others, substitute others in their places, or engage in other business without proper authority."

There was substantial evidence in the Investigation that Claimant's prior absentee record was far from satisfactory. It shows that Claimant would frequently call the Foreman and simply state that he would not be at work. Claimant's right to absent himself when he desired by simply reporting off was not absolute. Rule 801 is specific in providing that employees "must not absent themselves from duty . . . without proper authority."

We find and hold that Claimant was guilty of insubordination in refusing to work on May 28, 29, and 30, 1983, after being specifically instructed to do so in the emergency situation. The contentions of Claimant as to alleged illness and the meager evidence in support of such contentions are not persuasive. His actions on May 28, 29 and 30, 1983, and his prior absentee record fully warranted dismissal.

While there were conflicts between the statement of Claimant and others in the Investigation, it is well settled that this Board will not weigh evidence, attempt to resolve conflicts therein, or pass upon the credibility of witnesses.

The Claim will be denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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

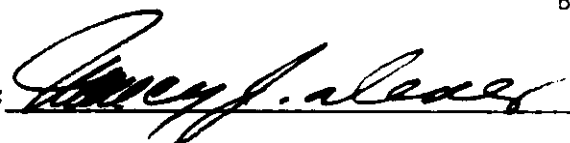
That the Agreement was not violated.

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 26th day of February 1986.