

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26050

Docket Number MW-26057

Referee Peter R. Meyers

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railroad Company (Southern Region)

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

1. The dismissal of B&B Mechanic M. R. Bullock for alleged absence without proper authority on July 15 and 29, 1983 was without just and sufficient cause (System File C-D-1898/MG-4207).

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 M. R. Bullock was employed as a B&B Mechanic by the Carrier, the Chesapeake and Ohio Railway Company. On July 29, 1983, Claimant was notified that he was dismissed from service because he had been absent without permission on July 15 and 29, 1983. The Organization subsequently appealed Claimant's dismissal from service. A Hearing was held on the property on September 20, 1983. The Carrier upheld Claimant's dismissal. The Organization then filed this Claim on Claimant's behalf, challenging Claimant's dismissal from service.

The Organization contends that a review of the record will establish that the Carrier has not met its burden of proof in this case. The Organization contends that Claimant's absence on the dates in question were related to the effects of his on-duty injury, suffered December 1, 1981. At the time of the incident, Claimant was still receiving physical therapy for his on-duty injury. The Organization points out that this Board consistently has held that illness and injury are just and proper causes for absence from duty, and that no employee may be required to jeopardize his health or safety as a condition for continued employment.

The Organization further argues that Claimant attempted to notify his Supervisor of his absences in a timely fashion, but did not succeed in reaching the Supervisor. The Carrier's witnesses neither denied nor challenged this point. The Organization therefore argues that Claimant exercised reasonable diligence in attempting to notify the Carrier that he would be absent from duty.

The Organization maintains that in view of the factual record and mitigating circumstances, Carrier's decision to discipline Claimant cannot be justified. The Organization contends, therefore, that the discipline cannot stand because it is excessive, capricious, improper, and unwarranted.

Finally, the Organization contends that Claimant was denied his contractual right to due process as provided by Rule 21 of the Controlling Agreement, which provides in part:

"(a)(1) Hearing -- An employee who has met the Railway Company's entrance requirements and who has not been rejected within sixty (60) days as provided by Rule 2(a) shall not be disciplined or dismissed without a fair hearing

. . . .

(g) Grievances, Other than Discipline -- An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above for discipline cases . . .

. "

The Organization contends that although the Hearing was conducted by the Carrier's Assistant Manager of Engineering, the Manager of Engineering rendered the subsequent decision; the Manager of Engineering was not present at the Hearing. The Organization asserts that this denied Claimant's right to due process. The Organization therefore contends that the Claim should be allowed: Claimant should be reinstated with seniority and all other rights unimpaired, and he should be compensated for all lost wages.

The Carrier contends that Claimant's dismissal did not violate the provisions of the July 25, 1977 Memorandum Agreement, which amended the Controlling Agreement's provisions governing discipline for absenteeism. The Memorandum Agreement establishes a system of progressive discipline for absenteeism: warning letter; five-day overhead suspension for a three-month probationary period; ten work days' actual suspension; dismissal from service.

The Carrier points out that pursuant to the Memorandum Agreement, Claimant received a warning letter in 1978 for a five-day, unauthorized absence; a five-day overhead suspension on February 4, 1983, for a two-day unauthorized absence; a ten-day actual suspension on February 17, 1983, for a two-day unauthorized absence; and finally was dismissed on July 29, 1983, after two more unauthorized absences. The Carrier asserts that it clearly and repeatedly warned Claimant that his unauthorized absences could result in dismissal; Claimant's dismissal was proper under the terms of the Memorandum Agreement.

The Carrier further argues that Claimant received a fair and impartial Hearing. The record establishes that Claimant was present at the Hearing, was assisted by a representative, and had opportunity to present and examine evidence and witnesses. Moreover, the Claimant stated during the Hearing that he felt the Hearing had been fair and impartial; his representative stated that the Hearing had been conducted in accordance with the labor rules.

The Carrier finally argues that substantial evidence supports its finding that Claimant was guilty of being absent from duty without authorization; Carrier therefore properly upheld the decision to dismiss Claimant. The Carrier points out that Claimant admitted that he did not notify his

Supervisor of his absences, nor did he obtain a slip from his doctor to give his Supervisor. Moreover, the Claimant admitted that he did not obtain permission to be absent, the violation with which he was charged. The Carrier contends that this Board repeatedly has held that it cannot set aside findings that are supported by substantial evidence. The Carrier therefore asserts that the Claim should be denied in its entirety.

In rebuttal, the Organization argues that the instant claim seeks a remission of unwarranted discipline; it is not a plea for leniency.

In rebuttal, Carrier asserts that even if Claimant's absences were justified and beyond his control, Claimant is not excused from his failure to obtain permission for those absences. When an employee is absent due to illness or injury, the employee still has the obligation of notifying his Supervisor; if the employee fails to notify his Supervisor, he is absent without permission and subject to discipline. The Carrier also argues that because it asked only that Claimant obtain permission for his absences, Claimant was not required to jeopardize his health and safety as a condition for continued employment.

The Carrier also contends that discipline for absenteeism is handled under the Memorandum Agreement in lieu of the governing agreement's Discipline Rules. The aggrieved employees bear the burden of proving that their absences were authorized; the Organization therefore bears the burden of proof in this case. Carrier asserts that Claimant testified that he did not contact his Supervisor about his absences; Claimant's Supervisor testified that Claimant did not notify him on either date in question.

The Carrier also contends that the assessed discipline was in line with the negotiated provisions of the Memorandum Agreement. The discipline was not excessive, capricious, improper, or unwarranted. The discipline, therefore, should stand.

Finally, the Carrier contends in rebuttal that the Organization's due process Claim should not be considered by this Board because it was never raised during the handling of this Claim on the property. The Carrier further argues, though, that if this Board does consider the issue, the Organization's position is without merit. The Carrier asserts that Rule 21 is a Grievance Hearing Rule and under the provisions of the Memorandum Agreement, it therefore does not apply to discipline for absenteeism. Further, Rule 21 does not specify which officers should conduct Hearings and render decisions. The Carrier therefore contends that its handling of the Investigation was not improper or violative of the Agreement.

This Board has reviewed the evidence in this case, and it finds that there is sufficient evidence in the record to support the discharge of the Claimant.

The parties entered into an agreement on July 25, 1977, setting forth the progressive disciplinary system to be followed in cases of alleged excessive absenteeism. The Claimant was afforded all of his rights pursuant

to that program between September 1978 and July 1983. The Claimant was repeatedly warned that his absences without permission constituted unacceptable behavior and could result in his discharge. He received all of the lesser forms of discipline pursuant to the system.

In July 1983, the Claimant was absent without permission on two occasions. Although he stated that he was suffering back pain on the dates that he was absent, he admittedly did not receive permission from supervision to be absent. Hence, he made himself eligible for discharge since he had reached the final stage of the progressive disciplinary system.

This Board has reviewed the procedures that were afforded to the Claimant, and we find that he was not denied any of his rights during the process. The parties agreed to the disciplinary system because of the problems that excessive absenteeism causes in the work place. The Claimant was properly disciplined and discharged pursuant to that system. Hence, this Claim is denied.

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 Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act as approved June 21, 1934;

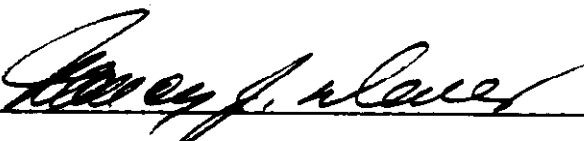
That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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 11th day of June 1986.