

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26051  
Docket Number MW-26058

Peter R. Meyers, Referee

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

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

1. The dismissal of Mr. L. L. Cox for alleged absenteeism on June 2 and 7, 1983 was without just and reasonable cause (System File C-M-1836/MG-4206).

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 L. L. Cox was employed as a Trackman by the Carrier, the Chesapeake and Ohio Railway Company. Claimant was absent from service on June 2 and June 7, 1983. By letter dated June 7, 1983, Carrier dismissed Claimant from service on the grounds that he had been absent without permission. The Organization filed a Claim on the Claimant's behalf. After a Hearing on the property, Carrier denied the Organization's appeal and upheld the Claimant's dismissal.

The Organization contends that the Carrier bears the burden of proving its charges by substantial evidence, but the Carrier has not met its burden. The Organization argues that the record establishes that the Claimant received permission to be absent on the dates in question. Claimant was the only witness at the Hearing; Carrier neither challenged nor denied his testimony that he had received permission to be absent on both days. The Organization further asserts that because the Carrier did not instruct Claimant's Supervisors to testify at the Hearing, it may be presumed that their testimony would be unfavorable to the Carrier. Moreover, the Organization points to the general principle that undenied statements must be accepted as correct; it is, therefore, unquestioned that Claimant was absent from duty with permission from proper authority.

The Organization therefore contends that Carrier's dismissal of the Claimant cannot be justified. The Organization asserts that the Claim should be allowed; Claimant should be reinstated with seniority and all other rights unimpaired; Claimant also should be compensated for all lost wages.

The Carrier contends that it fully complied with the provisions of the July 25, 1977 Memorandum Agreement governing discipline for absenteeism. The Memorandum Agreement provides for a system of progressive discipline for absenteeism that consists of the following steps: warning letter; five-day

overhead suspension for a three-month probationary period; ten-day actual suspension; and dismissal. The Carrier points out that these provisions replace the formal disciplinary proceedings, including Hearings, that are provided in the Controlling Agreement.

The Carrier maintains that pursuant to the Memorandum Agreement, Claimant received a warning letter on September 7, 1982, after a two-day, unauthorized absence; a five-day overhead suspension on May 10, 1983, after another two-day, unauthorized absence; a ten-day suspension on May 13, 1983, after three more unauthorized absences; and was dismissed on June 7, 1983, after the two absences in question in this dispute. Claimant therefore was disciplined four times in less than one year for unauthorized absence from duty. Claimant was clearly and repeatedly warned that his unauthorized absences were unacceptable behavior and could result in his dismissal from service. The Carrier therefore contends that Claimant's dismissal was proper under the terms of the Memorandum Agreement.

The Carrier further contends that the Claimant received a fair and impartial Hearing. Claimant and his Representative were present at the Hearing; they had full opportunity to produce and examine evidence and witnesses.

The Carrier also argues that Claimant admitted that he did not receive permission to be absent on June 7, 1983. Claimant testified that on June 7, he did not reach the proper Supervisor until 7:00 A.M., the time his shift started. The Carrier contends that an admission of wrongdoing substantiates the violation.

Carrier further points out that Claimant's Supervisor initialed a time card that reported Claimant as absent without permission on June 2, 1983. The Carrier asserts that although Claimant's testimony disagreed with this time card, Carrier determined, based on the entire record, that there was no reason to rescind Claimant's dismissal from service. The Carrier maintains that this Board has held that it cannot set aside findings that are supported by substantial evidence; substantial evidence in this record supports the finding that Claimant was guilty of being absent from duty without permission.

Finally, the Carrier argues that it committed no procedural violations in handling this Claim. The Carrier therefore contends that the Claim should be denied in its entirety.

In rebuttal, the Organization contends that the awards cited by the Carrier in its submission have no precedential value in this case.

In its rebuttal, the Carrier contends that in absenteeism matters, the system of discipline provided in the Memorandum Agreement replaces the formal disciplinary system contained in the Controlling Agreement. The Carrier asserts that under the Memorandum Agreement, the Organization bears the burden of proof in absenteeism cases. Moreover, the Organization was responsible for ensuring the presence at the Hearing of any witnesses it felt were necessary.

The Carrier reasserts that contrary to the Organization's contention that Claimant received permission to be absent on the days in question, Claimant did not receive permission to be absent on June 7, 1983; further, Claimant's Supervisor initialed a time card showing that Claimant was absent without permission on June 2, 1983.

This Board has reviewed the evidence in this case, and it finds that there is sufficient evidence in the record that the Carrier has fully complied with the provisions of the July 25, 1977, Memorandum Agreement regarding absenteeism matters. That Agreement, which sets forth the progressive discipline to be imposed in cases involving alleged excessive absenteeism, was complied with by the Carrier as it attempted to encourage the Claimant to improve his attendance. Between September 7, 1982, and June 7, 1983, the Claimant progressed through the disciplinary program and failed to reform his behavior. Based upon the agreed-upon disciplinary procedure, he was properly discharged. In conformance with the language and intent of the July 25, 1977, Memorandum Agreement, the Carrier provided the Claimant with a clear message that his absences without permission were unacceptable and could result in this dismissal. He was then properly dismissed.

This Board also finds that the Claimant was treated fairly during the process and was granted all of his procedural rights. Moreover, there was sufficient proof offered that the Claimant was absent without permission in June 1983, thereby making himself eligible for discharge since he had been progressively disciplined pursuant to that Agreement. The Agreement was reached because of the problems that excessive absenteeism causes in the work place. We conclude that the Carrier acted properly with respect to the Claimant and followed all of the steps in the procedure. Hence, the Claim must be 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.

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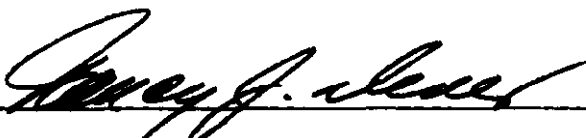
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1986.