

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26362

Docket Number MW-26787

John E. **Cloney**, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The dismissal of **Trackman** C. Webber, Jr. for alleged absence without permission on **August** 27, 28, 29, 30 and 31, 1984 was arbitrary, **capricious**, unwarranted and in violation of the Agreement (**System File C-D-2619/MG-4909**).

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

OPINION OF BOARD: In a 1977 Memorandum of Agreement the parties agreed absences without permission would be handled by (1) a warning letter for **the** first offense, (2) a five day overhead suspension for a 3 month probationary period for the next offense, (3) a ten day actual **suspension** for the next offense, and (4) dismissal for the next offense. The Agreement further provided the contractual discipline Rules would not apply to discipline assessed under the Memorandum. In 1979, **the** Memorandum was amended to provide a **Letter** of Overhead Suspension would be removed following **the** three month probationary period if no further Letters had Issued. **It** was also agreed that if an **employee** who has received a ten day suspension and received no further letters in a six month period both the ten day **suspension letter** and the five day overhead suspension Letter would be **removed**. In **both** situations the original warning **letter** remains of record.

On **September 10**, 1984, **Claimant** was sent a letter charging him with being absent without permission on August 27, 28, 29, 30 and 31, 1984. The letter noted Claimant had a warning letter on June 10, 1982, a five day overhead suspension on April 5, 1984, and a **ten day actual** suspension on May 21, 1984. The letter concluded that Claimant was dismissed effective close of business September 14, 1984, pursuant **to** the Memorandum Agreement.

Claimant contends his absence was due to an ear problem and that he tried to contact his Supervisor, Withers, at his home on August 25, 1984, **to** say he would be absent. He **states** he left a message with Withers' son. He again called on the 26th. speaking to Withers' wife. Later on August 26, 1984, **he** reached Withers from a pay phone. Withers told him he, Withers, was on vacation and couldn't excuse him. He also claims **Withers** could not give him the name of a Carrier representative to **notify**.

On September 26, 1984, the Organization asked that Claimant be reinstated with **backpay** and requested a grievance hearing absent reinstatement. Attached to the request was a prescription from St. Luke Hospital dated August 25, 1984, and a "Return to Work or School" note from a Dr. Humphries which stated **Claimant** could return to work on September 4, 1984. The note was dated August 24, 1984, with the "24" scratched out and "30" written above it. Thus it read August 30, 1984. **Claimant** contends he couldn't get an appointment with Dr. Humphries prior to August 30, 1984. On October 4, 1984, Carrier declined to reinstate **Claimant** but agreed to a hearing. On October 9, 1984, Claimant was advised hearing had been scheduled for 10:00 A.M. on October 22, 1984, in Huntington, West Virginia.

Claimant, who lives in Cincinnati, Ohio, contends he experienced car problems driving to the hearing. Not knowing who to notify he called his father (also an employee of Carrier) and asked him to contact Program Coordinator - Track Schilt, who had issued the charges. His father notified Schilt that Claimant would be late. When Claimant arrived at the hearing site everyone was gone.

At the hearing the Organization objected to having the matter proceed until it could determine where Claimant was. Nevertheless the hearing proceeded. Withers testified Claimant had called his home on August 26, 1984, and left a message that he wouldn't be at work because he didn't have a ride. He called again on August 27, 1984, and said the same thing, this time talking to Withers. Withers denied Claimant said he was ill or had seen a doctor. During that call, according to Withers, he gave Claimant the name of the man who was in charge of the gang that week (Callahan) and the name and phone number of the motel at which Callahan could be reached.

Trackman Siefert was timekeeper during the week August 27, through 31, 1984. He testified Claimant came to the camp cars on August 29, 1984, after working hours and stated he heard "they had my letter for me." Siefert knew of no letter. Claimant asked what he should do and Siefert referred him to the motel at which Callahan was staying. Claimant did not mention any illness to Siefert. The hearing adjourned at 10:37 A.M.

On October 25, 1984, Schilt denied the appeal. The Organization thereafter requested a new hearing which was refused.

The Organization argues that prior to his dismissal Claimant had three years of satisfactory service.

Claimant alleged in a letter to the General Chairman dated October 27, 1984, that Withers had excused him from work on August 24, 1984, so he could see his doctor regarding his ear. The Organization maintains Carrier was thus aware of Claimant's problem and the absence was not without permission because an employee is not required to obtain permission on a day to day basis in a continuing illness.

Further, the Organization argues failure to postpone the hearing denied Claimant due process because he **was** not present. It also contends Schilt, who had been notified of Claimant's **reason** for being Late for the hearing, and also rendered the decision. Since **Schilt** was not present at **the** hearing, the Organization contends he **was not** in a position to make credibility findings and this **too** constitutes deprivation of due process.

Carrier denies Claimant's record was satisfactory. pointing out four letters for unauthorized absences issued from July 19, 1982, through July 25, 1983. They were removed from his records in accord with the Memorandum.

We cannot agree that failure to postpone the hearing deprived Claimant of due process. While his absence may have been due to unfortunate circumstances **the** responsibility cannot be shifted **to** Carrier. Although Claimant **tried** to notify Carrier officials through his father, the contact was not made until 10:07 A.M. Efforts to relay the message to the hearing **room** in time were not successful. Thus no Carrier official was aware of the problem until **after** the hearing scheduled starting **time** of 10:00 A.M.

Neither can we agree Schilt improperly made credibility findings, if for no other reason than there was none to make. There was no testimonial conflict. Withers denied Claimant mentioned any illness but rather stated he lacked transportation. This was undenied on the record.

It is difficult for **this** Board to understand why Claimant could not contact some Carrier official who was on duty during **the** five day period.

In the **circumstances**, and **despite** the medical documentation **Claimant** produced, it can't be said Carrier was arbitrary in concluding Claimant was absent without permission on the dates alleged. Accordingly we should not disturb **its** assessment of discipline, and we won't.

FINDINGS: The Third **D**ivision 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 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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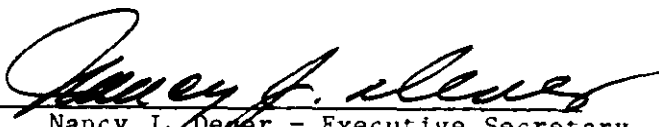
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at: Chicago, Illinois, this 25th day of June 1987.