

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26476
Docket Number MW-27084

John E. Cloney, Referee

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(New Orleans Public Belt Railroad

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

1. The dismissal of **Trackman C. Rutledge** for alleged '. . . continued unauthorized absences; failure to notify anyone in authority of your inability to protect your assignment, and complete disregard to written and verbal warnings, regarding your absenteeism' was based upon unproven charges, arbitrary and without just and sufficient cause.

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 was notified of his dismissal from service by letter of July 26, 1985, signed by Manager Engineering and Maintenance **Childress**. The letter stated in part:

. . . you were dismissed . . . by Track Supervisor R. A. Lubrano, account continued unauthorized absences; failure to notify anyone in authority of your inability to protect your assignment, and complete disregard to written and verbal warnings regarding you absenteeism."

The Organization requested a Hearing which was held on August 20, 1985. At the Hearing a list of dates on which Claimant missed work between January 1 and July 26, 1985, was introduced into the record. Lubrano **testi-**fied:

. . . I have a list of days that he has missed . . . that I would like to show . . . it's all there the payroll shows the same things I have on the sheet there. It's a total of 28 days missed including 10 discipline days. 9 rain days and out of a possible 154 days he missed 1 day every 5.42 days and according to the way I look at it that is part time help and I don't have any part time jobs on the railroad."

Included on the list were about six full or partial days on which the whole **crew** was off due to rain and the Fourth of July holiday. With reference to this Lubrano testified:

"The, what I read to you previously out of the 154 working days that is with the rain days in there. I gave him the benefit of the doubt and he still missed 1 day every 5.42 days. I did not deduct those 9 days from the 154."

The Organization objected to the list. Hearing Officer Childress stated:

"In defense of the document . . . I believe it is an accurate statement to say it is trying to correctly evaluate those days in which . . . (Claimant) was not compensated for one reason or another."

The Board notes that ten of the days of absence were "days off without pay as a measure of discipline" for certain infractions.

At the Hearing Claimant contended he notified management, often through others, when he was unable to protect his assignment. Although no log is kept, this was denied by management witnesses. One period of absence was due to an arrest and incarceration. Claimant was suspended for five days as a result. Carrier relies on Awards of the Board to the effect that such circumstances "does not constitute unavoidable absences for good cause" (Third Division Award 24760). By letter of August 30, 1985, Childress sustained the dismissal. On September 12, 1985, the Organization appealed arguing, inter alia, Claimant was "charged with 10 days lost from duty while serving suspension time issued by his Supervisors." On October 7, 1985, the Manager Labor Relations responded Claimant's "attendance from April to July is also excessive, after two five-day suspensions."

The record establishes Claimant had received prior warnings regarding attendance and contains substantial evidence to support Carrier's conclusion most absences had been without notification. Thus discipline was justified. Nevertheless, we have consistently held an employee cannot be disciplined twice based on the same conduct. The testimony of **Lubrano** as well as the exhibit he offered clearly demonstrates that in assessing discipline he considered time lost due to the two prior suspensions. Clearly we do not imply that a past record may not be considered when discipline is being decided. It can be and should be, but here the facts show something different. The time Claimant lost by virtue of suspension was added to other absences in determining the percentage of absences and the extent of discipline. To this extent Claimant was disciplined twice for the same offenses. Accordingly, we shall require Claimant be reinstated with seniority unimpaired on a last chance basis, but with no **backpay** for time lost while out of service.

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 as approved June 21, 1934;

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

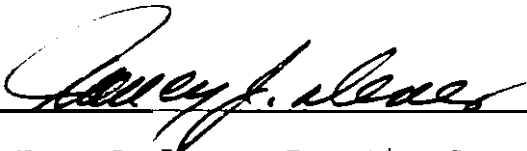
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", is written over a solid horizontal line.

Nancy J. **Dever** - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.