

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Port Terminal Railroad Association

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

(1) The dismissal of Mr. C. C. Green under the provisions of '*** Article 5, Paragraph (A), of the agreement ***', effective February 15, 1989, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File PTR - Green).

(2) The Claimant shall be reinstated with seniority, all benefits and rights unimpaired and he shall be paid for all wage loss suffered, including holidays and any overtime which would have accrued to him had he not been dismissed."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, had been in Carrier's service for approximately ten years when, on January 9, 1989, he was instructed by his Supervisor to contact the Employee Assistance Program Counselor to discuss certain activities in connection with his participation in a rehabilitation program. On the morning of January 10, 1989, Claimant requested and was granted a one-day personal leave of absence. Subsequently, because neither the Carrier Supervisor nor the E.A.P. Counselor had heard from Claimant, he was notified by letter dated February 15, 1989, with a copy to both the Local and the General Chairmen of the Organization, that he was dismissed from Carrier's service in an application of Article 5, Paragraph (A) of the Agreement for the reason that he

had been absent from service for more than thirty days without proper authorization. This letter of dismissal to Claimant was eventually returned to the Carrier by the Postal Service on March 5, 1989, marked "unclaimed". However, in the intervening period of time, the Organization, on February 24, 1989, requested a Hearing under the provisions of Rule 11 (B) of the Agreement. After agreed-upon postponements, the Hearing was held on March 30, 1989, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the Hearing, Claimant was notified by letter dated April 17, 1989, that his dismissal from service was reaffirmed. Subsequent appeals were taken in the usual manner of handling disputes on the property and, failing to reach a satisfactory resolution during the on-property handling, the dispute has come to this Board for final adjudication.

The applicable Rules involved in this dispute are as follows:

"Rule 11 - Discipline

- (A) Employees disciplined or dismissed will be advised of the cause for such action in writing within ten (10) days.
- (B) An employee disciplined or who feels unjustly treated, shall upon making a written request, individually or through the Local Chairman or General Chairman to the Engineer-Maintenance of Way, within ten (10) days from date of advice, be give a fair and impartial hearing within ten (10) days thereafter and decision will be rendered within twenty (20) days after completion of hearing. At the hearing the employee may be represented by duly accredited representatives of the Brotherhood, or an employee in active service under this agreement. He shall be privileged to secure the testimony of witnesses in his behalf; however, the attendance of such witness called by him shall be without expense to the Association. The time limits in this rule may be extended by mutual agreement."

"Article 5

- (A) Employees shall not, except in case of emergency absent themselves from their duties without permission from some authorized supervisor or official. If absent in emergency the employee will report to his supervisor as quickly as possible the reason for such absence. Employees, absent more than thirty (30) days without proper leave, name shall be removed from seniority roster."

From a review of the record of this case it is apparent that there is a conflict between the respective positions of the parties. The Organization argues that Carrier has not met its burden of proof; that Claimant was withheld from service by the Carrier and, therefore, was not absent without authorization; that Claimant contacted the Supervisor on January 11, 1989, and was informed that he was being held out of service; and that Claimant attempted, without success, to contact the E.A.P. Counselor.

Carrier, on the other hand, contends that Claimant's only excused absence was on the single date of January 10, 1989; that he made no apparent or recorded attempt to contact the E.A.P. Counselor; that his only contact with any Supervisor occurred after he had been absent without permission for more than thirty days; that the provisions of Article 5 of the Agreement are self-executing; and that, when considered in light of Claimant's prior employment record, the dismissal from service was justified.

Our review of the Hearing transcript convinces us that there is substantial evidence in the record to support the action taken by the Carrier. We cannot resolve the conflict in testimony between the Claimant and the Supervisor relative to the alleged conversation of January 11, 1989. Claimant says he talked to the Supervisor. The Supervisor says he did not. Regardless of this conflict, there is no conflict in Claimant's own testimony that for a period of more than thirty days he did not make any contact or have any conversation with the E.A.P. Counselor. There is no probative evidence in this record to support Claimant's contention that he had authorization to be absent from service except for the one-day leave on January 10, 1989. During the period from January 10, to February 15, 1989, he was, based upon this record, absent without authorization.

Claimant has been accorded all due process rights to which he is entitled under the provisions of the Agreement. Carrier had the right to consider Claimant's prior employment record when reviewing the details of this proven incident. Article 5 is clear and self-executing. Taken separately, the single incident of unauthorized absence for more than thirty days following January 10, 1989, is sufficient justification for termination of service. When the unsatisfactory prior employment record is considered in conjunction with the current incident, there is no justification for this Board to entertain the thought of granting Claimant another chance. Claimant's actions have precluded any such thought. Carrier's actions in this instance were neither arbitrary, capricious nor excessive. They will not be disturbed.

A W A R D


Claim denied.

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Award No. 29003
Docket No. MW-29201
91-3-90-3-74

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1991.