

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30803
Docket No. MW-31090
95-3-93-3-31

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Denver Rio Grande Western Railroad Company

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

(1) The dismissal of Section Laborer S.F. DiGesualdo for alleged '. . . continual and habitual tardiness and absenteeism from duty without proper authority with the most recent occurrence being your failure to protect your 7:30 a.m. to 4:00 p.m. assignment . . . on November 27, 1991 . . .' was arbitrary, capricious and in violation of the Agreement. (System File D-92-09/MW-07-92).

(2) The Claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

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 employee within the meaning of the Railway Labor Act as approved June 21, 1934.

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

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

Claimant was employed by the Carrier as a Section Laborer. From September 30 to October 23, 1991, Claimant was in a hospital rehabilitation program pursuant to arrangements by the Carrier's Employee Assistance Program ("EAP"), following his arrest for Driving Under the Influence of alcohol ("DUI").

On October 3, 1991, a medical leave request for up to 45 days was made on behalf of Claimant. By letter dated October 28, 1991, Claimant was released from medical leave effective November 1, 1991, leaving him eligible for return to duty effective November 4, 1991. Claimant's return to service was conditioned, in part, on his fulfillment of his work obligations.

Before returning to duty, Claimant indicated to EAP that he wanted to go hunting from November 4 to 8, 1991. EAP advised Claimant that hunting was not covered under his medical leave. Notwithstanding EAP's statement, Claimant went hunting from November 4 to 8, 1991 and did not work. He had no permission to be absent. Claimant's supervisor, R. J. Gutierrez, stated that Claimant told him that he (Claimant) believed his medical leave ended November 8, 1991.

On November 11, 1991, Claimant requested, and was granted, time off to be in court on November 12 and 14, 1991. The Carrier's Special Agent D. F. Bowen stated that he investigated court records and found that Claimant had appeared in Pitkin County Court only on November 12th. His whereabouts on the 14th is not accounted for. Claimant's testimony that he spoke with Mr. Gutierrez on that date is contradicted by Gutierrez's statement that he was not on duty.

On November 18, 1991, Claimant was again absent from duty. He called stating that his car was broken down. On November 19, Claimant called to say his car had broken down again. On this occasion, Mr. Gutierrez arranged for Claimant to be picked up and brought to work. On November 19th, Mr. Gutierrez issued a verbal reprimand to Claimant for repeated absenteeism during the period November 4th through 18th.

By Superintendent's letter dated November 22, 1991, Claimant acknowledged that he returned to service November 4, 1991, conditioned on fulfillment of his "... obligation to work and cooperate with the [EAP]." Claimant was also obligated to follow through on the recommendations of the EAP.

On November 27, 1991, Claimant was absent from a district safety committee meeting. Claimant called Mr. Gutierrez and told him that he (Claimant) had been arrested on November 26 in Garfield County and then transported to Pitkin County and incarcerated.

Claimant testified that there had been a clerical error in which a county court clerk failed to remove a bench warrant from his record. Claimant testified that he posted bond in order to obtain his release and that the receipt for posting of a prior bond on October 29, 1991 served also as the receipt for the bond he posted on November 27, 1991.

Special Agent Bowen testified that there was no record in either Pitkin or Garfield County of Claimant's arrest on November 26th or 27th or of his incarceration the night of November 26th.

Claimant stated that he "... completely quit cold turkey, quit all substances and alcohol abuse." However, he further testified that during the course of his time in custody on November 26th to 27th, he had been taken to a detoxification center because he "was under the influence of alcohol."

Based on the discrepancies between Claimant's account of his whereabouts on November 26 and 27, and the results of Special Agent Bowen's investigation, the Carrier summoned Claimant to an investigatory hearing pursuant to Rule 29 of the Agreement to develop facts and determine responsibility in connection with his "... alleged continual and habitual tardiness and absenteeism from duty without proper authority" The hearing was convened on December 6, 1991, at which the above testimony was adduced.

Following the hearing, the Carrier found Claimant guilty of continual and habitual tardiness and absenteeism from duty without proper authority with the most recent occurrence being his failure to protect his assignment as a section laborer. The Carrier dismissed Claimant from service by letter dated December 13, 1991.

The Organization protested the dismissal. The claim was progressed in the usual manner, without resolution; and was brought to this Board.

The Organization argues that the Carrier's action must be overturned because the absences that the Carrier used to establish a pattern of absenteeism ("continual and habitual tardiness and absenteeism") occurred outside the time limits set by Rule 29 and therefore, may not be considered. It notes, in support of its position, that Claimant was on medical leave from October 10 to November 18, 1991. The Organization argues that Claimant's participation in the EAP wipes clean the slate of his prior absences, since those were caused by his substance abuse. It also asserts that Claimant's absence on November 27, 1991 was the result of his incarceration due to a computer error. The Organization contends that the Carrier made no attempt to counter this argument and that the inadvertent nature of Claimant's incarceration distinguishes this incident from general holding of this Board that incarceration is not a justified reason for absence from work. It urges that the imposition of discipline was improper and the penalty, in any event, arbitrary and excessive. Although acknowledging that Claimant was reprimanded prior to being dismissed, the Organization contends that Claimant has not received the benefit of progressive discipline. The Organization urges, therefore, that the Claim be sustained and urges, further, that Claimant be compensated for lost wages and benefits.

The Carrier argues that Claimant's guilt is established by substantial evidence. It asserts that it complied with Rule 29 and timely advised Claimant of the charges. The Carrier contends that Claimant violated Rules 1007 (prohibiting dishonesty, indifference to duty), and 1011 (prohibiting absenting oneself from duty without proper authority). It asserts that it acted within its rights to accept the version of events testified to by credible witnesses which contradicted Claimant's testimony, since the version accepted is "supported by substantial competent evidence" and is neither arbitrary nor capricious. It also notes that the EAP personnel's testimony proved Claimant ceased participating in the EAP and Claimant admitted he was under the influence of alcohol since leaving the EAP. The Carrier contends that it properly found Claimant was absent without authority and was dishonest, all in violation of the Rules. It further contends that Claimant's violations are serious and warrant dismissal, based on his overall record. It urges that the claim be denied.

The Board has considered Claimant's arguments that the Carrier considered absences which occurred more than 30 days prior to the investigation. We are not persuaded. The charge against Claimant and the violation of which the Carrier found him guilty was his continual and habitual absenteeism and tardiness. The instances of Claimant's absences and tardiness established at the hearing and relied on in the determination to dismiss him occurred between November 4th and the 27th, 1991.

Under Rule 29 of the Agreement, the investigation must be held not more than 30 calendar days "from date of report". Since Claimant's original medical leave did not expire until November 18th, the Board believes that the "date of the report" is appropriately deemed not earlier than the date supervision received the EAP's notice that Claimant's leave was terminated and that he was to return to work on November 4th. Indeed, not until November 22nd did Claimant sign the letter confirming termination of his medical leave and acknowledging his obligation to have reported on November 4th. That places Claimant's absences considered by the Carrier within 30 days of the investigation and renders the investigation not untimely. Rule 29 does not preclude the Carrier from considering Claimant's entire record for purposes of assessing the appropriate penalty.

Claimant's return to service following treatment for substance abuse was conditioned on his compliance with both his employment and his EAP obligations. Therefore, even under the Organization's assertion that Claimant's disciplinary slate was "wiped clean" by his EAP treatment, Claimant was responsible to protect his assignment, and not be absent without leave, beginning November 4, 1991. The Board believes that Claimant knew, or should have known, that he was obligated to return to service on that date.

The record is clear that Claimant immediately violated his obligation to the Carrier by going hunting November 4th through 8th, rather than working as required. Claimant's medical leave was terminated prior to that date; and, even if it had lasted until November 18th, it was granted for a specific purpose and would not afford Claimant authority to be absent to go hunting.

The record contains substantial evidence, in the form of the testimony of Claimant, Mr. Gutierrez, and other Carrier witnesses that Claimant was also absent from work on November 18th and 19th, allegedly with car trouble. As to Claimant's absences on November 14th (leave to be in court) and November 27th (allegedly incarcerated), there is substantial evidence in the record, in the form of testimony from Special Agent Bowen, that Claimant did not appear in Court on the 14th and was not incarcerated, wrongfully or otherwise, on the 27th. Claimant's testimony to the contrary is not borne out by the records. The evidence is sufficient to support the Carrier's conclusion that Claimant's explanations for the days were untrue and that he was absent without authorization as charged.

In the letter to Claimant from the EAP releasing him to return to work, Claimant was admonished to meet his work obligations. Most basic to an employee's responsibilities is the obligation to report for duty when and as scheduled. The record is clear that Claimant violated that obligation, immediately upon his release to return to work and on several days thereafter, for different, largely-unsubstantiated reasons. Indeed, in the 23 days after Claimant's availability to return to service following his treatment for substance abuse, 16 of which were work days, he was absent or tardy, without authorization, on 11 days. He continued to absent himself following the verbal reprimand he received for missing work due to car trouble.

The Board is persuaded that the nature and variety of Claimant's absences and his lack of valid reasons establish his chronic and habitual absences during the period. The Board concludes, under the circumstances, that the Carrier satisfied the limited obligations it had to attempt to correct Claimant's attendance through progressive discipline. We are further persuaded that the Carrier did not abuse its discretion by concluding, on the basis of Claimant's overall record, that dismissal was the appropriate penalty.

Claimant was continuously and habitually tardy and absent from duty without proper authority. The penalty of dismissal is appropriate, and is neither arbitrary nor excessive.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

National Railroad Adjustment Board
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.