

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20273
Docket Number MW-20393

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company (A&P Regions))

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

(1) The Carrier arbitrarily and capriciously dismissed W. D. Terry without just and sufficient cause and on the basis of unproven charges. (System File MW-RO-72-100)

(2) The charge be stricken from the record; Laborer W. D. Terry be restored to service, with seniority, vacation and all other rights unimpaired and that he be paid for the assigned working hours actually lost as per Rule 32(c).

OPINION OF BOARD: This is a dismissal case in which the Claimant has already been restored to service. He was dismissed on January 26, 1973 and restored to service on October 30, 1973. Thus, the sole issue is whether the original discipline should be set aside, thereby allowing the Claimant to recover for time lost.

The Claimant was dismissed for being absent without permission on January 22, 23, 24, and 25, 1973. According to the hearing record the Claimant had ten work days of earned vacation when he received permission to take two days' vacation, Friday, January 12, and Monday, January 15, to take a trip to Ohio. On Tuesday, January 16, 1973, he called the Carrier's Timekeeper to request permission to take additional vacation. The Timekeeper's statement about this conversation is as follows: "...at 8:15 AM, Mr. Terry called. His words to me were 'Mr. Manning, this is Terry. I got back late from Ohio and would like to have vacation today (which was Tuesday the 16th) through Friday, the 19th.' (which would have been January 16th, 17th, 18th and 19th). I told him this would be all right. He said he would be back in Monday morning, January 22nd." A different version of the conversation was given by the Claimant. "I called Mr. Manning and was talking to him on the phone to tell him that I was late getting back in town on the 16th and that I would have to be off, I couldn't make it in that morning. He says 'OK'. I said 'I will try to get in tomorrow or by Friday.' He said, 'I will just hold you on vacation until you return back to the job.' I said, 'OK', then." Counting from the first day the Claimant was off to take the Ohio trip, January 12, the Claimant's ten work days of earned vacation expired at the end of work on Thursday, January 25. He reported for duty on Friday, January 26, but was given a dismissal letter due to unauthorized absence from January 22 through 25.

The foregoing, and the whole record, makes it clear that the Claimant used the first two days of his vacation with the Carrier's consent. Thereafter, he requested and was granted permission to use additional vacation time, but a conflict exists as to how much. The Timekeeper says the second request resulted in permission for Claimant to remain on vacation until the beginning of work on Monday, January 22; the Claimant says until the beginning of work on Friday, January 26. Despite this conflict, the testimony of the Timekeeper and the Claimant is quite similar, except for the Timekeeper's statement that Claimant referred to returning to work on a specific date, January 22. Thus, the Timekeeper and the Claimant could be said to have reached different conclusions about essentially the same facts, i. e., an honest difference of opinion. However, this is a matter of subjective judgment and the Carrier has made the contrary judgment that Claimant was given a clear direction to return to work on January 22, and that he failed to do so. On the record before us, we conclude that the Carrier's judgment was not arbitrary or capricious in determining that the Claimant was absent without permission. However, we are concerned that the discipline was excessive in the total context of the case. It is clear that the Claimant obtained permission from the Timekeeper for some further absence beyond the two days granted for the Ohio trip. Thus, at worst, the Claimant's situation is that he misconstrued the length of the authorized absence and has not been able to offer an excusable reason for doing so. This is not flagrant misconduct, however. Also, the Claimant's earned vacation expired on Thursday and he reported for duty on Friday, the last work day in the work week. This coincides with the Claimant's stated belief that his absences were being charged against vacation and that he was due to report when the vacation expired. In view of these mitigating facts, and since the record strongly indicates that the Claimant had an honest, though erroneous, belief that he had permission to be absent, we conclude that a thirty (30) day suspension is the appropriate discipline for the Claimant's unauthorized absence of four days.

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

The discipline was excessive.

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The discipline is reduced to a thirty (30) day suspension,
with pay for time lost beyond the suspension period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.