NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23974
Docket Number MS-23901

Lamont E. Stallworth, Referee

PARTIES TO DISPUTE: (Robert J. Butler
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(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Petitioner claims that he was (a) discharged without just cause; (b) discharged in violation of the labor agreement; (c) discharged without being accorded due process in a fair, hearing; and (d) discharged without being provided full and fair representation by his collective bargaining representative."

OPINION OF BOARD: At the inception of the matter here in dispute, Claimant Robert J. Butler had approximately fourteen (14) years of service and was employed as a Track Foreman on the Harrisburg Division.

On December 15, 1978 the Claimant was notified to attend a trial in connection with the charge of "being absent without premission on November 27, December 14, 15, 1978 (third offense)". Subsequent to a hearing on January 3, 1979 the Claimant was notified that he was disciplined by "Dismissal in all Capacities" for the above alleged offenses. The discipline decision was appealed to the Manager, Labor Relations. After an appeal hearing on January 31, 1979, in a letter dated February 5, 1979, Claimant's appeal was denied. Further appeal was made to the Senior Director, Labor Relations. Following a conference held on April 20, 1979 the Senior Director denied the Claimant's appeal in a letter dated April 27, 1979. In a letter dated September 10, 1980, Claimant Butler served notice upon the Third Division advising of his intent to file an individual appeal.

The Carrier maintains that the dismissal of Claimant was warranted and that the trial was fair and impartial. According to the testimony of Mr. R. E. Clark, Track Supervisor, Claimant Butler was absent without permission on the three dates cited in the charge. Mr. Clark testified as follows:

"Q: Mr. Clark, Mr. Butler stated that on Friday, November 24, 1978, he informed you he was ill and he would not be in to work on Monday, November 27, 1978. Would you please tell me what you know of this incident?

A: On Friday he told me he would be sick next week, that he would not be in and I said he was to make sure he called me before 7:00 AM on Monday and tell me. I don't see how you can be sick on a Monday when you are not sick now.

That's what I told him. I said 'you don't have my permission to be off'.

"Q: Mr. Clark, did Mr. Butler state to you he was sick at that time, Friday, November 24, 1978?

A: No.

Q: Mr. Clark, on the 27th, did Mr. Butler request permission to be off?

A: No.

Q: Mr. Clark, did Mr. Butler make arrangements with you or request permission to be off on the 14th of December, 1978?

A: No.

Q: Mr. Clark, did Mr. Butler arrange or request to be off on the 15th of December, 1978?

A: No."

The Carrier stated that the Claimant does not deny his guilt of the charge. The Carrier maintains that in arriving at the discipline imposed, the Carrier applied the provisions set forth in the Unauthorized Absenteeism Agreement of January 26, 1973 which states that employes who have been found guilty of three unauthorized absences from work within a twelve (12) month period are subject to dismissal from service. In the instant case, Claimant Butler was first absent without permission on March 14, 1978. Claimant was served written notice advising him that unauthorized absences from work would not be tolerated and would subject him to discipline. Claimant was again absent without permission on September 25, 28, 1978 and October 3, 1978. Claimant admitted his guilt and was subsequently disciplined by three (3) days suspension.

The Claimant maintains that testimony by Mr. Clark indicates that Mr. Butler's wife contacted Mr. Clark at 3:00 PM on December 14, 1978 to say that Mr. Butler would not be in December 14 or December 15 because he was going to New York to attend a funeral. To get an excused absence the employe must call in prior to 7:00 AM on the day of the absence and therefore December 15, 1978 cannot be considered an unexcused absence. Further, the December 14, 1978 absence was justified since the Claimant's efforts to give notice of the absence were reasonable under the circumstances and the rule requiring notice prior to 7:00 AM was ill-defined and unenforced. Claimant Butler asserted that he was informed by his Employer that substantial compliance rather than exact compliance with the notice rule was permitted. Under the emergency circumstances, Claimant asserts that he was in substantial compliance.

As regard to Butler's absence on November 27, 1978, Claimant maintains that he notified his Supervisor that he felt ill as he was leaving work and therefore might not be in Monday, November 27th. On the 27th Claimant was still suffering from the flu and did not report to work. The Employer had notice on the 24th that Butler was then ill and Butler testified, " I was sick and I told him".

Claimant maintains that while he did not call in on the 27th, there were many instances where the Employer at Harrisburg, once notified of illness, does not require daily calls reaffirming the illness. Further, the Employer does not have uniform standards as to what constitutes an authorized or unauthorized absence, and the Claimant's Supervisor testified that the distinctions between the two rested solely with the Supervisor.

An affadavit dated April 17, 1979 was executed by James Burton, a Conrail employe for 42 years. Burton swore that in the Spring of 1978, Mr. Clark announced his firm resolve to obtain Butler's discharge and that Butler has not done anything that any other employe hasn't done. Burton also swore that Supervisor Clark had sent Claimant Butler home from work when he came in late while at the same time he did not send other employes home for the same cause.

Claimant further maintains that he was not adequately represented at the hearing due to the incompetence of his union representative. Butler asserts that his union representative did not explore the issue that Supervisor Clark had disciplined him for conduct that went unpunished when committed by others and that his representative made no attempt to advance Butler's case or bring out facts in his favor.

Under careful consideration of the record herein the Board finds that Claimant received a fair and impartial hearing. The charge was supported by substantial evidence on the record. Furthermore, under the circumstances, the contract controls in this matter. Accordingly, the Board concludes that the discipline assessed was not premised on caprice or unreasonableness. The Board, therefore, denies the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of August 1982.