

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24763
Docket Number MW-25164

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Maine Central Railroad Company

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

(1) The seventy-five (75) demerits imposed upon Trackman P. L. Troiano, resulting in his dismissal, for alleged violation of 'Rule 707' was without just and sufficient cause, in violation of the Agreement and on the basis of unproven charges.

(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: The record in this dispute is voluminous, including an investigation transcript of 127 pages. The Board has carefully reviewed the entire record, including the transcript of the lengthy investigation. We find that the investigation on the charge issued against the claimant on December 31, 1981:

"You are charged with violation of Rule 703 and 707 of the Rules for the Government of the Operating Department of the Portland Terminal Company for absenting yourself from work, without proper authority, during the period September 25, 1981, through December 28, 1981."

was conducted in a fair and impartial manner and that none of claimant's substantive procedural rights was violated. While some objections were raised during the course of the investigation by claimant's representative, none was of sufficient significance to invalidate the proceedings. Other objections were raised in the course of appeal on the property and before the Board as to the inclusion of certain material in the investigation. It is well settled that if objections are to be raised as to the manner in which an investigation is conducted, such objections must be raised during the course of the investigation; otherwise, they are deemed waived. Objections on appeal come too late.

The record shows that claimant called his foreman and laid off sick on September 25, 1981. He also called the General Supervisor's office and reported sick on September 28, 1981. Nothing further was heard from claimant by the Carrier and on November 12, 1981, the General Supervisor wrote him:

"Our records show that you have not worked for the Portland Terminal Company since September 25, 1981.

Please explain why you have not returned to work. If the reason is sickness, please furnish a statement from your doctor."

On December 4, 1981, claimant reported to the General Supervisor's office with a statement from his personal physician, Dr. Mazzone, dated December 4, 1981, reading:

"Paul Troiano is OK to return to work on Dec. 7, 81."

Claimant was instructed to be examined by Company physician and appointment was made for such examination on December 14, 1981. The Company physician sent the General Supervisor a report dated December 14, 1981, but which the General Superintendent contends was not received in his office until December 23, 1981. The concluding paragraph of the Company physician's report read:

"It is hard for me to imagine a tonsillitis and laryngitis lasting for over two months which would physically impair a person from doing his work. Mr. Troiano maintains that he was sick the whole time, but states that Dr. Mazzone did not treat him the whole time. He in fact, took antibiotics that he had at home on his own. In short, I am at a loss to explain his prolonged absence and he certainly seems to be in good shape today and fit for duty."

The claimant returned to work on December 29, 1981.

We consider the delay in receiving the Company physician's report dated December 14, 1981, as completely unreasonable, and, at least a delay that could not be charged to claimant. It would seem that it should not have taken in excess of two days for the delivery of a letter sent to an address in the same city.

Following the investigation, claimant was notified on January 15, 1982:

"Facts developed during your hearing at the General Office Building of the Portland Terminal Company on January 8, 1982, demonstrated that you violated Rule 707 of the Rules for the Government of the Operating Department by absenting yourself from duty, without proper authority, during the period September 25, 1981, through December 28, 1981. As a result of your hearing you are hereby assessed seventy-five (75) demerits. Please sign and return the lower portion of Form MC-57.

Your record indicates that following a hearing on July 25, 1980, 25 demerit marks were assessed against your record on July 31, 1980, for:

'Violation of Rule 707 - absent from assignment on July 17, 18 and 21 without notifying either supervisor or foreman that you would not be reporting for duty.'

and following a hearing on November 28, 1980, an additional 50 demerit marks were assessed against your record on December 3, 1980, for:

'Violation of Rule 707 of the Rules for the Government of the Operating Department of the Portland Terminal Company.'

Prior to the discipline assessed herein your total discipline standing was 69 marks. Your total discipline now stands at 144 marks. Having accumulated over 100 demerit marks under the Brown System, you are hereby discharged from the service of the Portland Terminal Company."

Based upon our study of the entire record, we are convinced that claimant was negligent in not keeping supervisory personnel informed as to his physical condition during the more than two-month period, or in seeking and obtaining medical assistance. His actions during the period involved, coupled with his prior record concerning absenteeism, warranted severe discipline. However, permanent dismissal was excessive. The time that claimant has been out of service should constitute sufficient discipline. We will award that he be restored to service with seniority and other rights unimpaired, but without compensation for time lost, except that he will be awarded pay for time lost from December 16, 1981, to December 29, 1981, the date he returned to work. This payment is because of the delay in receipt of the report of the Company physician, which, as we have stated, cannot be charged against the claimant. We will also award that the 75 demerit marks assessed claimant in the present case be cancelled.

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:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1984.