

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26274
Docket Number CL-26613

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10015) that:

1. Carrier violated the rules of the agreement when it dismissed James W. Stiles, ID 1519065, from all service following an investigation held on February 11, 1983.

2. Carrier shall reinstate James W. Stiles to service with all rights unimpaired, clear his record of the charges and compensate him for all compensation lost. Carrier shall also reimburse him for all health and welfare benefits and dental benefits."

OPINION OF BOARD: Claimant, an employe since June, 1978, was a furloughed Clerk headquartered at Youngstown, Ohio. Under the applicable Agreement, Claimant was entitled to receive a daily guarantee. Claimant was required by the Carrier to respond, when called, for extra work within a 30-mile radius of his headquartered point.

After receiving notice on January 14, 1983, that his grandmother was ill, Claimant drove from his home in Warren, Ohio to Morgantown, West Virginia. Claimant did not return until January 23, 1983. Claimant's grandmother died on January 27, 1983. On January 15, 16 and 19, 1983, the Carrier called but could not reach Claimant to fill Clerk positions. On January 23, 1983, Claimant accepted a call to fill a position starting at 7:00 A.M. but then failed to report for the assignment due to oversleeping. Claimant was then charged by the Carrier with failing to be available for service and failing to protect his assignment. After an Investigation held February 11, 1983, Claimant was dismissed from service.

Claimant's prior disciplinary record shows numerous instances of failing to protect his assignments and resulting disciplinary actions including suspensions. In June, 1982, as a result of Claimant's inability to live up to his obligations on the job, Claimant met with the Carrier's Division Manager and Superintendent of Administration along with the Organization's local representative and Claimant requested the opportunity to eliminate further cause for complaint. However, in November, 1982, Claimant nevertheless could not be reached for a number of vacancies because he failed to

provide the Carrier information as to where he could be contacted. Claimant was told by the Carrier's representatives that unless the problem was resolved, he would be removed from the Protective List. The Carrier further had to give Claimant two notifications in writing to provide the necessary information and further had to advise Claimant that the protective benefits due him were being suspended. Claimant did not provide the information until December 15, 1982.

The Organization first challenges the conduct of the Investigation contending that the Investigating Officer, Trainmaster T. L. Burch, foreclosed Claimant and his representative from certain areas of inquiry thereby depriving Claimant of a fair and impartial Hearing as required by Rule 47 (a-1) of the Agreement. We have closely examined the record and cannot conclude that Claimant was deprived of a fair and impartial Hearing. The areas of inquiry sought to be explored by Claimant and his representative concerned maintenance of a vacation roster, notification of vacation time allowance, overtime and rest days. We find that the areas of inquiry foreclosed by Investigating Officer Burch were not ultimately material to the charges and the facts at issue - i.e., Claimant's undisputed failure to make himself available for calls and further failure to report after accepting an assignment. Nor do we find that Claimant has been prejudiced as a result of other rulings by the Investigating Officer so as to cause a different result in this matter.

We do find that if the Investigating Officer had permitted limited questioning along some of the lines of inquiry foreclosed by him in this case, the Board would not have had to examine a somewhat disjointed record and address the kinds of issues injected into this case by virtue of the rulings made. However, we cannot conclude that Claimant has been prejudiced by the evidentiary rulings of the Investigating Officer or that his actions crossed the line to amount to a denial of a fair and impartial Investigation.

With respect to the merits of the Claim, the Organization asserts that the Carrier did not give sufficient weight to the asserted mitigating circumstances presented, i.e., the illness of Claimant's grandmother. We find that the record evidence is sufficient for us to conclude that the Carrier's assessment of dismissal was not an arbitrary or capricious action. Upon close examination, the asserted mitigating circumstances, although unfortunate, are not relevant. Claimant had a lengthy and recent history of engaging in the precise conduct for which he was charged in this matter. Claimant, once again, simply absented himself from contact with the Carrier and when he did make contact with the Carrier and accepted an assignment, he failed to appear for that assignment. Claimant had alternatives for protecting his job in light of the circumstances presented. Claimant chose to ignore those alternatives and simply disappeared. The record supports the Carrier's conclusion that its prior progressive disciplinary actions and chances given to Claimant to correct his difficulties were of no avail. The Carrier's decision to dismiss Claimant from service is supported by the record and the choice of penalty cannot be considered arbitrary or capricious so as to amount to an abuse of discretion.

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 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:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.