

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29969
Docket No. MW-30051
93-3-91-3-462

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Duluth, Missabe and Iron Range Railway Company

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

- (1) The thirty (30) day suspension issued to Track Laborer J. P. Haedt for his alleged absence without authority and failure to follow instructions on July 20, 23, 27, 30, 31 and August 7, 10 and 21, 1990 was arbitrary, capricious, excessive and based on unproven charges (Claim No. 21-90).
- (2) Claimant Haedt's record shall be cleared of the charges leveled against him 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 employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

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

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

Claimant was an eighteen year track department employee when, by letter dated September 6, 1990, he was instructed to appear on September 13, 1990, to answer charges relative to alleged absence without permission on several dates during July and August, 1990. The hearing was conducted as scheduled at which time Claimant was present, represented and testified on his own behalf. Following completion of the hearing, Claimant was notified by letter dated

September 25, 1990, that he had been found guilty of the charges and was disciplined by suspension of thirty days. He served the 30-day suspension from September 27, 1990, to and including October 26, 1990. Appeals on behalf of Claimant were initiated and progressed through the normal on-property grievance procedures.

The Carrier in this case has argued that Claimant was properly found at fault for being absent without permission. Carrier further argued that Claimant had been previously counselled on more than one occasion relative to his absenteeism habits and was specifically instructed by letter dated October 5, 1988, as follows:

"* * * * *

You, (sic) also agreed you will not miss anymore (sic) work unless ill and if ill you will call Rich Herring or myself at 7:00 am. Also, you agreed to provide a Doctor's diagnosis of illness.

If you violate the above instructions and continue to miss work, progressive disciplinary action will result."

Carrier continued its argument that the discipline as assessed in this instance was commensurate with the scope and gravity of the proven charges and that the Organization recognized that the charges had, in fact, been proven as evidenced by the Organization's statement as made by the General Chairman during his October 9, 1990, handling of the appeal with Carrier's Chief Engineer, to wit:

"I hereby request you reduce discipline and reinstate Mr. Haedt on October 15, 1990, or will (sic) claim all days missed as the investigation clearly points out Mr. Haedt did not violate Rule 3 or Rule 12 of the General Rules and Code of Conduct."

Carrier concludes their argument by contending that the Statement of Claim as made by the Organization before this Board is at variance with the subject of the dispute as handled on the property.

The Organization, for their part, argued that Claimant's due process rights were violated in this case on two occasions because a Carrier officer other than the hearing officer rendered the decision following the hearing and the same Carrier officer who made the charges also rendered the decision. The Organization continued their argument by contending that Claimant was ill on three of the dates in question and could not be disciplined for those dates. Additionally, the Organization argued, without

contradiction by the Carrier, that the October 5, 1988 letter of instruction had not been enforced by Carrier during the period of time between its issuance and the incident here in dispute and therefore, it had lost its meaning and effect. The Organization concluded their argument with the contention that the 30-day suspension was arbitrary, capricious and excessive.

As to Carrier's contention relative to an alleged variance between the claim as handled on the property versus the Statement of Claim before this Board, we are not convinced that there is any significant difference present. This Board has repeatedly held that there must be a significant variance between the on-property subject and the subject listed with this Board before we will accept an argument such as here advanced. The substance and the reality of the Statement of Claim to this Board is not different from the subject as handled on the property. Carrier's argument in this regard is rejected.

As for the Organization's so-called "due process" violations as argued before this Board, we do not find that any such contentions were made during the on-property handling of this dispute. It is abundantly clear that "first time" arguments before this Board are not proper and will not be entertained. The Organization's arguments in this regard are therefore dismissed.

From the record as properly developed during the on-property handling of this case, it is clear that this employee has a serious problem relative to his work attendance. It matters not how good the employee is or how much seniority and service he has if he is repeatedly absent from his assignment. The Carrier has the right to expect that their employees will perform service as assigned. When they are absent, for whatever reason, either the work does not get done or the remaining working employees are handicapped, or both. Absenteeism is a pernicious malady which hurts everyone and need not be tolerated. In this case, Claimant was individually and specifically counselled, cautioned and instructed - and apparently agreed - to not miss work unless he was ill and, if he was ill, he would contact one of two specifically named Carrier officers and would provide medical documentation relative to his illness. Claimant ignored this instruction. However, from this record it is apparent that Carrier to some degree permitted Claimant to ignore the instruction and therefore, by its inaction, played a part in the creation of this absenteeism scenario. This does not, however, relieve Claimant of his primary responsibility to cover his assignments and to comply with the instructions issued relative to his absenteeism situation.

Carrier's argument relative to the Organization's alleged acknowledgment of the situation here involved is not convincing.

Even if we accept that the Organization, in an attempt to resolve this dispute, made an offer of settlement, the fact remains that the offer was not accepted by the Carrier and therefore, Carrier cannot now point to that offer as an admission against interest.

On the basis of the relative convincing force of testimony and evidence as found in this case, this Board is of the opinion that there is substantial evidence to support the conclusion that Claimant was absent without proper permission on the dates as charged. We are not convinced, however, that the imposition of a 30-day suspension was progressive discipline as that term is generally accepted and employed in this industry, especially in light of Carrier's apparent failure to police and enforce its own instructions to this Claimant. The record in this case supports not more than twenty days suspension as a first step suspension in the progressive imposition of discipline. That modification of the discipline as assessed in this case is therefore ordered.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of December 1993.