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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13798

Docket No. 13677

04-2-02-2-39

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

- “1. That the Kansas City Southern Railway Company violated the Controlling Agreement, particularly Rules 15 and 29, but not limited to when Shreveport, Louisiana Electrician, Timothy Stanley was unjustly and arbitrarily assessed a five (5) day suspension from the services of the Kansas City Southern Railway company, beginning on January 30, 2002, and ending on February 3, 2002, following investigation held on January 3, 2002.
2. That, accordingly, the Kansas City Southern Railway Company make whole Electrician Stanley as follows:

 - (a) Compensate him for all wages lost at the prevailing rate of pay of electricians and all applicable overtime with interest at the judicial rate;
 - (b) Make him whole for any qualifying days towards vacation rights;
 - (c) Make him whole for any loss of health and welfare and insurance benefits;

- (d) Make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;
- (e) Make him whole for any and all other benefits that he would have earned during the time withheld from service, and;
- (f) Any record of this arbitrary and unjust disciplinary action be expunged from his personal record."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant in this case had nearly two years of tenure at the time of the incident which precipitated the charges in this case. On April 24, 2001, he was counseled about his on-time attendance and signed a statement which included the admission, "I understand that I must improve my on-time attendance or be subject to corrective action."

On December 22, 2001, he allegedly called in at approximately 2:30 P.M. to confirm that he would report for his 4:00 P.M. to midnight shift but would be late. He reportedly told the daylight Foreman that he was waiting for his medication to "kick in." However, according to the Carrier, the Claimant did not show up for work at all.

By letter dated December 26, 2001, he was advised to report for a formal Investigation to determine his culpability for: "Failure to follow layoff procedures and protect your assignment on December 22, 2001." Following the Hearing, the Carrier found the Claimant responsible for violating several Rules for failing to show up for work and for failing to call in as required. He was assessed a five-day suspension.

The Carrier argues there is no dispute the Claimant failed to show up for work on the day in question and failed to notify his supervisor as required. It rejects the Claimant's assertion that he was too sick to report and attempted without success to call in to report his illness. It argues his explanation is self-serving and not credible.

The Carrier argues that the Claimant admits to calling in at 2:30 P.M. to say he would be late. However, it says even if he called in at 6:00 P.M., as he claims, he was already two hours past his start time. It contends the medication taken by the Claimant, Vioxx, would not have required a waiting period before it "kicked in." In addition, it argues, it would have made no sense that the Claimant would have known at 2:30 P.M. that his medication would not have taken effect by his 4:00 P.M. start time.

The Carrier not only faults the Claimant's assertion that he called in once at 6:00 P.M. and found the line busy, it says if he actually had called in to report he would have kept trying rather than wait again until 8:00 P.M.

The Carrier further takes exception to the Organization's assertion that Rule 15 excuses the Claimant's failure to properly notify the Carrier of his absence. It cites Public Law Board and Second Division Awards to the contrary. It says quite simply the fact an employee calls in does not relieve him of culpability for not reporting to work.

The Carrier further dismisses the Organization's contention that the Carrier was required to cite specific charges and Rule violations in the Notice of Investigation. It argues that it is the Organization's burden to prove that the language of the Rule supports their position. It argues not only has the Organization failed in this regard, but that it failed to demonstrate that the

Carrier's actions precluded the Claimant from developing and presenting a defense to the charges. Besides, it insists there are no Rules which require the Carrier to cite Rule numbers.

Finally, the Carrier contends the Hearing Officer, as the sole finder of fact, had ample evidence to conclude the Claimant's culpability. It maintains that numerous Decisions have held it is proper for a Carrier Officer to serve multiple roles in an Investigation.

The Organization insists the Claimant is not guilty of the charges contained in the Carrier's Notice of Investigation. Therefore, it argues, the discipline assessed is arbitrary, capricious and without merit.

The Organization maintains the Claimant called in long before the start of his shift to advise his Foreman that he had taken medication for pain and would not be reporting on time. It contends he also called two other times between 6:00 P.M. and 8:00 P.M. to report that he would not be at work. It says the first time the line was busy and the second time no one answered. It submits the Claimant was not aware of the Carrier's policy which required that he contact certain other individuals when he was reporting off work.

In addition, the Organization asserts the Carrier's layoff policy is in direct conflict with the Controlling Agreement. It cites Rule 15 which precludes assessing discipline when an employee is unavoidably kept from work. It insists the Claimant complied with the requirements of Rule 15 by contacting his Foreman to report he would be late and then attempting to contact him at least twice subsequently.

The Organization further takes exception to the Notice of Investigation. It contends the Carrier erred by not citing a specific Rule allegedly violated. It says the absence of specific charges prevented the Claimant from receiving a full, fair, and impartial Investigation. Moreover, it strongly objects to the fact the Hearing Officer served in multiple roles as the complaining officer, judge, witness, and jury. It argues this clearly violated the Claimant's due process rights.

In any case, the Organization maintains the Carrier did not meet its burden of proof in this case. They argue the Carrier based its decision on mere speculation and did not present a preponderance of evidence to support the charges.

The Board does not take lightly the Organization's concerns over a Carrier Officer serving in multiple roles in a disciplinary case. There are times when the circumstances may dictate that the better course would be to assure the roles are separated. It is not always possible for an individual to remain objective when they have preferred charges against another person. However, in this case, the Board does not believe the Claimant was prejudiced by the Hearing Officer serving multiple roles. We find no evidence of bias or prejudgment.

Moreover, we find sufficient evidence that the Claimant should have been aware that he was expected to contact certain individuals in the event he was reporting off work. We cannot accept his contention that he was ignorant of the policy. As an employee, he has an obligation to familiarize himself with the Rules and regulations under which he performs his service. Moreover, he had been counseled concerning the need to protect his assignment and to report to work in a timely manner. Once an employee is put on notice that his attendance or tardiness is a problem, he must respond in a positive way. Certainly calling once at 6:00 P.M. to report that he would not be attending his 6:00 P.M. shift is not acceptable behavior. It simply does not meet the requirements of protecting one's assignment. Employees are paid to report to work at their scheduled start time and complete their shift.

The Board finds there is substantial evidence the Claimant failed to properly report off for duty. The discipline assessed is not so harsh as to be unreasonable.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 27th day of April 2004.