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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24730  
Docket Number MW-25099

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Railroad Company (former St. Louis-  
(San Francisco Railway Company)

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

(1) **The** dismissal of Machine Operator W. J. Holloway for alleged violation of 'Rule 702' was without just and sufficient cause (System File B-1913-1/MWC 81-7-19).

(2) **The** claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Prior to his dismissal, claimant was employed by the Carrier as a machine operator, assigned to Tie Gang No. T-1 at Snyder, Oklahoma, working under the supervision of System Gang Foreman D. L. White and Assistant Roadmaster J. L. Lee. His assigned work hours were 7:00 A.M. to 4:00 P.M. each work day.

On October 25, 1981, claimant was dismissed from Carrier's service for being late for work on that date without proper authority. At the request of the Organization for a hearing in claimant's behalf, claimant was notified to report for investigation on November 12, 1981:

"Please arrange to report to the office of the Assistant Superintendent of Roadway Maintenance, 1625 N. Lexington, Springfield, Missouri at 0900 on November 12, 1981 for an investigation on your behalf as requested by Mr. E. R. Spears, General Chairman for the Brotherhood of Maintenance of Way Employees.

**The** investigation is to develop the facts and determine your responsibility, if any, in your alleged violation of Rule 702 of the Burlington Northern Rules of the Maintenance of Way Department, Operating Department which resulted in your being dismissed from Tie Gang T-1 on October 25, 1981.

This is to advise your personal and work records will be reviewed in the investigation. You may be represented at the investigation by a duly accredited representative of the Brotherhood of Maintenance of Way Employees."

The investigation was conducted as scheduled and on November 19, 1981, the General Chairman of the Organization was notified by Carrier's Manager Regional Gangs that claimant would not be permitted to return to service. The claim was handled in the usual manner on the property and, failing of settlement, was referred to this Board.

U It is well settled that in discipline cases the burden of proof is on the Carrier. The Organization has objected to Carrier's Exhibit No. 13, which is claimant's prior record. Claimant was advised in the letter of November 12, 1981, that his personal and work record would be reviewed in the investigation, and the record shows that it was reviewed.

In the investigation it was established that while on his way to work on October 25, 1981, claimant's automobile broke down at about 6:00 A.M., five miles east of the gang's assembly point at Snyder, Oklahoma; that claimant had the automobile towed back to **Lawton**, Oklahoma, some thirty-six miles east of the gang's assembly point and waited for the car to be repaired. He attempted about 8:00 A.M. to call the Manager Regional Gangs, but was unable to reach him. He made no effort to call the foreman or the Assistant **Roadmaster**. He left **Lawton** when his car was fixed, about 10:00 or **10:30** A.M., and drove about fifty miles to Altus, to the work site of the gang. The claimant further testified:

"Q. Mr. Holloway, did you explain to your roadmaster or foreman why you were late for reporting.

A. Yes, I did. I told him I had work done on my car. He asked me for my slip. I **hadn't** paid for it yet and didn't have a slip. I said I could get it. He said slip or no slip you are fired."

In the investigation claimant presented a receipt showing that the car had been towed to **Lawton** and repaired on the date involved. Claimant also stated that he was familiar with Rule 702 of the Rules for the Maintenance of Way Department, which reads:

"**Employees** must report for duty at the designated time and place. **They must** be alert, attentive and devote themselves exclusively to the company's service while on duty. **They** must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

and stated that the "proper authority" referred to in the rule was the foreman, the Assistant Roadmaster or the Manager Regional Gangs.

We do not consider that claimant was subject to **discipline** because of his car breaking down. He may have used poor judgment in having it towed to and repaired at **Lawton**. In Third Division Award No. 20198 it was held:

"... it could not reasonably be said that car trouble is not good cause for a one-day absence from work. The role of the **automobile** in American work life is too well known to require citation."

( The claimant was subject to discipline for not promptly notifying the foreman or the Assistant Roadmaster of his predicament. **The** Carrier relies upon claimant's prior record to support the **dismissal**. However, our attention has been called to Second Division Award No. 8871, involving this same Carrier and another Organization wherein the **Board** held:

"Dismissal, of course, is the strongest sanction which the Carrier can apply to any employee. The severity of the discipline in this case makes it clear that the Carrier reached beyond the charges brought against Claimant for grounds for its action. While it is true that an employee's employment record may be taken into account by the Carrier in determining the degree of discipline to be administered, the principle is not meant to grant the Carrier license to dismiss for a rule infraction not warranting dismissal in its own right. The point is well stated in Award No. 7708, in which the Second Division (Referee Franden) stated in regard to a charge of failure to protect assignment:

'Dismissal is the ultimate penalty which is reserved for the more serious offenses. Its application in the instant case is not warranted. It is obvious that the claimant's unenviable record was a major factor in assessing the dismissal penalty. While it is proper to consider an employee's past record, the facts of the instant case do not support dismissal.'

[Based upon the record in the present case, which actually resulted from a minor infraction, we consider permanent dismissal of claimant to be excessive. The time that he 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 any compensation for time lost while out of the service.1 Claimant should understand, however, that the purpose of this award is to give him one last chance to become a reliable and dependable employee; that it is expected that his work attendance record will improve, and that further major infractions on his part will result in final termination of his services.

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. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.