

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  
(Soo Line Railroad Company

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

(1) The sixty (60) days of suspension imposed upon Section Laborer J. A. Davis for alleged failure to properly protect his assignment was capricious, excessive and in violation of the Agreement (System File 18-88/800-16-A-89 CMP).

(2) The Claimant shall have his record cleared of the charge 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 employee or employees involved in this dispute are respectively carrier and employees 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.

This is a discipline case involving an employee who had some 23 years of seniority when, by letter dated June 2, 1988, he was informed that he was "... suspended from the service of the Soo Line Railroad Company, effective immediately, as a result of your continued failure to protect your assignment on a full time basis." This letter contained a listing of seven (7) dates between January 7 and May 20, 1988, on which Claimant allegedly missed work for a full day or a part of a day or left his work assignment early.

On this property, the Discipline Rule provides that an employee who has been disciplined or dismissed shall be given a Hearing if one is requested within certain stated time limit parameters. In this case, the request for a Hearing was timely made and held. Claimant was present and represented during the investigatory Hearing. He was permitted to testify on his own behalf and was permitted to cross examine Carrier's witnesses. Following the completion

of the investigatory Hearing, Claimant was informed that he was found by Carrier to be at fault for "fail(ing) to properly protect your assignment" and was assessed a sixty (60) day actual suspension from service. Appeals from the suspension were perfected on Claimant's behalf and progressed through the usual manner of grievance handling on the property which included a formal appeal Hearing at which question and answer testimony was taken. Claimant was present and represented throughout the appeal Hearing. Failing to reach a satisfactory resolution of the grievance during the usual on-property handling, the claim has come to this Board for final adjudication.

The Organization, in their presentation to the Board, has raised three (3) primary contentions, namely: that the Claimant did not receive a fair and impartial Hearing; that the Carrier did not prove the charge as made against the Claimant; and, that the discipline as assessed was arbitrary, capricious, improper, excessive and unwarranted. The Carrier, on the other hand, contended that the Hearing was fair and impartial; that the evidence adduced at the Hearing clearly supported a finding of responsibility; and, that the Carrier did not act in an arbitrary or capricious manner.

We have read and studied the transcripts of both Hearings which were held. We have read and studied the Ex-Parte Submissions which each party has presented to this Board. We have reviewed the Awards which each party has presented in support of their respective positions as well as all arguments.

The first issue which we will address is the contention that the investigatory Hearing was allegedly not handled in a fair and impartial manner. This contention by the Organization goes primarily to the conduct of the Hearing Officer in his questioning of Claimant and has been closely examined by our Board. In railroad discipline cases there is a significant difference between the conduct of the on-property hearing as compared with formal court proceedings. The purpose of the investigatory hearing is to get at the truth and to discover all of the facts about the matter under investigation so that a just decision can be made by the trier of facts and that a clear, complete record will be available for review by appellate tribunals such as our Board. More often than not, the hearing officer comes to the hearing with some knowledge of the subject under investigation. This fact, in and of itself, is not prejudicial. Quite often, as in this case, the hearing officer engages in persistent questioning in an attempt to adduce testimony. This too, in and of itself, is not evidence of prejudice. Because the hearing officer has the responsibility of developing the record which forms the basis of the discipline assessed as well as the basis of the appeals therefrom, the hearing officer must be given certain latitude in his/her conduct of the hearing. In this case, the hearing officer was extremely zealous in his attempts to develop the record and stretched his envelope of authority to the limits. We do not believe, however, that he exceeded his authority. While the record is repetitious in many respects, it is reasonably understandable. While the Hearing Officer may have been unnecessarily exacting in his questioning in

certain areas, his tactics, while not condoned, are not so egregious as to have denied Claimant the right to a "fair and impartial" hearing as that term is applied in railroad discipline proceedings.

When we examine the stated reason for the assessment of the sixty (60) day suspension, we find that Claimant did, in fact, fail to protect his assignment on a full time basis. That was the basis for the discipline. He was not disciplined because of absence without permission. He was not disciplined because of deserting his assignment without authorization. He was disciplined because of the "continued failure to protect your (his) assignment on a full time basis." The record contains substantial evidence to support this conclusion.

The employer/employee relationship demands that employees diligently perform the work for which they are hired. They are expected to fulfill their obligation to work on the days assigned. When they fail in this responsibility, they become part-time employees. A Carrier cannot be expected to operate with part-time employees. The right to discipline employees for excessive or repeated absences, even when they are due to illness, has been recognized and accepted by Referees. (See Award No. 117 Public Law Board 1790 and Third Division Award 26187). In fact, this same Claimant, in Third Division Award 26576, was put on notice that even though his ". . . requests for early leave were made with the best intentions, the fact remains that the results produced evaded rather than conformed to policy made sufficiently clear by the Roadmaster." The full text of Third Division Award 26576 is, by reference, made a part of this decision.

In this case, based upon the substantial evidence as found in the Hearing transcript, it is our conclusion that Claimant is guilty of continued failure to protect his assignment on a full time basis.

That brings us to the third part of this dispute. Was the assessment of a sixty (60) day suspension for this proven dereliction "arbitrary, capricious, improper, excessive and unwarranted" as contended by the Organization?

The record of this Board is replete with authority for the conclusion that, as an appellate tribunal, we may not, in normal circumstances, interfere with the Carrier's right to set the measure of discipline for proven offenses unless it can be shown that the discipline was imposed arbitrarily, without just cause or in bad faith. Claimant is a long-term employee. He is also a repeat offender. Discipline is a serious matter. To be effective, it should be progressive, it should act as a deterrent to others and its purpose should be to train and rehabilitate - not to be solely punitive. Claimant's record shows that he has not yet taken seriously these noble precepts. Third Division Award 26576, cited supra, involved the same Claimant and the same type of derelictions as are found in this case. It can only be hoped that this sixty (60) day suspension will carry a stronger message and have more of a salutary effect than did the four (4) working day suspension decided upon by Award 26576.

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Award No. 28875  
Docket No. MW-29173  
91-3-90-3-21

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.