

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30215
Docket No. MW-28566
94-3-88-3-402

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

- (1) The discipline [thirty (30) demerits] imposed upon B&B Carpenter T. Moreno for alleged violation of General Notice, Rules A, B, D and 604 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File D-112/871042).
- (2) The Claimant's record shall be cleared of the charges leveled against him and the thirty (30) demerits imposed upon him in connection therewith."

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.

This dispute centers around Carrier's decision to impose the discipline of 30 demerits upon the Claimant based upon the allegation that he violated Rules A, B, D, and 604 in connection with his alleged, "...failure to report for duty as Relief Foreman on Gang 5423 at the designated time and place and for absenting yourself from duty without proper authority on June 17, 1987,...."

The Organization submits that the instant claim must be sustained on procedural grounds and on the basis that Carrier failed to prove its charges against the Claimant. Carrier disagrees, arguing, first, that Claimant was afforded a fair and impartial hearing, and second, that Claimant's Rule violation was proven and the discipline assessed was fully warranted under all the circumstances.

With regard to the Organization's threshold objection, the correspondence between the parties during the handling of this dispute on the property indicates that the Organization representative sought a postponement of the scheduled June 26, 1987, Hearing by attempting on two occasions to contact a Supervisor. When the Supervisor could not be contacted, the Organization representative left a message for the Supervisor stating that he would be unable to attend the scheduled Hearing because of a conflict and requesting a new date. The Organization's statements were unrefuted by Carrier.

The Investigation was held as scheduled. Claimant appeared but no Organization representative was present. Carrier points out that during the Investigation, Claimant was asked if he wanted representation and his response was "no." Claimant also stated that he was willing to proceed with the Investigation. It is Carrier's contention that since Claimant was informed of his rights and chose to proceed, the Organization should not be heard to argue that Claimant was denied Agreement due process or that any procedural irregularities occurred.

Regarding the misconduct alleged, the record evidence established that during the week of June 15 through 19, 1987, the B&B Foreman was scheduled for one week of vacation, and therefore it was necessary to assign a relief Foreman to fill his vacancy. It is Carrier's position that because Claimant was the senior member of the crew, he was or should have been assigned as the relief Foreman. Carrier further alleges that Claimant was absent without notice on June 17, 1987. A Carrier witness testified at the Investigation of this matter that he saw Claimant on June 16, but Claimant did not advise him that he would be absent the following day. On June 17, Claimant did not report off, according to the testimony of the witness.

Claimant testified that Jim Reimer was the relief foreman that week. Claimant stated that he told Reimer on Monday, June 15, that he needed to be off work on Wednesday, June 17, and Friday, June 19. There is no evidence in the record that Claimant was refused permission to mark off.

Based on this Board's review of the record evidence in its entirety, we concur with the Organization that this Claim should be sustained. The Organization's attempts to reschedule the Hearing were not rebutted by the Carrier nor was any evidence forthcoming to indicate that Carrier would have been unduly prejudiced by a postponement. As noted in Fourth Division Award 3448, a case very similar on its facts to the instant matter: "A more reasonable approach to any investigation process is to extend every courtesy to the accused, except when a request for a postponement will deprive the Carrier of full and adequate presentation of all relevant evidence. A postponement in this case would have prejudiced no one."

Rule 48 reflects the intention of the parties to accommodate reasonable requests for postponements and to ensure an employee the right to representation:

"Rule 48.

* * * *

(b) Formal hearing may be postponed or time limits referred to herein extended by mutual agreement between management and the employee or his representative.

* * * *

(d) The right of an employee to be represented at the hearing by another employee covered by this Agreement, or by duly authorized representative(s) (not to exceed two) of the Brotherhood of Maintenance of Way Employees, but not otherwise, is recognized."

In the instant case, Carrier's failure to grant a postponement was arbitrary. Claimant had every right to be represented at the Hearing by an Organization representative who in all probability was better acquainted with the Agreement, the Operating Rules and with Investigation procedures. The fact that Claimant did not object to the proceedings does not obviate Carrier's responsibility to accommodate the Organization's reasonable request.

Turning to the merits, it is apparent that there is no probative evidence to support the charges leveled against the Claimant. It was Carrier's burden to show that Claimant violated the Rules as charged and that he was absent from duty without proper authority. Carrier's evidence on this point consisted solely of the testimony of a witness, who stated that Claimant did not notify him of the June 17 absence. Carrier never proved that Claimant had been assigned as relief foreman on the day in question. Moreover, Claimant's testimony that he had earlier notified the acting Foreman of his intended absence was not refuted. Under these circumstances, we must conclude that Claimant was not absent without proper authority from assignment as relief Foreman on June 17, 1987.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

Linda Wood
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.