

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33142  
Docket No. MW-33365  
99-3-96-3-870**

**The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [five (5) day suspension and disqualification as a foreman and welder] imposed upon Mr. L. Manning for violation of Rules 1.15, 1.6, 1.13, 1.16, 20.1 and 20.3.1 was an abuse of the Carrier’s discretion, without just and sufficient cause and on the basis of unproven charges (System File B-2585/MWC 95-12-01AA SLF).**
- (2) As a consequence of the aforesaid violation, the Claimant’s record shall be cleared of the charges leveled against him, his seniority rights shall be reinstated 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 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.

On June 19, 1995 the Claimant, a Track Foreman in Jonesboro, Arkansas, reported to work "four minutes late." In addition, he failed to wear "proper safety equipment and stuff." He was advised by Roadmaster Larry Locke "about three or four days" before June 19 that he was required to wear the safety equipment when "he came to work on that day." As a result, Locke dismissed the Claimant from service.

After an Investigation was held on July 13, 1995, the Hearing Officer concluded that dismissal was not warranted. He reduced the dismissal to a five day disciplinary suspension and disqualification as a Foreman and Welder.

a. Events of June 19, 1995 - Rules 1.15, 1.13 and 20.1

1. Rule 1.15, in relevant part, provides as follows:

"Rule 1.15 Duty-Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties."

The record establishes that the Claimant violated Rule 1.15 on June 19, 1995. It is undisputed that the Claimant reported late for work on June 19. In the past, the Claimant has reported late to work on various occasions despite instruction from Locke to report to work on time.

The Claimant acknowledged that he reported for work on June 19, four minutes after his starting time of 6:00 A.M. He admitted that it "was not the first time" he had been late for work. During the "last several years," in the position of Foreman he estimated that he had been late for work "probably three or four times."

The Claimant's testimony merely confirmed Locke's testimony that without calling the Carrier, he had been late "several times." Moreover, the Claimant acknowledged that Locke had previously talked to him "about being at work on time."

**2. "Rule 1.13 Reporting and Complying with Instructions:**

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

On June 19, 1995, the Claimant violated Rule 1.13 of the Maintenance of Way Operating Rules when he reported to work late and was not prepared to begin performing services, contrary to previous instructions of Locke.

After a safety meeting that was held on June 15, Locke told the Claimant that while he was on "Company time, [he] expected him to wear his safety shoes at all times," to which the Claimant replied, "Okay." Four days later, on June 19, in addition to reporting late to work, he was not wearing his safety shoes.

The Claimant does not dispute the testimony of Locke. He recalled Locke discussing the subject of safety shoes with him on June 15. On June 19, when the Claimant reported for work, he was wearing his "slippers" and his safety shoes were left in his car. Clearly, the record establishes that the Claimant violated Rule 1.13 of the Maintenance of Way Operating Rules.

3. There are specific responsibilities placed on "all foremen" under Rule 20.1. Locke elaborated on the failure of the Claimant to comply with the requirements of the position of Foreman. He stated: "... the foreman's duty is to be on time, to get things lined out ready for the work day, get their instructions and be ready to go by work time." It is important for the Foreman to report to work on time so that the gang receives "their instructions, to have everything ready to go, ready for the work that day to ensure . . . safe work" - and that the jobs will be done safely. Clearly, on June 19, 1995 the Claimant violated these provisions of Rule 20.1.

**b. Evidence with Respect to Claimant's Failure to Comply With Rules  
20.3.3 and 1.16**

Evidence was also presented by the Carrier with respect to the Claimant's failure to satisfy requirements of Rule 20.3.3 which sets forth various other responsibilities of "Track Foremen." Such evidence consisted of not submitting "time and material reports

as required and his failure to stay with the crew because he is at the "phone three or four times a day." Locke also provided testimony with respect to the Claimant's failure to comply with Rule 1.16. This Rule states that "Employees subject to call must indicate where they can be reached and must not be absent from their calling place without notifying those required to call them." Locke said that "a couple of times" he has talked to the Claimant "about the need to be available on call."

Such evidence is not entitled to any weight. It is unfair to resurrect vague and general "talks" or discussions that Locke had with the Claimant in the past, about his deficiencies as a Foreman. In other words, none of the alleged deficiencies of the Claimant which Locke talked about with him rose to the level of formal discipline. Indeed, in Investigating Officer D. E. Hiett's letter dated July 20, 1995 to General Chairman E. R. Spears, in relevant part, he states:

"... Looking at [the Claimant's] record, however, I find one letter of counsel, but no formal discipline. Therefore, in this case, I believe dismissal is unwarranted."

Thus, in the absence of formal discipline, it is unreasonable for the Claimant to take such "talks" with Locke, seriously. Moreover, without any formal discipline, given the frailty of recollection, it is difficult to establish the actual facts of the alleged "talks" or discussions with respect to the alleged Rule infractions.

#### PENALTY

In light of the record in the case, it is undisputed that on June 19, 1995, the Claimant reported late to work. It is undisputed that Locke had talked to the Claimant about his tardiness and had memorialized the talk with a "writing" which he gave to the Claimant. Accordingly, the Claimant violated Rule 1.15 and several aspects of Rule 20.1 by failing to report for duty on June 19, 1995 at the designated time of 6:00 A.M.

In addition, contrary to Locke's specific instructions on June 15, the Claimant reported to work without wearing his safety shoes which were left in his car. Thus, by failing to comply with instructions from Locke, he violated Rule 1.13.

However, in light of the record in this case, the Carrier's permanent disqualification of the Claimant as a Foreman and Welder cannot be sustained. Besides

the failure of the Carrier to issue formal discipline against the Claimant for his alleged Rule infractions, there is nothing in the record which establishes that the Claimant was ever informed that the infractions would result in the serious penalties of disqualification as a Foreman and as a Welder. Clearly, the discipline by the Carrier is excessive, unduly punitive and disproportionate to the offenses committed by the Claimant on June 19, 1995.

Thus, it is our conclusion that the Claimant is to have the Foreman and Welder seniority restored to him consistent with the applicable Agreement and Rules. Moreover, the Board concludes that the suspension of the Claimant which was issued by the Carrier is upheld based upon the Rule infractions committed by him on June 19, 1995.

### **AWARD**

Claim sustained in accordance with the Findings.

### **ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of March 1999.