

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35371
Docket No. MW-35362
01-3-99-3-235**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company (former
(Burlington Northern Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Grinder Operator K. R. Melby for alleged violation of Rules 1.13 and 1.15 for his alleged ‘ . . . absence from duty without proper authority and abandoning your assigned position as a Grinder Operator from November 14, 1997 to present date ***’ was arbitrary, excessive an abuse of the Carrier’s discretion and in violation of the Agreement (System File B-M-572-O/MWB 98-04-09AA BNR).**
- (2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges 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 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 was first hired by the Carrier in 1979. In November 1997, he was employed as a Grinder Operator. On November 14, 1997, the Claimant began to absent himself from work. It was the Carrier's understanding that the Claimant's absence was due to his incarceration. On January 7, 1998, the Carrier issued a Notice of Investigation, directing the Claimant to attend an Investigation at which he was charged with his absence from duty without proper authority and abandoning his position from November 14, 1997, to the date of the notice. The Investigation was originally scheduled for January 14, 1998, but was postponed until January 22, 1998, at the request of the Organization. These notices were sent via certified mail to the Claimant's last known address, and received by his mother. When the Investigation was convened, Roadmaster Jacobson testified he had spoken to the Claimant's mother, who told him that the Claimant was in the Deer Lodge County Jail awaiting transfer to the Montana State Penitentiary for a term of up to ten years.

Following the Investigation, the Claimant was dismissed from service. At no time during the handling of the claim herein has the Organization refuted Roadmaster Jacobson's testimony. We must conclude, therefore, that the charge against the Claimant was proven.

The Organization protested the timeliness of the charge against the Claimant, asserting the discipline Rule requires Investigations to be held no later than 15 days from the date of the occurrence. The Board has long recognized that a continuing absence such as the Claimant's is a single offense, and the charge may be issued any time during the absence. In Third Division Award 24353, also involving an employee who was absent due to incarceration, the Board held:

"The Board finds no justification for the Organization's contention as to the timeliness of the charge or the investigation. Claimant's absence from March 24, 1980, to the date of the charge, May 13, 1980, was of a continuing nature. The charge was issued during the period of the absence, and the investigation was timely held after the date of the charge."

The Organization next protests the Carrier's failure to further postpone the Investigation when requested by the Claimant's representative. The fact that the Claimant was not present at the Investigation was not a sufficient basis for postponing it, particularly after the Carrier had already granted one postponement. There was no indication the Claimant would be able to attend the Investigation in the reasonably foreseeable future. The Carrier was under no obligation to postpone it indefinitely.

The Organization's next objection is that the charging officer, Division Engineer Kiefer, issued the discipline, but was not present at the Investigation. We have been cited no Rule that requires the Hearing Officer to be the person who issues the discipline. This industry has recognized that while the Hearing Officer may be in the best position to make credibility determinations because of his presence at the Investigation, he may report those findings to another Carrier official, who has responsibility for the actual assessment of discipline. Further, this case presented no credibility issues to be resolved by the Hearing Officer. The only testimony was that of the Roadmaster, who established that the Claimant had been continually absent without permission during the time covered by the notice of charge.

Finally, the Organization argues the Carrier should have approved a leave of absence for the Claimant. Aside from the fact that the Carrier denied there had been a request for a leave of absence, and the Organization offered no proof to the contrary, we do not agree the Carrier is obligated to grant a leave of absence for an incarcerated employee. Award 76, Public Law Board No. 2206, between these parties, found that incarceration is not a proper justification for an employee's absence. The only reasons for granting a leave of absence cited in Rule 15 are sickness, business matters of serious importance to the employee, or the Carrier's ability to spare the employee. None applies in this case.

Under the circumstances, the Board finds that the discipline imposed in this case was neither arbitrary nor unreasonable. Essentially, the Claimant abandoned his employment through his extended absence without authority. His dismissal was warranted. The fact that he was a long-term employee is not sufficient to mitigate the discipline in this case.

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AWARD

Claim denied.

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 Third Division

Dated at Chicago, Illinois, this 20th day of March, 2001.