

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36315
Docket No. SG-35932
02-3-00-3-13**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Southern
(Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Co. (former Southern Pacific):

Claim on behalf of G. Pankey for payment of one day’s pay at the straight time rate and to have any reference to this discipline removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 53, when on October 27, 1998, it sent the Claimant home without pay and failed to provide him with a fair and impartial investigation and imposed harsh and excessive discipline against him without meeting the burden of proving the charges against him. Carrier’s File No. 1169216. General Chairman’s File No. SWGC-1893. BRS File Case No. 11073-SP.”

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.

At the time this dispute arose, the Claimant was regularly assigned as a Signalman on the Los Angeles Division. On the date in question, October 27, 1998, the Claimant was late reporting for duty. The Organization contends that the Claimant reported four minutes late. The Carrier insists that the Claimant was ten minutes late in reporting for his regular assignment. Regardless of whether it was four minutes or ten minutes, the facts of record indicate that after reporting for service, the Claimant was not permitted to work on that date. The claim as outlined in the Statement Of Claim supra was presented on the Claimant's behalf and has been handled in the usual manner on the property. Failing to reach a satisfactory settlement of the case, it is now properly before the Board for final and binding resolution.

The Organization insists that the Claimant called his Foreman some 20 minutes before the scheduled starting time of his assignment to advise that he was stuck in freeway traffic. It further insists that at that time the Foreman advised the Claimant "to come on in." After the Claimant reported - either four minutes or ten minutes late depending on whose version is accepted - the Claimant was informed by the Manager Signal Construction that he (the Claimant) was in violation of the existing ATTENDANCE POLICY. The Manger thereupon sent the Claimant home without pay for the day. The Claimant was also given a "letter of counsel" informing him that future occurrences of tardiness could result in discipline.

The Organization argues that this action was tantamount to discipline in violation of Rule 53; that the letter of counsel should be rescinded; and that the Claimant should be paid for the day's pay lost. It insists that the Claimant was not a perpetually tardy employee; that he did, in fact, arrive at the job site in sufficient time to have performed his assigned duties; that he was denied a fair and impartial Investigation prior to the assessment of discipline; that the Manager had not previously made the employees aware of his attendance policy; and finally that the Carrier recognized its deficiency in this case by offering during conference to settle this case for four hours pay to the Claimant.

The Carrier makes several salient points, namely, that many prior decisions of the Board have regularly upheld a Carrier's right to withhold from service an employee who does not report for service on time; that such withholding of tardy employees from service does not involve an application of the discipline process; and that in this case the Carrier's policy on tardiness was properly applied by the Manager.

Rule 53 - INVESTIGATIONS, DISCIPLINE AND APPEALS reads, in pertinent part, as follows:

“(a) An employee who has been in service more than ninety (90) calendar days, or whose application has been formally approved, shall not be disciplined or dismissed without a fair and impartial investigation, however, by mutual agreement with the Company, an employee may accept discipline proposed by the Company and waive, in writing, the right to a formal investigation. The waiver will specify the discipline to be assessed, but the waiver assessment will not result in dismissal. The employee shall be afforded an opportunity to consult with his duly accredited representative before signing a waiver. The signed waiver will be placed on the employee’s personal record and a copy will be furnished to the Local Chairman.”

The ATTENDANCE POLICY in effect on this property reads, in pertinent part, as follows:

**“Attendance
Revised 07/31/1998
Policy Statement**

It is expected that all employees will fulfill their job responsibilities with a consistently dependable attendance record.

Guidelines

Coverage

Employees are all services rendered (ASR) employees. ASR employees are required to be available for work duty at any time. Excused absences include holidays, vacation days, family medical leave, other approved leaves of absence and sick time.

Notification

When it is necessary for an employee to be absent from work, the employee's manager must be notified as soon as possible. If the absence cannot be predicted in advance, employees should notify their manager within the first half-hour of their starting time on the first day of absence. If they must leave work, their manager should be notified as far in advance as possible.

Noncompliance

Any absence of any duration without notification of management will be considered an occurrence. Two or more occurrences of absence without notification within a 90-day period may result in disciplinary measures up to and including dismissal. Four or more occurrences of unexplained absence within a 12-month period may result in dismissal. Two consecutive days in which an employee fails to report to work as expected will be considered a voluntary resignation on the part of the employee."

There are three principal issues that the Board must address in this case. First is the issue of whether it is a matter of discipline when a tardy employee is sent home without pay. The Board has regularly ruled that a Carrier's action of not permitting a tardy employee to work on any day on which the employee did not report for duty at the assigned reporting time is proper and is not equivalent to discipline. For example, see Third Division Award 27226 and citations contained therein. The letter of counsel issued to the Claimant in this case was not a reprimand as argued by the Organization, but rather was advice to him that future tardiness could result in discipline.

The second issue in this case is in regard to the Organization's argument that "the carrier recognized, during conference, the circumstances that prevailed in this case, and offered to settle the case for four (4) hours pay to the Claimant." It is a well-established tenet of dispute resolution that an offer to compromise a particular case is **NOT** an admission against interest and cannot be cited by either party to a dispute. The Board has ruled on this issue on many occasions. The Board has uniformly held that offers of compromise and settlement are not evidence of anything and, in fact, are not admissible in evidence. In this case, the offer of settlement was rejected by the Organization. It cannot now present such offer of settlement as evidence against the Carrier's interest. An offer of compromise is not a reflection of the merits of a case.

The third issue involved in this dispute concerns the uncontested facts of this particular case. It is not disputed that the Claimant did not have a history of tardiness. It is uncontested that when the Claimant called the Carrier to notify his Foreman of his problem he was told by his Foreman "to come on in." This advice appears to be at odds with the Manager's alleged no nonsense approach to tardiness. Clearly the Manager had the right to set his standards for attendance in line with the promulgated Company Policy on this subject. However, there is no evidence in this record to support the contention that the Manager's standards had previously been made known to the employees under his jurisdiction. Clearly the Claimant's Foreman did not apply these standards when he informed the Claimant "to come on in." The Carrier's candid acknowledgment during the on-property handling of this case is enlightening. The Carrier stated:

"Instead, in line with past Awards and in the perspective of fairness, it is not necessary that ALL railroad employees on the system are sent home if they report to work tardy. It is enough that Mr. Pankey knew what the results of his tardiness would be while he worked for Manager Smith."

While the Board is not in the business of dispensing equity, the Board is inclined in this particular case to apply the "perspective of fairness" as set forth by the Carrier and to rule for the Organization on the basis of the particular facts as found in this case. This action will not do any harm to the long line of prior decisions of the Board relative to tardiness and to the Carrier's right to send the tardy employee home without pay or involvement of the discipline Rules. The Board believes that in this case after the Claimant was told by his Foreman "to come on in," he was entitled to perform his assigned duties on that date. Therefore, the claim for one day's pay at the straight time rate of pay is sustained. However, the letter of counsel relative to future instances of tardiness will remain in the Claimant's record.

AWARD

Claim sustained in accordance with the Findings.

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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 13th day of November 2002.