Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36566
Docket No. MW-35966
03-3-00-3-53

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (formerly The Denver
(and Rio Grande Western Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed and refused to allow Track Machine Operators J. P. Allen and R. L. Ward to work on Gang 9083 on October 5, 1998 (System File UP-98-16/1173279 DRG).

2. As a consequence of the violation referred to in Part (1) above, the Claimants shall now be '. . . compensated eight (8) hours at their respective TMO rate of pay; three (3) days per diem allowance @ 48.00 per day; and Article XIV travel allowance based on mileage between their respective homes in Grand Junction, Colorado, and the assigned work location in Page City, Kansas.'"

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 October 5, 1998, the Claimants were assigned as Track Machine Operators on a system gang working in the vicinity of Page City, Kansas. On that date, the Claimants reported to work eight minutes late due to sustaining a broken fan belt on Claimant Allen's pick up truck. Because the Claimants were late, Gang Supervisor D. A. Dimas did not permit the Claimants to work that day. As a result of not being allowed to work, the Claimants lost a day's wages, three days' per diem allowance and weekend travel allowance. This claim followed.

As a general proposition, the majority view is that the Carrier can withhold employees from service for being late and that such actions are not discipline. See Third Division Award 27226 between the parties:

> "In numerous Awards, this Board has held that the Carrier may refuse to permit the late employee to work that day and that such refusal does not constitute discipline. (See Third Division Awards 22904, 23294, 24428, 25987)."

That concept was also stated in Third Division Award 23294, supra, where the employees were three to five minutes late ("Employes who report to work late without advance notice are in a tenuous position to demand the right to complete their assignment. . . . The Carrier is under no obligation to keep their assignment open").

Therefore we must conclude that, although sending the Claimants home for being eight minutes late was arguably petty and the Claimants did have car trouble, given that the Claimants were late, Supervisor Dimas still had the managerial right to send them home and such action was not discipline.

The Organization's arguments do not change the result.

First, in the development of the record on the property, the Organization asserted that the Claimants were declined work on the day in dispute even though roll call for the gang had yet to commence. The Organization's purpose in presenting this assertion that roll call was not missed by the Claimants is to show that there was no harm to the Carrier as a result of the Claimants' late appearance at work. But, the Carrier disputed that assertion. The Carrier asserted that the Claimants missed roll call at the beginning of their shift as well as the job briefing and warm up exercises. The Organization bears

the burden in these cases to establish the necessary facts to support the claim. On this issue, the factual premise of the Organization's argument is disputed. Based on what is before us, we have no way to resolve this disputed fact. Therefore, the assertion that the Claimants did not miss roll call cannot change the result.

Second, according to the Organization, on October 5, 1998, another employee, L. C. Castor, reported for work one hour late and Supervisor Dimas allowed that employee to work. Further, according to the Organization, on October 7, 1998, F. L. Velasquez and L. Velasquez reported for work three minutes late and were also allowed to work. With these assertions, the Organization argues the Claimants were the subject of disparate treatment. However, these assertions are also disputed by the Carrier. The Carrier responded that these employees were told to show up at Oakley, Kansas, at starting time and were then sent to Page City. The Organization objected to the Carrier's assertion concerning the other employees as "disputable" because the Carrier failed to present any documentation from the gang supervisor supporting that assertion.

The problem here from the Organization's perspective is that disparate treatment is an affirmative defense which, because it was raised by the Organization, places the burden on the Organization to clearly demonstrate the existence of disparate treatment. Disparate treatment is shown when similarly situated employees are treated differently. Given that the Carrier asserted that the other employees who arrived late did so because they were sent from other locations and that the record establishes that the Claimants were late due to car difficulties, we cannot say that the Organization met its burden of demonstrating that similarly situated employees to the Claimants were treated differently. We essentially have two parties making assertions. But the burden is on the Organization to establish the necessary fact. It has not done so.

Third, the Awards cited by the Organization also do not change the result. Third Division Awards 20198, 23220 and 24730 were discipline cases where the employees did not report for work for an entire day or were late (due to car trouble) and were disciplined. Certainly, here the Carrier could have attempted disciplinary action against the Claimants - but it chose not to do so. As noted earlier in Award 27226, supra and Awards cited therein, the Carrier is not obligated to treat these kinds of cases as disciplinary matters and can send late reporting employees home. Third Division Award 24151 involved a case where the employees were sent home for being two to five minutes late and the Board found that the carrier acted unreasonably. We are not

persuaded that Award 24151 is binding authority, particularly in light of the majority view expressed in Award 27226 and the Awards cited therein.

This case is really about the exercise of managerial prerogatives. The relevant inquiry in this case is therefore whether the Organization has shown that the Carrier was arbitrary when it determined that the Claimants could not work because they were late? At most, the Organization has shown that Supervisor Dimas acted in a petty fashion when he did not allow the Claimants to work. However, given what is before us, we are unable to find that the Organization carried its burden to show that Dimas' action was arbitrary. The claim must therefore be denied.

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 16th day of June 2003.

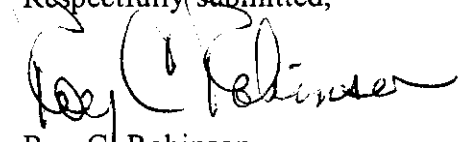
LABOR MEMBER'S DISSENT
TO
AWARD 36566, DOCKET MW-35966
(Referee Benn)

The issue in this case was the fact that the Claimants were returning to work following their three (3) rest days. On the way to the work site, they experienced car trouble which required repairs en route. As a result of the repair work, they were eight (8) minutes' late for work. It is our position that the Carrier acted arbitrarily when it refused to consider the reasons for their late arrival and refused them the opportunity to work the day. As a result of the Carrier's decision, the Claimants were denied two hundred fifty dollars' ($250.00) travel allowance, one hundred forty-six dollars' ($146.00) rest day per diem, one day's pay and workday per diem. Add that all up and the Claimants were denied over five hundred dollars ($500.00) for being eight (8) minutes' late due to circumstance beyond their control. The Majority stated that:

> "*** At most, the Organization has shown that Supervisor Dimas acted in a petty fashion when he did not allow the Claimants to work. However, given what is before us, we are unable to find that the Organization carried its burden to show that Dimas' action was arbitrary. ***"

According to the Carrier, it is acceptable to be petty but not arbitrary. When consideration is given to the adverse effect it had on the Claimants, it certainly did not matter to them. In effect, what has happened here is the Majority has acted as an asset protection agent of the Carrier and developed a denial award based on its own brand of industrial justice. Award 36566 is palpably erroneous and I, therefore, dissent.

Respectfully submitted,



Roy C Robinson
Labor Member