

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36613  
Docket No. MW-36966  
03-3-01-3-557**

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

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company [former Southern  
( Pacific Transportation Company (Western Lines)]**

**STATEMENT OF CLAIM:**

- “(1) The discipline (Level 5 - Permanent Dismissal) imposed upon Mr. S. M. Thomson for alleged violation of Union Pacific Rules 1.13 and 1.15 in connection with not reporting to work on June 9, 2000 at Portola, California while employed as a B&B steelman was without just and sufficient cause, unwarranted and in violation of the Agreement (Carrier’s File 1245497 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. M. Thomson shall now ‘...be reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired, compensated for all wages (straight time and overtime) and benefit loss suffered by him, including but not limited to medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing, compensated the overtime associated with Claimant coming into the office on his rest day, and the alleged charge(s) be expunged from his personal record.’”**

**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 employed by the Carrier since November 23, 1992. On June 8, 2000, he was scheduled to report to work at Portola, California, 183 miles from his permanent home, at 6:00 A.M. While stationed in Portola, the Claimant was living in a mobile home located 5-10 minutes from the worksite. On the morning of June 7, the Claimant overslept. He testified that electric power was disrupted during the night and his alarm was disabled. He woke up at 6:25 A.M. and drove immediately to headquarters, arriving at 6:40 A.M. The Claimant explained that he decided to drive to work rather than call because he had no cell phone and no change for a pay phone. Prior to his arrival, the Foreman had already called the Director Bridge Maintenance to report the Claimant's absence. The Director Bridge Maintenance had instructed that the Claimant was not authorized to work if he arrived late.

By letter dated June 9, 2000, the Claimant was charged with failure to report to work at 6:00 A.M. on June 8, in violation of Rules 1.13 and 1.15. An Investigation was held on June 16, 2000. On June 29, the Hearing Officer found the Claimant guilty as charged. In accordance with the Carrier's UPGRADE policy, the Claimant was dismissed because he had been found guilty of the same Rule infraction three times during a 36-month period.

**Rule 1.13 Reporting and Complying with Instructions, reads as follows:**

**"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."**

**Rule 1.15 Duty - Reporting or absence, reads as follows:**

**“Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.”**

**The Carrier argues that the Claimant was previously counseled on the need for regular reporting and attendance. By his own admission, he did not report on June 8 at the designated starting time of 6:00 A.M. The Investigation into the charges assessed was fair and impartial, the Carrier established by substantial evidence that the Claimant was guilty of the misconduct alleged and the penalty imposed was consistent with the Carrier’s UPGRADE policy.**

**The Organization argues that no discipline was warranted because 1) the Claimant was late for work due to circumstances beyond his control, 2) the Claimant was disciplined not for being late but for not calling the Foreman, even though he did in fact contact the Foreman as soon as possible; 3) the gang was not disrupted by the Claimant’s lateness because it was still at the headquarters when the Claimant reported; 4) termination was not appropriate because the UPGRADE policy that prescribes termination following three violations of the same Rule in 36 months specifically excludes missed calls and tardiness; and 5) the Claimant’s past record cannot be used to prove guilt, only to determine the degree of discipline warranted.**

**The record does not support the Claimant’s attempts to argue that he was late for reasons out of his control. He was placed on notice two months before that his attendance record was unsatisfactory and that further absences would result in discipline. He apparently knew that there was a danger of the electricity at the mobile home being disrupted, because he testified there was a history of children knocking out the power lines. However, he took no precautions like having a battery operated back up alarm. He also had no means for notifying his employer like a home phone, change for a pay phone, or a cell phone. Under these circumstances, the record does not support the argument that there was nothing he could have done to ensure that he could get to work on time or at least call if he was going to be late.**

The Board concludes that the record supports the conclusion that the Claimant was guilty of being late on June 8. However, notwithstanding his prior record, dismissal is not warranted. The Hearing Officer relies on the "three strike rule" to justify dismissal. Yet the three strike Rule specifically excludes missed calls and tardiness. Two of the Claimant's violations relied on were absenteeism and the third (the case at issue) was tardiness. While the Carrier may also have considered this case to constitute a failure to follow instructions, its essence is tardiness. He reported to work 40 minutes late. The rationale for the exclusion of acts of tardiness from the dismissal provisions of the three strike Rule apply to the facts of the instant claim.

This does not mean that no discipline was warranted. Had the Hearing Officer relied on the UPGRADE progression, as the Claimant had a previous Level 4 discipline status, the additional Level 1 would result in dismissal. In this case, however, we note that the Hearing Officer did not specifically rely on the UPGRADE progression and the Claimant did attempt to report to work as soon as he allegedly awoke. Thus, we conclude that time out of service constitutes sufficient discipline. The Board directs restoration to service at a Level 4 discipline status with seniority and other rights unimpaired. There shall be no compensation for time lost while out of service. Restoration to service is also contingent upon timely successful passage of a return-to-service physical examination. The Claimant should understand that this Award gives him his final chance to become a reliable and dependable employee. It is expected that his work attendance record will improve. Further attendance infractions on his part will unquestionably place him at risk for permanent loss of employment.

### **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 29th day of July 2003.**