

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37327
Docket No. MW-37119
05-3-02-3-78**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(New Orleans Public Belt Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s decision to suspend Bridgeman Helper A. Thornton for thirty (30) days for his alleged violation of NOPB’s Safety Rules 1.1, 1.4 and 1.6 on October 2, 3 and 4, 2000 was arbitrary, capricious, excessive and in violation of the Agreement (System File MW-01-2-NOPB).
- (2) The Carrier’s decision to dismiss Bridgeman Helper A. Thornton from service for his alleged violation of NOPB’s Safety Rules 1.1, 1.4 and 1.6 on October 2, 3 and 4, 2000 was arbitrary, capricious, excessive and in violation of the Agreement.
- (3) As a consequence of the violation referred to in Part (1) above, the Claimant shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.
- (4) As a consequence of the violation referred to in Part (2) above, the Claimant shall have 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.

Claimant A. Thornton, at the time of the incidents that occurred between October 2 and 4, 2000, had established and held seniority as a Bridgeman Helper in the Bridge Sub-Department. During the relevant period, the Claimant was working under the supervision of Bridge Supervisor M. Dumas, Assistant Bridge Supervisor J. Bertucci and under the direct supervision of Bridge Foreman S. Bourgeois on the Mississippi River Bridge. At that time, the Claimant had more than two years of service.

The Mississippi River Bridge is both a railroad bridge and a highway bridge spanning the Mississippi River upstream approximately seven miles from downtown New Orleans. The rail portion of the bridge consists of two main lines and is located above the vehicular portion of the bridge that consists of four lanes of traffic.

Between October 2 and 4, 2000, the Claimant was observed on numerous occasions by various supervisors and fellow workers not performing his duties as instructed, taking excessive water breaks, walking from end to end of the project performing no service, carrying around an empty bucket as if he were working, killing time by loading a bucket, pouring it out and then reloading it with the same material, working in an unsafe manner, refusing to assist his fellow workers, refusing to comply with instructions for the proper operation of equipment and making discourteous, derogatory remarks to other employees.

By letter dated October 9, 2000, the Carrier informed the Claimant that he was being disciplined for violating NOPB Safety Rules 1.1, 1.4 and 1.6 and was issued a 30 day suspension. The letter indicated as follows:

“... You were observed on numerous occasions during this period of time not performing your duties as instructed, taking long, excessive water breaks, walking from end to end of the project performing no service.

* * *

In view of the above, you are being disciplined in the form of a 30-working-day suspension from the service of the NOPB....”

On October 12, 2000, the Claimant requested a formal Hearing in accordance with Rule 16 of the Agreement. By letter dated October 18, the Carrier granted the Claimant's request and a Hearing took place on October 25.

The Carrier, by letter dated November 7, 2000, notified the Claimant that he was being dismissed from service for his violation of the NOPB's General and Safety Rules for All Employees, 1.1, 1.4 and 1.6 during his tours of duty on October 2 through 4, 2000.

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization claims that not only has the Carrier been unable to prove that the Claimant engaged in the acts alleged, even if he did engage in such acts, the discipline imposed was unreasonably harsh. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays, and seniority. In addition, the Organization claims that the Carrier engaged in double jeopardy because the Claimant was initially assessed a 30-day suspension and only after the Claimant rejected this penalty and requested a Hearing did the Carrier increase his penalty to dismissal.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the

requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the Hearing transcript leaves no doubt that the Claimant violated the applicable Rules. In addition, the Carrier asserts that the Organization failed to appeal the matter in a timely fashion, thereby rendering the instant appeal "dead" pursuant to the time limits imposed by the Agreement. Finally, the Carrier alleges that it acted within its rights by increasing the penalty to dismissal based upon information determined during the course of the Hearing.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the evidence, the Board determines that the Carrier failed to prove that the Organization's appeal was untimely. While the Carrier presented evidence, the Organization properly rebutted that evidence and has shown that it properly appealed the discipline. Thus, this portion of the Carrier's defense is rejected.

As to the substance of the matter, the Board finds that the Carrier proved by substantial evidence that during the period of October 2 through 4, 2000, the Claimant did violate the cited Safety Rules. The testimony of Bridge Supervisor Dumas, Assistant Supervisor Bertucci, and that of several of the Claimant's co-workers is consistent with the charges alleged and proves that the Claimant engaged in the enumerated acts.

In addition, the Board finds that the 30-day suspension imposed was reasonable and we will not disturb it. However, we find that the Carrier engaged in double jeopardy by imposing the penalty of dismissal upon the Claimant, after initially assessing him a 30-day suspension. The Board finds that had he not appealed the discipline, the Claimant's penalty would have been limited to 30 days. Thus, in essence, he was penalized for requesting a Hearing. Substituting the

previously assessed 30-day suspension with the penalty of dismissal, based upon the same charges, constitutes double jeopardy. See Third Division Award 26476. Further, while the Carrier indicated that it increased the penalty assessed based upon the October 6, 2000 presentation of witnesses' written statements, the 30-day suspension itself was actually imposed after October 6, i.e., on October 9, 2000, three days later. This is an inconsistency of some proportion and undermines the Carrier's defense.

Based on these conclusions, the Board upholds the 30-day suspension imposed upon the Claimant, but rejects the dismissal as improper. The Claimant is to be reinstated with seniority unimpaired and paid for all time lost following the 30-day suspension in accordance with the parties' discipline Rule.

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 19th day of January 2005.