

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29588
Docket No. MW-30209
93-3-91-3-657

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(Davenport, Rock Island and North
(Western Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The seven (7) days' suspension imposed upon Laborer A. Lievanos for alleged violation of Rule 604B of the General Code of Operating Rules was arbitrary, excessive and in violation of the Agreement (System File C-91-S090-1).

(2) The Claimant's record shall be 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 employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

On Thursday, August 30, 1990, Claimant phoned the Carrier at approximately 6:55 A.M. to advise he would be unable to report to work because he was ill. The Director of Maintenance and Operations gave Claimant permission to be absent. Claimant continued to be absent the following day, but did not contact the Carrier. According to Claimant, he had taken medication which caused him to oversleep.

When Claimant arrived at work on Tuesday, September 4, 1990, the next scheduled work day, he was given a letter directing him to report for an Investigation on September 10, 1990, concerning his August 31, 1990, absence. The letter also advised Claimant he was being withheld from service pending the outcome of the Investigation.

By letter dated September 11, 1990, Claimant was advised he was assessed a seven day suspension, to run from September 4 through 10, 1990.

Aside from the merits of the discipline, the Organization objects to Carrier removing Claimant from service prior to the Investigation. The Organization cites Rule 36B of the Agreement, which reads as follows:

"In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of the rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor."

The language of Rule 36B clearly limits the right of the Carrier to remove an employee from service prior to an Investigation to those "cases involving serious infraction of the rules." The parties, having drawn a distinction, must have recognized there are Rules violations which are not serious enough to warrant removal from service. Generally, this Board has permitted such action when the nature of the offense is such that allowing the employee to continue working might endanger his safety or that of his fellow employees or the public, or would interfere with the orderly performance of work. Claimant's removal from service in this case was a violation of the Agreement. See Third Division Award 27009, holding a six day absence is not the type of "serious case" contemplated by the Rule.

This holding, however, does not negate the discipline entirely. There is substantial evidence in the record to show Claimant was absent without permission on the day in question. While his taking medication may explain his absence, it does not excuse it. Some discipline was warranted. At issue is whether a seven day suspension was excessive.

Where the Carrier has improperly withheld an employee from service pending Investigation, there is always the temptation discipline will be issued to coincide with the time lost, without regard to either the nature of the offense or the employee's record. See Third Division Award 6659. Contractual due process dictates that the latter two factors, as well as the measure of discipline imposed upon other employees with similar records guilty of similar offenses, be determinative.

The record indicates Claimant had over thirteen years of service and had no prior discipline. According to the Organization, Claimant had received a commendation for his efforts in time of emergency. Furthermore, Carrier's Discipline Guidelines, which were made part of the Investigation Record, indicate a first offense for absence without authority (in excess of 15 minutes) will result in discipline from deferred suspension to actual suspension.

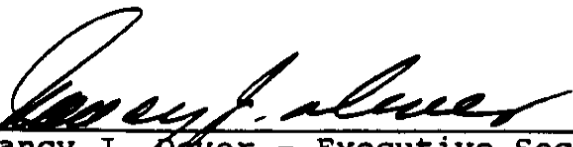
In light of the above, it is evident Claimant was suspended for seven days to cover the time he was already out of service. The discipline was, therefore, excessive. Consistent with the Carrier's Discipline Guidelines, we will reduce the discipline to a five day deferred suspension, and direct that Claimant be compensated for any time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.