

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30697
Docket No. MW-31100
95-3-93-3-84

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis and Southwestern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The discipline imposed upon and subsequent dismissal of Welder Helper D. D. Dawson, for alleged absence without authority on January 3, 1992 and failure to report at the designated starting time on January 6, 1992 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File MW-92-9-CB/MWD92-8).
- (2) As a consequence of the violations referred to in Part (1) above, the Claimant shall be reinstated to his former position with all seniority, vacation rights and benefits unimpaired, 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 entire 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 waived right of appearance at hearing thereon.

Claimant was employed as a Welder Helper, assigned to Meade, Kansas. He had 13 months of service. Claimant was scheduled to work from 7:30 A.M. until 4:30 P.M. He worked under the supervision of Roadmaster C. A. Maida and Foreman D. B. Smith.

On January 3, 1992, Claimant did not report for work at the time scheduled. Claimant testified that the Foreman had agreed to pick him up from his residence, located approximately 1 1/2 miles from the designated reporting location, but did not arrive until 8:30 A.M. The Foreman testified that he had stopped to pick Claimant up, but that he was not ready, stating that he had overslept. On January 6, 1992, Claimant again failed to report for work at the time scheduled. He did not report until 8:05 A.M. In neither instance did Claimant give the Carrier notice he would be tardy; and he did not have the Carrier's permission to be tardy.

Claimant and his entire crew had repeatedly been instructed concerning timely reporting. Claimant had previously been counselled concerning timely reporting on approximately 10 occasions. He had been given a letter of caution and had received a five day suspension for earlier violations of Rule 604.

The Roadmaster suspended Claimant from service and, by letter dated January 13, confirmed his suspension and directed him to report for an Investigation for violation of Maintenance of Way Rule 604, which requires, in part, that employees report for duty at designated times and places and not absent themselves from duty.

A Hearing was convened on January 22 at which the above facts were ascertained. Following the Hearing, the Carrier dismissed Claimant from service.

The Carrier argues that the record establishes Claimant's violation of Rule 604. It points out that he admitted being late on both occasions, without permission of or notice to the Carrier. The Carrier argues that it is not obligated to retain in its employ persons who do not report as assigned, on a full-time basis. It asserts that Claimant's record of prior attendance violations in his short period of service establishes that he was not reliable and that he failed to respond to the Carrier's corrective efforts. It urges, therefore, that the penalty of dismissal was appropriate.

The Carrier argues that the Organization's challenges on the basis of denial of due process are without merit. The Carrier argues that its suspension of Claimant, pending Hearing, was appropriate in light of the fact that his offense was dismissible and in order to avoid adverse consequences, such as staged injuries, which might otherwise occur. It also argues that the suspension was appropriate, in light of Claimant's unreliability, as a result of which the crew might be required to work short, creating safety problems. The Carrier contends that Claimant was, in any event, paid for the time between his suspension and his dismissal.

The Carrier also argues that the Investigation was not untimely, since Article 14 requires notice of the cause for the disciplinary action and a Hearing held within 15 days of the notice. This the Carrier asserts was done: January 22 is within 15 days of the January 13 notice.

The Carrier asserts that Claimant's guilt is established by substantial evidence. It denies any procedural violation. The Carrier argues that the penalty was appropriate to the offense and not arbitrary or capricious. It urges that the Claim be denied.

The Organization argues that the Carrier violated Claimant's due process by suspending him, pending Hearing. The Organization points out that suspension is appropriate only in "serious cases." It contends that such language has been applied to allow suspensions only for infractions involving moral turpitude, safety violations, gross misconduct, or other offenses for which the employee's presence at work after the infraction would create undue risk or disruption.

The Organization also argues that the charges failed to specify that the Carrier would be relying on Claimant's entire record, thereby depriving him of notice and violating the Carrier's obligation not to consider Claimant's record until after the charges were proved. It argues, further, that the Carrier failed to conduct the Hearing within 15 days, as the Agreement requires.

The Organization urges that the Carrier failed to meet its burden of proof, since there was no "positive evidence" adduced by the Carrier as to Claimant's guilt. It also asserts that the offense was minor, in that there is no indication that the Carrier's operations were disrupted. Finally, the Carrier contends that the Carrier was obligated to utilize progressive discipline to correct Claimant's tardiness, but failed sufficiently to do so.

The Organization urges that the claim be sustained and Claimant made whole for all wages and benefits lost.

Reporting for work when assigned is a basic responsibility of employees. Failure to report is a disciplinable offense. As a general matter, tardiness is correctable; and employers are obligated to attempt to correct tardiness through progressive discipline before resorting to dismissal. Numerous Awards of this Board support those principles. See, e.g., Third Division Awards 23232, 23864 and 24780.

The burden rested on the Carrier to prove the charges against the Claimant by substantial evidence. The Board concludes that the Carrier met that burden through the testimony of Claimant's

supervisors, who testified as to his tardiness, and through Claimant's admission that he was, in fact, late on both occasions. Claimant's testimony that, on January 3, he was relying on a ride from the Foreman in a Carrier vehicle does not relieve him of responsibility to get to work on time, but might mitigate the offense to some extent; however, the Foreman testified that Claimant was not ready when he arrived, having overslept. That testimony, apparently credited, constitutes substantial evidence in support of the lack of excuse for or mitigation of Claimant's January 3 tardiness.

The Organization is correct that the Carrier submitted no separate evidence that Claimant's tardiness disrupted its operations, but the Board is not persuaded that separate documentation of harm is required to prove the offense or to support its seriousness. What is required in order to sustain dismissal for tardiness, is proof that the Carrier attempted to correct prior attendance problems through counselling and progressive discipline. The record establishes that the Carrier had repeatedly counselled Claimant about tardiness and had issued a warning letter and a five day suspension for violation of the same Rule in July 1991, only five months before this incident. Claimant, a short-term employee, had no record of reliable service to offset the accumulation of Rule 604 problems. We are not persuaded, under the circumstances, that the penalty of dismissal was arbitrary or excessive.

The Board has considered the Organization's due process arguments, but, with the exception noted, finds them to be without merit.

An employee's work record may not be used to establish his guilt of the offense charged, but is always subject to consideration in determining the appropriateness of the penalty to be imposed; no separate advance notice of such consideration is required. Neither does the introduction of an employee's past work record into the Hearing, prior to a determination of guilt, constitute a violation of Claimant's Agreement due process rights when the record is used, as it was in this case, for a permissible purpose - to assess the appropriate penalty. Indeed, such introduction afforded Claimant opportunity to explain and rebut the assertions made with respect to his record.

Of the Organization's complaint that the Carrier violated the Agreement by not holding the Investigation until January 22, the Board is not persuaded. Rule 14 dates the 15 day period for conducting the Hearing from the date the employee is advised of the charge against him, not from the date of the incident. That advice was sent by letter dated January 13, within the 10 day time frame

allowed, and was necessarily received by Claimant on or after that date. January 22 is within the 15 days following that advice.

Claimant was suspended, pending Investigation. To support the Carrier's action, Rule 14 requires that Claimant have been charged with committing a "serious offense." Of the Carrier's argument that Claimant's offense was "serious" because he was subject to dismissal for it, the Board is not persuaded. Board precedents make clear that it is the serious nature of the offense, and not the potential severity of the penalty, which justifies suspension pending Investigation. See, e.g., Third Division Awards 5140 and 6659.

In the instant case, there is no indication that Claimant's presence would have disrupted the workplace. The Carrier's arguments that he might have created an injury or, by further not showing up, have created safety problems are speculation, not supported by the record, and, if accepted, would effectively deny Claimant the presumption of innocence to which he is entitled. The Carrier represented that Claimant had been paid for the time of his suspension pending Hearing, an assertion the Organization protests as having not been raised on the property. If the Carrier's assertion is correct, then that portion of the Award will be mooted; there is no intention to have the Carrier pay twice for the same time.

The Carrier met its burden to prove that Claimant committed the violations with which he was charged. The penalty of dismissal was not arbitrary or excessive and will stand. The Carrier lacked sufficient cause to suspend Claimant, pending Investigation and decision on his conduct. He shall be made whole for wages and benefits lost as a result of the Carrier's action withholding him from service, pending Hearing and decision.

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 31st day of January 1995..

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