

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32209
Docket No. MW-32850
97-3-96-3-190**

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspension from service and subsequent dismissal) imposed upon Foreman Inspector M. H. Allen for alleged violation of CSX Transportation Operating Rules 500, 501 and 502 in connection with his having deserted his assignment between the hours of 1545 and 1614 on October 31, 1994 while working on the Yemassee Subdivision in Charleston, South Carolina was arbitrary, capricious and on the basis of unproven charges [System File MA-95-123/12(95-0506) SSY].**
- (2) As a consequence of the aforesaid violation, the Claimant shall be reinstated to service with all seniority and benefits unimpaired, his 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 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.

By letter dated November 7, 1994, Claimant, a Foreman Inspector, was notified by Roadmaster J. V. Brown that he was being charged with abandoning his flagging assignment prior to completion of his tour of duty, resulting in a train delay on October 31, 1994 at the site of construction of the proposed Mark Clark Expressway Overpass on the Carrier's Yemassee Subdivision, Charleston, South Carolina.

Carrier charged Claimant with violation of Operating Rules 500, 501 and 502 as follows:

"Rule 500: Employees must not absent themselves from duty, . . . without permission from their immediate supervisor."

"Rule 501: Employees must not be . . . incompetent. They must not willfully neglect their duty...."

"Rule 502: Employees must devote themselves exclusively to the Company's service while on duty rendering every assistance in their power in carrying out the rules and special instructions...."

Following the formal Investigation held on March 6, 1995, the Carrier determined that the evidence demonstrated that Claimant violated the above Rules. By letter dated March 24, 1995, Claimant was dismissed from service. The Carrier determined that Claimant deserted his job while protecting the construction of the proposed Overpass with a 707 Order.

The incident occurred when the "707" was issued in the Claimant's name for the date in question, expiring at 5:00 P.M. At approximately 4:00 P.M., the contractor advised Claimant that it needed to cross a bulldozer over the tracks. Claimant decided that he should call the Dispatcher on the telephone to ascertain the location of trains in the area. At the same time, two non-employee friends of Claimant climbed down a hill from the Overpass to ask Claimant when he would be off for the day. Claimant drove to a location at the top of the hill to use the phone to call the Dispatcher and gave his

friends a ride to their car. Claimant later asserted that to have them climb the steep dirt slope of the Overpass would have risked injury to them. Claimant lost control and overturned his vehicle, resulting in injuries to Claimant and the two passengers in the car. Train R103-31 was delayed for 17 minutes. The Carrier found that Claimant had left his post of assignment and responsibility without permission resulting in his absence from that assignment and the resulting accident and train delay.

The record shows that Claimant asserted that he had permission to go to the phone to make the call to the Dispatcher. But the record does not show definite evidence that he had permission to do that on the date in question. Claimant's testimony in that regard is in conflict. Therefore, the Carrier's conclusion that the Claimant did not have permission is supported by substantial evidence in the record.

The Organization argues that the Investigation was not fair and impartial in that the Carrier did not afford the Organization the opportunity to interview or to have present the two non-employee potential witnesses to the incident. The Carrier's letter of charges advised the Claimant that it would be his responsibility to arrange for the presence of witnesses whom he might wish to produce at the Investigation. Carrier's position in this regard is correct. Third Division Award 23857.

In addition, the record fails to establish what material information would have been developed had the two non-employees been present as witnesses at the Investigation. Therefore, the Organization has not shown prejudice to the Claimant by the absence of those two potential witnesses. First Division Award 23441.

Carrier maintains that it was not necessary for Claimant to leave his place of assignment in order to carry out his duties. There is sufficient evidence in the record regarding Claimant's flagging assignment to substantiate that argument. Roadmaster Brown testified that a train arriving at Claimant's order board would have had to come to a stop before proceeding and then would have proceeded with oral instructions or a yellow hand signal from Claimant. Therefore, the evidence that the telephone at the work site was inoperative is irrelevant. Because the accident occurred after Claimant left his place of assignment, the Organization's argument that Claimant did not desert his assignment because he was injured and could not cover it, is not substantiated by the record.

The Organization argues that the Investigation was unfair in that a summary of Claimant's personnel record was read into the transcript by the Investigating Officer, and that Claimant's full service record was not available at the Investigation. The Organization particularly objects to caution card notations in that record which it maintains were incorrect. But there is no evidence in the record to support that contention. We find no evidence that the Personnel Data Summary is incorrect. It shows that Claimant, with 22 years' service, incurred two 60-day suspensions, a 5-day suspension, and a 30-day suspension prior to the incident under review.

In view of the fact that the record before this Board shows that Claimant did engage in the misconduct with which he was charged, and of his prior disciplinary record, this Board finds that the record demonstrates that Claimant intentionally failed to fulfill his work responsibilities and that the discipline imposed by the Carrier was not excessive or unfair.

Accordingly, the record demonstrates no basis for this Board to overturn the decision reached by the Carrier.

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 17th day of September 1997.