

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32936
Docket No. MW-34069
98-3-97-3-603

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway (former
(Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] imposed upon Mr. K. R. Bertram for alleged failure to report for duty on April 2 and 3, 1996 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File T-D-1150-B/MWB 96-08-29AE BNR).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered with proper credits for benefits and vacation purposes.”

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.

On April 3, 1996, Claimant was notified to appear for an Investigation on April 12, 1996, in connection with his alleged absences on April 2 and 3, 1996. The Investigation was held as scheduled. Claimant did not appear and the Investigation proceeded in absentia. On May 2, 1996, Claimant was notified that he had been suspended for 30 days.

The Organization contends that Carrier violated Claimant's due process rights by refusing to postpone the Hearing to enable Claimant to attend. The Organization further contends that Carrier failed to prove the charges by substantial evidence. Finally, the Organization argues that Rule 42 requires that the claim be sustained. The Organization contends that the Carrier officer designated to receive the appeal of the discipline must respond to the appeal. In the instant case, in the Organization's view, a different Carrier officer responded to the appeal and, consequently, the absence of a proper response mandates that the claim be sustained.

Carrier contends that no reason for Claimant's failure to attend the Hearing was offered and, therefore, Carrier acted properly in proceeding in absentia. Carrier further argues that it proved that Claimant was absent on April 2 and 3, 1996, and that his absence was due to his incarceration. Incarceration does not provide a legitimate excuse for failure to protect an assignment. Carrier argues that it may have any Carrier officer respond to the appeal and that, in this case, the Superintendent, the Carrier officer designated to receive the appeal, responded to the appeal. The only difference was that the appeal was received by the individual who was serving as Superintendent at the time the appeal was filed and the response came from his successor.

The Board, having considered the entire record, finds that Carrier did not violate the Agreement by refusing to postpone the Hearing. No reason has been offered to justify Claimant's failure to attend the Hearing. Certainly, incarceration would not justify a failure to attend an Investigation or require that the Hearing be postponed. See Third Division Award 31627 and Awards cited therein. Similarly, incarceration does not excuse a failure to report for duty and protect one's assignment. *Id.* There was no dispute that Claimant was absent on April 2 and 3, 1996, and that his absence was due to his incarceration. Accordingly, we find that Carrier proved the violation by substantial evidence.

What remains is the question concerning Carrier's response to the appeal of the discipline. The Organization contends that the Carrier officer designated to receive the appeal was required to respond. Carrier contends that any officer could respond. Each side cites Awards in support of its position. We need not resolve this conflict because in the instant case, the Carrier officer designated to receive the appeal, i.e., the Superintendent, also responded to the appeal. Only the identity of the individual holding that office had changed. However, the concept of an appropriate Carrier officer to respond to an appeal must refer to the office, rather than the specific individual holding the office. It would make no sense to hold that if the individual occupying the office at the time of the appeal dies, retires or is otherwise replaced, Carrier may not respond validly to the appeal. The parties never could have intended such a result. Therefore, we conclude that Carrier's response to the appeal was proper under the Agreement.

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 23rd day of November 1998.