

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33047
Docket No. MW-33671
99-3-97-3-129**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] imposed upon Mr. R. M. Widup for alleged insubordination on July 25, 1995, was unwarranted and in violation of the Agreement (System Docket MW-4110-D).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. M. Widup shall receive the remedy prescribed by the parties in Section 4 of Rule 27.”**

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.

R. M. Widup (Claimant) has established seniority as a vehicle operator in the Maintenance of Way Track Department. On May 3, 1995, the Claimant witnessed an incident during which Trackman C. Reading sustained a personal injury. Of note, the Claimant also sustained a personal injury on May 3, 1995, during the same incident in which Trackman Reading was injured, when he fell into the front bucket of an end loader. The Carrier ultimately issued charges against Trackman Reading, and as a result, the Claimant was instructed to make himself available to testify as a witness at Mr. Reading's Hearing. After a postponement, the Claimant was again advised, by notice dated June 30, 1995, that the Hearing was rescheduled for July 25, 1995. When the Claimant did not appear at Mr. Reading's Hearing the Carrier sent the following Notice of Hearing which was premised upon:

"Your insubordination to J. A. Cierley on July 25, 1995, whereas you were instructed to report as a witness for a hearing on C.E. Reading and you did not appear."

The Hearing, originally scheduled for August 23, 1995, was postponed, and by Notice dated August 22, 1995 the matter was rescheduled for October 5, 1995. There is no dispute that the Claimant receipted for this notice on August 24, 1995. However, neither the Claimant nor his Representative appeared for said Hearing which was ultimately held in absentia. As a result of the Hearing, the Claimant was found guilty as charged and by Form G-32 dated October 20, 1995, he was assessed a 30 day suspension. The discipline was appealed and properly progressed until denied by the Carrier's highest appellate officer. The issue is now properly before this Board for adjudication.

Relying primarily upon Rule 27 of the Agreement, the Organization asserts that the Carrier "had no valid reason not to postpone the hearing, and its decision to conduct same, in absentia, denied the Claimant his contractual right to a fair and impartial hearing." According to the Organization, on October 2, 1995, District Chairman Ames faxed a request for a postponement of the Investigation to Division Engineer Stump, with an attached statement from the Claimant's personal physician, as to why he was "unable" to attend the October 5 Investigation. Further, the Organization asserts that the faxed request was followed by a telephone call from the District Chairman in which he also requested a postponement due to the Claimant's "medical condition." However, the Carrier declined the request for the postponement, and the Hearing was conducted as scheduled, with neither the Claimant nor his Representative present.

Finally, the Organization contends that the Carrier “failed to present sufficient probative evidence to prove the charge leveled against the Claimant. Accordingly, the Organization maintains that the imposed discipline is a “violation of the Agreement, unwarranted and cannot stand.”

For its part, the Carrier states that, at the outset, the Claimant was charged with insubordination because he failed to follow instructions to attend, as a witness, the Hearing of a fellow employee. The Carrier goes on to assert that testimony at the Claimant’s October 5, 1995 Hearing shows “clearly” that the Claimant was insubordinate - not only through the testimony of the Carrier witness who sent the Claimant the Notice of Hearing, but also through the testimony of two “impartial” observers of the incident in dispute. The Carrier further asserts that the discipline imposed was “commensurate” with the “gravity” of the proven offense. Finally, the Carrier maintains that the Claimant was afforded a fair Hearing which was “properly” held in absentia. Since the Organization had already requested a postponement for the Hearing, and neither the Claimant nor his Representative offered a “valid reason” for a second postponement, the Carrier contends it was justified in its actions regarding the October 5 Hearing in dispute.

On May 17, 1995, the Carrier advised the Claimant to attend an Investigation, as a witness, concerning fellow employee Reading. The Organization was also advised regarding said Hearing. After a postponement, the Claimant was again advised, by notice dated June 30, 1995 that the Hearing had been rescheduled for July 25, 1995. According to Production Engineer Young, the Claimant was given copies of the notices of the Hearing and postponement notices that were sent out, and he was part of the paragraph stating: “Please plan to attend as witnesses. . . .” Additionally, J. A. Cierley, Office Manager for the Division Engineer stated that she personally sent the Claimant a copy of the G-250 directing him to appear as a witness for the Company at Mr. Reading’s Hearing. When asked if all of the information was forwarded to the Claimant, Ms. Cierley stated that she did not receive any of the correspondence back for lack of delivery. In light of the extensive evidence presented on this record, we must conclude that the Claimant was properly notified regarding the Hearing in dispute, including notification of each of the ensuing postponements.

It was asserted that on October 2, 1995 the Organization faxed a request for postponement of the October 5, 1995 Hearing. On October 3, 1995, the Claimant’s Representative called the Carrier and was advised that absent a valid reason, the

Hearing would be held as scheduled. At that time, neither the Claimant nor his Representative offered any reason or explanation regarding the Claimant's "medical condition." There is no dispute that the only medical information made available to the Carrier was a September 27, 1995 medical summary which indicated that the Claimant could return to work on "light duty." Obviously, such would not preclude the Claimant's attendance at a Hearing on medical grounds. The Claimant had the responsibility of verifying the fact that he was unable to attend his own Hearing with medical information at the time of the Hearing, and not after the Hearing had been held and discipline had been imposed. Absent evidence of the Claimant's "medical condition" we cannot fault the Carrier for its decision to proceed with the October 5, 1995 Hearing.

Finally, in all of the circumstances, the Carrier's imposition of a 30 day suspension cannot be considered unreasonable harsh or discriminatory. Prior Awards have upheld harsher penalties, up to and including dismissal, in cases of proven insubordination. See for example Public Law Board No. 3514, Awards 503, 493, 527 and 421.

Based on the foregoing, this claim is denied.

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 24th day of February 1999.