

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35022
Docket No. MW-35321
00-3-99-3-186**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Louisville and Nashville
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] imposed upon Bridge Tender D.K.Marquar for his alleged ‘ . . . FAILURE TO REPORT FOR YOUR BRIDGE TENDER ASSIGNMENT 5M5B 250 AT BILOXI BAY BRIDGE ON MARCH 13, 14, 20 AND 21, 1998 AND FAILURE TO FOLLOW INSTRUCTIONS ISSUED TO YOU ON FEBRUARY 23, 1998.’ (Emphasis in upper case in original) was arbitrary, capricious and based on unproven charges [System File 34(14)(98)/12(98-848) LNR].**
- (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.”**

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.

Claimant D. K. Marquar was employed by the Carrier as the Lead Bridge Tender at the time of the claim.

By letter dated March 30, 1998, the Claimant was notified to attend an Investigation in connection with the charge that he absented himself from work without proper notice or permission on March 13, 14, 20 and 21, 1998. The Claimant was also charged with insubordination and failure to protect his assignment.

The Hearing took place on April 8, 1998. On May 6, 1998 the Carrier notified the Claimant that he had been found guilty of the charges and was being assessed a 30 day actual suspension.

The Carrier argues that the Claimant received a fair and impartial Investigation and that there was substantial evidence on the record to support finding of wrongdoing. It contends that the Claimant had been informed of the procedure for reporting off and failed to comply with that procedure. The fact that the Claimant's absences were due to Union business does not insulate him from complying with the Carrier's Rules and procedures. Under the circumstances, the Carrier maintains that the discipline imposed was lenient and should not be disturbed.

The Organization challenged the discipline on procedural and substantive grounds. Although not mentioned in the appeal, the Organization objected during the Investigation to the absence of a citation in the charge letter to the Rule or policy that the Claimant violated or with which he failed to comply. In addition, the Organization asserts that the Carrier failed to grant a postponement request at the start of the Investigation, thereby depriving the Claimant of a fair Investigation. Substantively, the Organization argues that the Carrier failed to present any credible evidence to support the charges leveled against the Claimant. It contends that the Claimant's absences were authorized and that the charges against the Claimant stemmed from a personal vendetta or anti-Union animus harbored by the Claimant's immediate supervisor.

After careful review of the record in its entirety, we conclude, first, that the Claimant did receive a fair Hearing. It is well established that the Carrier need not cite the relevant Agreement provisions or specific Rules in its charge letter so long as the Claimant and the Organization are adequately notified of the nature of the charges. See Third Division Award 27217, Second Division Award 12118. That is what occurred in this case. The charge letter describes with specificity the misconduct alleged and the dates of the occurrences. There can be no doubt that the nature of the allegations was adequately conveyed to the Claimant and the Organization and that they were not deprived thereby of the ability to mount a defense.

Similarly unpersuasive is the Organization's contention regarding the denial of its postponement request. It is noted that there is no record of a request from the Organization to postpone the Investigation prior to its commencement. Moreover, the Organization's stated purpose for the postponement was, as the Organization representative conceded, based on an erroneous premise regarding the date of the Hearing and the presumed inability to secure witnesses who would lose pay by reporting off prior to a holiday. As the record developed, however, it became clear that the Hearing did not take place on a day immediately preceding a scheduled holiday, as the Organization first contended, and therefore there is no basis for concluding that the ability of the Organization to have a fully developed record was impaired.

As to the substantive issues, the record shows that the Claimant failed to report for work on March 13, 14, 20 and 21, 1998. The crux of the dispute centers on a credibility conflict as to whether the Claimant gave the required notice and obtained the requisite permission to absent himself on those days. The Claimant testified that he was away on Union business on the dates in question, in connection with his position as BMW Local Chairman and BMW Legislative Director for the state of Mississippi. He stated that he attempted on or about February 24 or 25, 1998 to inform his immediate supervisor, R. J. Seymour, of his anticipated absences for the upcoming month. After reaching Seymour's answering machine, the Claimant decided not to leave a message, but rather to speak directly with another supervisor, R. F. Garrett. According to the Claimant, he notified Garrett by phone that he would be away on Union business on the dates in question.

The Claimant testified that he fulfilled his responsibilities for both the Carrier and the Organization for the past 15 years without incident prior to Seymour's

reassignment to a supervisory position in November 1997. Both the Claimant and Bridge Tender R. L. Netto testified that the Claimant, as Lead Bridge Tender, had successfully scheduled relief assignments to cover his absences for 15 years prior to the instant matter.

The Carrier witnesses testified that scheduling and notification procedures changed when Supervisor Seymour assumed his supervisory responsibilities in November 1997. Seymour testified that he advised employees of his 24-hour contact phone numbers and directed employees from that point forward to notify him in the event of absence, including absences for attending Union business. A memo from the District Engineer to all employees in November 1997 reiterated that personal days, including those for Union business, had to be cleared through Supervisor Seymour.

In a letter dated February 23, 1998, Supervisor Seymour issued specific instructions to the Claimant regarding the notice requirement. The letter was prompted by an incident in which the Claimant sent a fax notifying Seymour of an absence after the absence occurred. Supervisor Seymour expressly informed the Claimant that notification had to be provided not less than one day prior to the absence. In his written response of March 1, 1998, the Claimant agreed to provide the proper notice. He subsequently provided Seymour with three written notifications for absences due to Union business in March and April 1998.

Despite the notice requirement, the Carrier witnesses contend that the Claimant provided no notification for the absences on March 13, 14, 20 and 21, 1998. Supervisor Garrett denied receiving a message from the Claimant on February 24 or 25, 1998. He stated that he would have written down a message from the Claimant had he called to notify the Carrier that he was going to be off. Supervisor Seymour testified that neither the Claimant nor Garrett informed him of the absences for the dates in question. Seymour belatedly found out from another Bridge Tender that the Claimant was going to be gone on March 20. When Seymour checked the records, he discovered that there had been earlier unauthorized absences in March.

The conflict in the testimony is sharply drawn, and it was the Hearing Officer's role to resolve the opposing testimony and to determine the credibility of the witnesses. The Board in its appellate jurisdiction does not substitute its judgment for the Carrier in these matters absent a finding that there has been an abuse of discretion or that the Carrier's determination was motivated by bad faith or bias. On this record, no such

conclusion is warranted. Persuasive in the instant case was evidence that the Claimant had ample notice of the proper procedure for reporting off, and he acknowledged that he knew of and would comply with the requirement. The Claimant's assertion that he verbally informed Supervisor Garrett of his anticipated absences was credibly denied, and no motive was ascribed to Garrett to suggest that he harbored any personal animosity against the Claimant or that he fabricated his testimony in order to see the Claimant disciplined.

Moreover, the Claimant's credibility was seriously undermined when he acknowledged that he planned his schedule at the beginning of each month. We cannot say the Carrier erred in concluding that it would be unlikely for the Claimant to have notified Supervisor Garrett on February 24 or 25 that he was going to be absent on March 13, 14, 20 and 21 when the Claimant did not know he would be absent on those dates until after March 1, 1998. This conclusion is bolstered by the fact that no reasonable explanation was advanced by the Claimant as to why he properly advised Supervisor Seymour of other absences for March 1998, but not for the absences in question.

Equally significant, the Claimant cannot assert a justifiable exception to the reporting Rule based on his Union status. While we agree that the right of the Claimant to perform his Union duties must properly be protected and that he must be allowed to operate without fear of retaliation in the performance of that role, it is also clear that the claim of unfair discrimination based on anti-Union animus has not been proven on this record. The instant case does not involve the question of whether permission should be granted to attend to Union business. It involves an employee who ignored his supervisor's reporting Rules and failed to report for his assignment. The Carrier cannot function properly if employees who are also acting in a Union capacity can with impunity disregard reasonable Rules and regulations unrelated to the performance of any Union activity. The Claimant was properly subject to discipline under these facts.

Finally, we note that the Board is authorized to consider only the evidence and argument presented during the handling of the case on the property. The Organization contends that Supervisor Seymour conducted a personal vendetta against the Claimant, but bases its contention on alleged incidents raised for the first time in the Organization's Submission before the Board. Our consideration has been limited to the evidence that was properly made part of the on-property record.

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 25th day of October, 2000.