

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35304
Docket No. MW-34928
01-3-98-3-610**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) demerits later changed to a ten (10) day record suspension] assessed Trackman G.L Reid for his alleged failure to protect his assignment on July 15, 21, 22, 23, 24 and 28, 1997 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (Carrier’s File 8365-1-611).**
- (2) Trackman G. L. Reid shall now have his record cleared of this incident and exonerated as prescribed in Rule 6.”**

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 July 28, 1997, the Claimant was notified to attend an Investigation to determine his responsibility, if any, for failure to protect his job assignment while working as a Trackman on Tie Unit No. 2 on the following dates: July 15, 21, 22, 23, 24 and 28, 1997.

The Investigation was held on August 18, 1997. At the Hearing, the Production Supervisor testified that the Claimant had missed six days and did not call in or provide an excuse to be absent. The Claimant readily admitted that he was absent on the dates in question, but claimed that he had contacted the Carrier on at least one of those days to report his absences. The Claimant testified that his absences were initially attributable to car trouble. When his car was fixed, he discovered that his gang had moved, and he was out for several additional days until he could determine their new location.

The record further shows that on July 3, 1997, several weeks prior to the absences giving rise to this dispute, the Production Engineer issued a memo to all Foreman informing them that "absenteeism and tardiness are, once again, getting out of hand." Furthermore, employees who arrived late or were absent without notification three times were to be given a letter of warning. The Production Supervisor testified at Hearing that the Claimant was not provided with a letter of warning after his third day of absence.

The Claimant was subsequently informed by letter dated September 10, 1997 that he had been assessed ten demerits as a result of the findings of the Investigation. The Carrier later amended its assessment of discipline by letter dated September 22, 1997 from ten demerits to a ten-day suspension after determining that the additional demerits on the Claimant's record would otherwise have resulted in the accumulation of sufficient demerits to warrant dismissal.

The Organization filed the instant claim, and during the on-property handling of this dispute contended that: 1) the Claimant was denied a fair and impartial Investigation because of various procedural infirmities regarding the manner in which the Hearing was conducted; 2) the Carrier failed to meet its burden of proof; 3) the Claimant received what amounted to "double discipline" in that the increase from ten demerits to a ten-day suspension unfairly penalized the Claimant twice for the same offense. The Carrier denies that any of these contentions have merit.

We agree. A careful review of the record discloses no procedural error which would warrant vitiating the discipline imposed. The Hearing Officer conducted the Investigation with no showing of bias or improper handling. Moreover, the fact that the Hearing Officer both conducted the Investigation and assessed the discipline was not prejudicial or violative of any provisions of the Agreement. There are numerous Awards, including those on this property, that have concluded that the multiple role of Hearing Officer does not constitute grounds for overturning discipline. See, e.g., Third Division Award 24207; Public Law Board No. 5625, Award 8. The Organization's objections that the Investigation was unfair are unpersuasive.

Turning to the merits, we find that the charges are supported by the evidence and that discipline was therefore appropriate. There is a dispute in the record as to whether or not the Claimant provided notice of his absence. However, even if the Hearing Officer fully credited the Claimant's version, his testimony does not provide sufficient justification for his absences. The Claimant was unable to specify when he called and in fact could recall only one day when he left a message for the Carrier regarding his absence. Moreover, his excuses for failing to protect his assignment were untenable in light of his six day absence. The Claimant had a duty to protect his assignment. He failed to do so, as the record clearly shows.

In view of the substantial evidence supporting the Claimant's culpability, the remaining question is whether the disciplinary penalty was reasonable. As noted, the Carrier originally assessed the Claimant's discipline record with ten demerits. It later changed the discipline assessed to a ten-day record suspension instead. The Claimant's record shows that, at the time of the Investigation, he had accumulated a total of 60 demerits on his record. The addition of ten more demerits would have given him a total of 70 demerits, thereby subjecting him to discharge under the Carrier's progressive discipline policy.

Where, as here, the assessment of demerits would result in dismissal, the Carrier can impose a suspension in lieu of the demerits on a one-time only basis under the provisions of the progressive discipline policy. That is what occurred here. The fact that the Carrier amended the discipline was not proven to be a violation of any provision of the Agreement nor was it "double discipline" as the Organization contended since the suspension was imposed only after the demerits were rescinded. Moreover, as a practical matter, the Carrier's decision to amend the discipline benefitted the Claimant by pulling him back from the precipice of discharge and giving him another opportunity

to modify his behavior. We cannot say that the suspension imposed was arbitrary or unreasonable under these circumstances.

As a final matter, we note that the Organization contended for the first time at oral argument before the Board that the Claimant was not disciplined consistent with the Carrier's July 3, 1997 memo providing for a written warning after three un-excused absences. It is well-established, however, that the Board may not consider de novo arguments. The process fails, and the opposing party is seriously prejudiced, if, at the final step, the Board is asked to deal with an issue not previously raised or considered on the property. We must therefore conclude that the interpretation and application of the Carrier's July 3, 1997 policy must be saved for another day when a more fully developed record is available to the Board.

Having established that the misconduct was proven and the discipline imposed was warranted, the instant 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 January, 2001.