Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35308
Docket No. MW-35343
01-3-99-3-208

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
(
(I & M Rail Link, LLC (Montana Rail Link, Inc.)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [sixty (60) actual day suspension beginning concurrent with the day his seniority would allow return to service] imposed upon Mr. D. L. Carey for alleged violation of I&M Rail Link General Code of Operating Rule 1.15 was arbitrary, capricious, excessive and on the basis of unproven charges (System File D-74-98-380-41-IM).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall now be compensated ". . . for all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health & welfare benefits, and any and all other benefits to which entitled but lost as a result of Carrier's arbitrary, capricious, and excessive discipline assessed by General Roadmaster Holloway.'"

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.

The Claimant was serving a 45-day suspension beginning August 27, 1998 and continuing through October 14, 1998. Upon completion of his suspension, the Claimant was expected to return to work. However, he failed to report to work on October 15 and was continuously absent through October 29, 1998, when he received a notice informing him to report for a fact finding Hearing in connection with the charge that he had been absent without proper authority in violation of Carrier Rule 1.15.

At the fact finding Hearing, the Claimant testified that he had telephoned the Carrier's Assignment Clerk the day before he was scheduled to return to work and learned that 45 positions had been abolished that week. Based on this information, the Claimant testified that he believed he had been furloughed. Accordingly, he stayed at home awaiting recall from furlough.

The Carrier contends that the charges were proven and that the disciplinary penalty of a 60-day suspension was fully warranted. The Carrier argues that the Claimant knew that he was scheduled to return to work on October 15, 1998. Nevertheless, he failed to report for duty or contact his Supervisor until October 30 in direct contravention of Carrier Rule 1.15. In the Carrier's view, the Claimant failed to present any justifiable defense for his failure to protect his assignment. According to his own admission, the Claimant relied on an assumption that he had been furloughed. That assumption had no basis in fact, the Carrier maintains.

With respect to the level of discipline imposed, the Carrier asserts that the Claimant's disciplinary record demonstrates that it exercised leniency in imposing a 60-day suspension. In the span of less than a year, the Claimant had amassed a 30-day deferred suspension on March 27, 1998; a letter of instruction on May 5, 1998 for absenteeism and tardiness; a five-day deferred suspension on May 21, 1998 for being AWOL; another letter of instruction on July 6, 1998 for not putting away his tools; and a 10-day suspension on August 26, 1998 for failing to perform a track inspection. This latter occurrence resulted in the Claimant also serving the 35 days of deferred suspension from previous disciplines, the loss of his Foreman's seniority, and being barred from bidding a Foreman's position for one year. In light of the Claimant's

continuing pattern of irresponsible conduct, the discipline assessed here is entirely reasonable and should not be disturbed.

The Organization takes a different view and argues that the Carrier failed to meet its burden of proving that the Claimant is guilty of the Rule violation charged. It maintains that the record shows that the Claimant called the Assignment Clerk to inquire about his return to service and was reasonably led to believe that there was no position to which he could return because of the many job abolishments that had occurred just that week. Because a furloughed employee typically awaits formal recall to the Carrier's service, the Organization submits that the Claimant's decision to await that recall was reasonable. The Claimant was not required to do more under the circumstances, and therefore he should not have been disciplined for being absent without authority.

Moreover, the Organization argues that the Carrier's decision was reached in error inasmuch as it considered a portion of the Claimant's prior record that is currently being appealed. The claim on Claimant's 45-day suspension, which included the actual 10-day suspension and two other disciplinary suspensions that had been deferred, was still on appeal when the Carrier assessed the discipline in this case. The Organization argues that it was improper for the Carrier to take it into consideration when it assessed discipline in the instant case.

Based on a careful reading and analysis of the record, the Board finds that the Carrier has carried its burden of proof. Operating Rule 1.15 states in pertinent part that "employees must report for duty at the designated time and place with the necessary equipment to perform their duties." It is undisputed that the Claimant did not report for duty after serving his disciplinary suspension nor did he contact his Supervisor of his absence.

The Claimant's defense is that he was led to believe that he was furloughed. However, the testimony adduced at the fact finding Hearing established that the Claimant's belief was not reasonable under the circumstances. Both the Claimant and the Assignment Clerk agreed upon certain salient points of their conversation; i.e., that they discussed the job abolishments; that the Claimant did not ask if his position was still open nor did he ask if there were any open positions. The point here is that the Claimant was never told his job was abolished. His assumption in that regard was unfounded and does not excuse his extended, unauthorized absence.

Moreover, the Claimant made no effort to follow up regarding his return to work until after he received the fact finding notice. He allowed 15 days to elapse following his conversation with the Assignment Clerk without taking any further steps to determine if his job or any other jobs were available. He made no contact with any Supervisor during his prolonged absence. It must be concluded that the Claimant failed to take the necessary steps that a responsible employee would have taken to protect his position or return to work.

The remaining issue is the propriety of the 60-day disciplinary penalty meted out to the Claimant. The Organization objects to the discipline, arguing that the Carrier improperly relied upon prior discipline still on appeal in determining the quantum of discipline to be imposed in this case. In particular, the Organization points out that the Claimant's ten-day suspension, beginning on August 26, 1998, for failing to perform a track inspection should not have been considered since a claim was filed and remained pending at the time the Carrier assessed the discipline in this case. It is further pointed out that the ten-day suspension triggered an additional 35 days of suspension which had previously been deferred.

The Board reviewed the two precedent Awards cited by the Organization in support of its position. They cannot easily be reconciled. In Second Division Award 12451, the Organization, as here, maintained that the Carrier should not be permitted to include pending prior charges as the basis for assessing the level of discipline. The Board agreed, stating that because the claim on the earlier discipline was still on appeal, it was improper for the Carrier to consider it when determining the penalty in the case at issue. By contrast, Third Division Award 30601 rejected a similar argument, stating as follows:

> "The inclusion of an employee's prior disciplinary record, offered to allow consideration of the appropriate penalty, is not improper. The Board recognizes the prejudice that would result from inclusion and consideration of discipline later overturned; however the record does not contain documentation for the Organization's assertion that the disqualification of Claimant was overturned or indication as to the basis for any such reversal. It is well-established that the Board cannot take cognizance of material which has not been made a part of the record."

The Board finds the foregoing logic persuasive when applied to the facts in this case. Had the Claimant's prior discipline been overturned or rescinded, the Carrier would have been remiss in factoring that prior discipline into the mix when determining the proper level of discipline in this dispute. But that is not the case here, and the Organization has offered no contractual or Rule support for its contention that a pending case should have the same effect as one that has been reversed. Indeed, as a practical matter, a claim that is being appealed may take months or even years to come to final resolution. Given those circumstances, we do not believe that the Carrier should be precluded from considering prior discipline served by an employee as part of the employee's overall record absent evidence that the discipline has been overturned.

That being the case, we must agree with the Carrier that the Claimant's disciplinary record does not provide a basis for interfering with the level of discipline assessed. In less than a year prior to the instant occurrence, the Claimant had been disciplined on five occasions. Accordingly, we find that the discipline imposed in this case was neither arbitrary nor unreasonable, and the Agreement was not violated.

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.