

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35332
Docket No. MW-35449
01-3-99-3-345**

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 Employees
(Union Pacific Railroad Company (former Missouri Pacific
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s actions of withholding Mr. M.E. Gentry from service pending hearing and imposing Level 2 and Level 5 (dismissal from service) discipline for alleged violation of Rule 1.15 in connection with his being absent without proper authority on:**
 - (a) December 26, 1997 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (Carrier’s file 1131575 MPR)**
 - (b) January 5, 1998 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File Y98410/1136712-D)**
- (2) As a consequence of the violation referred to in Part (1)(a) above, the Claimant’s personal record shall be expunged of the charges leveled against him, he shall be reinstated to service with all seniority and other benefits restored and he shall be compensated for all lost wages beginning January 9, 1998.**
- (3) As a consequence of the violation referred to in Part (1)(b) above, the Claimant’s personal record shall be expunged of the charges leveled against him, he shall be reinstated to service with all**

seniority and other benefits restored and he shall be compensated for all lost wages beginning January 9, 1998.”

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 entered the Carrier's service on August 6, 1996. On January 16, 1998, the Claimant received a Level 1 assessment - a letter of reprimand - under the Carrier's UPGRADE policy for absenting himself without proper authority on December 8 and 9, 1997, in violation of Rule 1.15. Although a claim was filed initially by the Organization, it was not progressed further within the nine-month period specified in the Agreement, and therefore the Level 1 assessment under the Carrier's UPGRADE policy stands as good discipline.

At issue here are the second and third incidences of absenteeism without proper authority that led to a Level 2 assessment and finally a Level 5 assessment under the Carrier's UPGRADE policy, resulting in the Claimant's dismissal.

On December 26, 1997, the Claimant, a Truck Driver, was assigned to the 7:00 A.M. to 3:30 P.M. shift. According to his supervisor, the Claimant advised him at 7:15 A.M., fifteen minutes after starting time, that he would be late but would be reporting for work. Thereafter, the Foreman and the gang went to the work site at the north end of Ney Yard. Around noon, the Foreman received a radio transmission from the Claimant. Both the Foreman and the employee who relayed the radio transmission to the Claimant testified that the Claimant was advised where the gang was working. The

Foreman testified that if an employee is late to work, he is responsible for reporting directly to the work site.

There is no dispute that the Claimant did not report to the work site that day. The Claimant testified that there were extenuating circumstances that prevented him from reporting. He stated that he notified his supervisor at 6:00 A.M., an hour before starting time, that he was going to be late. The Claimant further testified that when he contacted the Foreman again around noon, he was told only that the Foreman was down by the Ney Yard shanty, but was not advised where the gang was working.

The Claimant testified that he drove around Ney Yard in his own vehicle for approximately a one-half hour, but was unable to locate the gang. At about 2:30 P.M., he decided to go home.

Our review of the record of the Investigation demonstrates that there is sufficient evidence to support the finding that the Claimant was guilty of failing to protect his assignment on December 26, 1997. We need no citation for the well-established proposition that the Board does not make credibility determinations. It is our function to determine whether substantial evidence exists for the Hearing Officer's determination. Here, it is apparent that the Hearing Officer had ample justification for concluding that the testimony of the Foreman and a coworker, who had no demonstrated motive to fabricate their testimony or falsely accuse the Claimant, was more persuasive than the Claimant's self-serving and implausible account. We find that the testimony fully substantiates the Claimant's responsibility for not reporting at the designated time and place on December 26, 1997 and further supports the finding that there was no justification for the Claimant's failure to report to his gang at any time on that date.

In addition, the Claimant's conceded course of action in leaving the property prior to quitting time constitutes an admission of guilt with respect to the Rule violation. The Claimant admittedly made no effort to contact supervision after arriving in the vicinity of the job site. He simply took it upon himself to go home.

Concluding as we do that the charges have been proven and that no procedural or due process infirmities exist on this record, the remaining question is whether the penalty was reasonable. The Claimant's demonstrated disregard for his responsibilities as an employee to communicate with supervision and to protect his assignment fully warranted the imposition of discipline. The Claimant had received a Level 1 assessment

for violating the same Rule only weeks earlier. We therefore have no basis for concluding that the application of the Carrier's UPGRADE policy under these circumstances, and the assessment of Level 2 discipline, was arbitrary or unreasonable.

Turning to the third incident, which took place on January 5, 1998, the Claimant was notified to attend an Investigation on January 23, 1998 in connection with the charge that he was absent without authority on that date. The Carrier also withheld the Claimant from service. At the Investigation, the Claimant's Foreman, Mr. Jones, testified that the Claimant timely reported to work on January 5, but about a one-half hour later advised that he was taking a safety day. The Foreman responded that such request required at least 48 hours advance notice. The Claimant asserted that he had several days earlier submitted his request to a different supervisor, Mr. Long. Foreman Jones checked with Foreman Long, who indicated that he had not authorized the Claimant's request.

The Claimant then discussed the matter with the Manager of Track Maintenance, Mr. Taylor. Mr. Taylor testified that he advised the Claimant that he was one of three men assigned to a gang that day and he was needed at the job site. Nevertheless, the Claimant insisted that he would not be able to work that day and that he was leaving the property. Mr. Taylor at that point specifically instructed the Claimant to report to the yard to meet his gang. There is no dispute that the Claimant did not give Mr. Taylor any specific reason why he could not work on January 5, 1998, nor did the Claimant ever claim that he was ill.

The Claimant testified that after his meeting with Mr. Taylor, he went to the compound and realized that he did not have his wallet, which contained his driver's license. Accordingly, the Claimant advised Foreman Jones that he was going to get his wallet. The Claimant left the property and did not return that day. He subsequently provided a doctor's statement that indicated that he was "completely incapacitated" on January 5. The statement gave no specifics as to the nature of the illness or medical condition that left the Claimant in a state of incapacitation.

The Board rejects the Organization's contention that the Claimant should have been excused from his assignment on January 5, 1998. The Claimant's testimony is confused and contradictory at best and fails to establish that there was a legitimate reason for him to leave the Carrier's premises. No logical explanation was forthcoming from the Claimant as to why he would have reported for work on January 5, 1998 if he

had earlier been given permission to take a safety day, as he claimed. No plausible reason was given to explain why, if he was in fact ill on that date, he did not simply inform supervision. No justification was offered to excuse the fact that the Claimant left to get his wallet, and then never contacted supervision after he had departed the Carrier's property to advise as to his whereabouts.

The Claimant clearly became tangled up in his own excuses. We cannot say on this record that the Carrier erred in concluding that the Claimant was guilty of the Rule violation charged in that he failed to protect his assignment on the date in question. Nor can we say that the Carrier erred when it concluded that the Claimant's after-the-fact medical excuse, which was completely devoid of any specific information, constituted an acceptable explanation for his course of conduct.

The Organization maintains that the Claimant failed to receive a fair and impartial Hearing and that the Carrier conducted the Investigation solely for the purpose of placing guilt. We do not agree. Generalized claims of unfairness and prejudgment on the part of the Carrier must be supported by probative evidence. That necessary evidence is lacking here.

Finally, the Board reviewed the procedural argument raised by the Organization and we find it to be without merit. The Organization argued that the Carrier improperly removed the Claimant from service prior to the Investigation. However, Rule 12, Section 1(a) allows pre-investigation suspensions. It states that an employee "may be held out of service pending such investigation which will be held in a reasonable time." This negotiated contractual language gives the Carrier considerable latitude to determine whether an employee should be held out of service. Inasmuch as there is no evidence that the Investigation was not held within a reasonable time, or that the Carrier applied the Rule in an irrational manner, we find that the requirements of the Rule have been met.

Following a guilty finding, the Board turns its attention to the discipline imposed. It must be remembered that the Board will not set aside discipline unless we find it to be unreasonable, arbitrary or capricious.

No such finding is warranted here. The Claimant was dismissed from service under the Carrier's UPGRADE policy. Under the UPGRADE program, an employee who is guilty of the same Rule infraction during a 36-month period may be subject to

dismissal. In this case, the Claimant was in violation of the same Rule three times within a few weeks. The Claimant was a very short term employee and this record demonstrates that he did not respond to corrective action. His continued failure to protect his assignment provided a proper basis for the Carrier's application of the UPGRADE policy's provisions. Termination under these circumstances cannot be viewed as unreasonable or unwarranted, and therefore, the claim must be 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 16th day of February, 2001.