

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35826
Docket No. MW-35833
01-3-99-3-738**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(I & M Rail Link, LLC**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. D. L. Carey for alleged violation of I&M Rail Link General Code of Operating Rule 1.13 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File D-11-99-512-01-I IMR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant D. L. Carey 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 when it discharged claimant from service effective June 18, 1999.’”**

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.

D. L. Carey (Claimant) holds seniority as a Foreman dating from November 4, 1997. On March 3, 1999, General Roadmaster D. Holloway notified the Claimant of the following:

“This is to inform you that you have been awarded the position of Truck Driver at Nahant.

In response to the fact finding session accorded you on December 9, 1998, you are suspended from service 60 actual days. These 60 days will begin effective March 2, 1999, which is the date of Award Bulletin 99.009. If your seniority will allow, you will report to the Truck Driver’s position in Nahant on April 30, 1999. Please contact Sue Olderog at (319) 344-** on April 19, 1999, and she will inform you of your options.**

Prior to returning to service you will be required to have a physical, which has been scheduled for April 20, 1999 at 9:00 a.m. at the Davenport Medical Center. You will also report to the Davenport Clinic at 10:00 a.m. that same day. Please call April Livermore at (319) 344-** if you have any questions regarding these appointments.”**

The instructions were sent Certified Mail, return receipt requested, and it is not disputed that the Claimant accepted and signed for the letter.

The Claimant did not contact Ms. Olderog on April 19 as he had been instructed; nor did he appear for his scheduled appointments on April 20. On April 26, 1999, Chief Engineer K. F. Koff directed the Claimant to attend a fact finding due to his alleged failure to follow the instructions contained in the General Roadmaster’s letter of March 3, 1999.

By letter dated June 18, 1999, the Carrier issued the Claimant the following termination letter:

"In response to the fact finding session accorded to you on May 20, 1999 you are officially dismissed from service with the I&M Rail Link effective June 18, 1999, for violating the following Rule:

**General Code of Operating Rule 1.13 - Reporting and
Complying with Instructions."**

The cited Rule reads as follow:

"Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

The Organization protested the dismissal maintaining that the fact finding had not been held fairly. Specifically, the General Chairman contended that "Roadmaster Holloway was the witness, his subordinate, who takes orders from Holloway was the judge, and witness Holloway was the executioner."

With regard to the quantum of discipline assessed, the General Chairman asserted that the Claimant's termination was both "excessive and disparate," and that "A simple missed appointment does not rise to the level of dismissal." In that connection, the General Chairman notes that the Claimant was not afforded a "reminder" letter or "reminder" phone call regarding the April 20 appointment, nor was the Claimant warned that his failure to report as directed would result in termination. Further, the Claimant was experiencing "relationship problems" with his fiancée during his suspension, and that alone is "sufficient" reason for being remiss about the April 20 appointment, according to the Organization.

Finally, the General Chairman asserts that the Claimant did contact Ms. Livermore on April 28, 1999 and properly presented himself at his appointment which was rescheduled for April 29, 1999. "Claimant's actions in returning to work and calling in ahead of his time to report back from his lengthy suspension show without a doubt that he was certainly interested in his continued employment with this Carrier," according to the General Chairman.

The Vice President of Operations denied the claim, contending that:

“Mr. Carey signed for the certified letter instructing him to report for his physical. He was fully aware of the instructions. It is the claimant’s responsibility, not the responsibility of the carrier, to do what is required to protect his position and comply with instructions.

*** * ***

The fact finding held on May 20, 1999 charges the claimant with ‘failure to follow the instructions of Mr. Holloway’s letter of March 3, 1999,’ putting him in violation of General Code of Operating Rule 1.13. This fact finding has proven that Mr. Carey was in violation of this rule. Mr. Carey has failed repeatedly to protect his position because of his blatant disregard for instructions given to him by General Roadmaster Holloway.

*** * ***

As evidenced by Mr. Carey’s previous discipline, the company has taken ample steps to encourage change in Mr. Carey’s behavior. The fact finding and resulting discipline is appropriate. The appeal is denied.”

The issue remained unresolved on the property and is now before the Board for adjudication.

The Claimant was charged with failure to follow the instructions of General Roadmaster Holloway, and in doing so, violating General Code of Operating Rule 1.13. The Carrier’s letter of March 3, 1999 instructed the Claimant to: 1) contact Ms. Livermore should he have any questions regarding the scheduled appointments; 2) report for a physical examination; 3) contact Sue Olderog prior to his return date of April 30 for further instructions as to where he should report; and, 4) on April 30, 1999, report to the position Ms. Olderog assigned him. The Claimant did not report for the April 20 appointments, nor did he contact Ms. Olderog as he had been instructed. And, if the Claimant was unclear about any of the March 3 directives, he made no attempt to contact either Ms. Livermore or General Roadmaster Holloway for clarification. In fact, the Claimant did not contact the Carrier until after General Roadmaster Holloway

issued the April 26 correspondence directing the Claimant to attend a fact finding due to his alleged failure to follow the instructions set forth in the March 3, 1999 letter.

A review of the Claimant's personal record during his relatively short tenure with the Carrier reveals that this is not the first instance upon which the Claimant "missed" an appointment. The Claimant received a warning letter and a five-day suspension for excessive absenteeism. He also received a 60-day suspension for failing to return-to-work for more than two weeks following a previous suspension. See Third Division Award 35308. In addition to his history of failing to appear for scheduled job obligations, the Claimant was involved in Safety and Operating Rule violations on three separate occasions since March 1998.

It is not incumbent upon the Carrier to retain an employee who repeatedly and blatantly fails and/or refuses to follow reasonable work place instructions from his supervisor(s). In light of the Claimant's continued pattern of irresponsible conduct during his short tenure with the Carrier, and his unwillingness/inability to protect his position, this 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 14th day of November, 2001.