

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35973
Docket No. MW-36375
02-3-00-3-564**

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
(Grand Trunk Western Railroad Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) demerits] assessed Trackman H. Echols for his alleged failure to protect his assignment on August 17, 19, 23 and 24, 1999 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (Carrier’s File 8365-1-681).**
- (2) As a consequence of the violation referred to in Part (1) above, Trackman H. Echols shall now ‘... have the discipline removed from his record, and be compensated all wages, credits and benefits, including per diem, and mid-week travel allowance.’”**

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.

By letter dated August 27, 1999, the Claimant was instructed to report for an Investigation on September 8, 1999 to determine his responsibility, if any, for reporting late

for work on August 17, 19 and 23, 1999. At the beginning of the Investigation, the Claimant, the Organization and the Carrier agreed that the date of August 24, 1999 would be added to the original letter of charges.

Subsequent to the Investigation, the Carrier assessed the Claimant 30 demerits for failure to protect his job assignment while working as a Trackman on the dates in question.

The Carrier's sole witness at the Investigation was Assistant Foreman A. Tovar, who is in charge of compiling payroll records for production gangs. Tovar testified that the Carrier's absenteeism policy that requires employees to report for work and protect their assignments. An employee is marked with an excused absence or tardy if he requests and obtains advance permission from supervision, or if his after-the-fact excuse is deemed to be legitimate and deserving of approval. Being unavoidably held up by a train or road construction were cited as examples where, the Assistant Foreman conceded, a Foreman might exercise his discretion and report a tardy as excused.

With respect to the particular charges in this case, the Assistant Foreman testified that Gang Foreman T. Runyon reported to him that the Claimant had arrived to work late on August 17, 19, 23 and 24, 1999. Although the Assistant Foreman testified that he marked the Claimant as having unexcused tardies on those dates, the attendance records were not submitted in evidence at the Hearing. In addition, Gang Foreman Runyon did not appear to testify as a witness.

The Claimant denied being tardy on August 17, 19 and 24. He stated that he was detained by road construction on August 23 and was approximately 20 minutes late for his 7:30 A.M. start. The Claimant acknowledged that his paycheck reflected a reduction of one hour's pay for each of the dates in question.

Various arguments were advanced by the parties, but there is one in particular that governs the outcome of this case. In any discipline matter, the Carrier has the burden of proving that the allegations of wrongdoing are supported by substantial evidence. This is not an onerous evidentiary burden, but it does require that the weight of the evidence tip in the Carrier's favor. While hearsay is admissible and can be acceptable to a limited degree, based on the circumstances, it is generally insufficient to carry the burden of proof absent any corroborative evidence and in the face of controverted facts. See Third Division Awards 12252, 23944, 29009 and 30233.

In this instance, the Carrier relied strictly upon the hearsay testimony of the Assistant Foreman and had no other independent information for its disciplinary action. Neither the attendance records nor the Gang Foreman who made the determination that

the Claimant was tardy on the dates in question were in evidence at the Hearing. As the record stands, we simply do not know the basis for the determination that the Claimant was tardy on those four dates. The Claimant denied being tardy on August 17, 19 and 24, and the circumstances he recounted for being late on August 23 were acknowledged by the Assistant Foreman as a basis for an excused tardy on the attendance record. When the Claimant's Hearing testimony is weighed against the hearsay testimony offered by the Carrier, it is clear that the hearsay comes up short.

The Carrier argued that there is corroborative evidence that bolsters its case. It contends that the lack of objection or protest by the Claimant when he received his paycheck showing that time had been deducted for the four tardies amounts to an admission or at least tacit acquiescence that the Claimant in fact failed to protect his assignment on those dates. The short answer to that argument is that the Carrier's actions were protested by the filing of the instant claim. We find no admission under these circumstances.

Concluding as we do that the discipline is without sufficient foundation, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

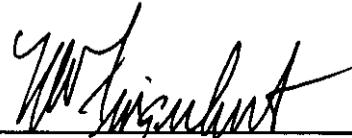
Dated at Chicago, Illinois, this 8th day of March, 2002.

**CARRIER MEMBERS' DISSENT
TO THIRD DIVISION AWARD
35973, Docket MW-36375
(REFEREE KENIS)**

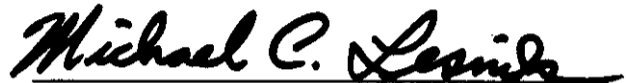
The Carrier argued that the evidence showed that the Claimant never objected to or protested the Carrier's reductions of his paycheck on the dates he came to work late. The Majority rejected the corroborative evidence stating:

"The short answer to that argument is that the Carrier's actions were protested by the filing of the instant claim."

The short answer to that observation is that the claim here involved an assessment of discipline. There is no contention, let alone evidence that Claimant ever sought to recoup the amounts deducted from his paycheck. Such failure was a patent admission of his late reporting for work. The Claim should have been denied.



Martin W. Fingerhut



Michael C. Lesnik



Paul V. Varga