

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36368
Docket No. MW-36267
03-3-00-3-498**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Southern Pacific
(Transportation Company (Western Lines))**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Upgrade Level 2 discipline assessed Truck Driver F. J. Lucero for his alleged unauthorized absence on January 25, 26, 28 and 29, 1999, which led to him being assessed a Level 5 dismissal; was without just and sufficient cause, based on unproven charges, in violation of the Agreement, excessive and undue punishment (Carrier's File. 1197772 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Truck Driver F. J. Lucero shall now be reinstated with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of this incident."**

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.

In January 1999 the Claimant was a Truck Driver on Gang 7416 headquartered at Tucson, Arizona. His regular assigned workdays were Monday through Friday from 7:00 A.M. to 3:00 P.M. He had approximately 21 years of service with the Carrier and its predecessor, the Southern Pacific Transportation Company.

The Claimant was absent from the gang the week of January 25, 1999. He took a vacation day on Wednesday, January 27, 1999. However, he had no authority to be off work on January 25, 26, 28 or 29, 1999. The Claimant returned to the gang on Monday, February 1, 1999. At the end of the workday, he was suspended from service pending an Investigation into his purported absence from duty without proper authority on the aforementioned four days. The Investigation was held on February 17, 1999.

At the February 17, 1999 Investigation the Claimant admitted that he was not given authority to be absent from duty on January 25, 26, 28 or 29, 1999. He stated that he called the Manager of Track Maintenance's office the morning of Monday, January 25, 1999 to request vacation time off, but there was no answer. The Claimant knew that the Manager of Track Maintenance was away from Tucson on business that week.

The Claimant telephoned Track Supervisor/Inspector B. Fuller on Wednesday, January 27, 1999 and requested vacation for January 25, 26 and 27, 1999. However, Supervisor Fuller did not have authority to approve his vacation request. The Claimant did not contact any Carrier Officer on January 28 or 29, 1999, because he assumed that he was still on vacation.

On March 18, 1999 the Claimant was assessed a Level Two discipline (one day suspension) under the Carrier's UPGRADE Formal Discipline Policy for his putative violation of Operating Rule 1.13 and 1.15. Because the Claimant was on Level Four discipline at the time, the March 18, 1999 Level Two discipline resulted in him being placed on Level Five. Under the Carrier's UPGRADE Discipline Policy, employees on Level Five are subject to permanent dismissal. The Claimant was dismissed from service on March 18, 1999. The Organization appealed that discipline to the Board.

Suspension pending investigation

Rule 45(a) on the Southern Pacific Transportation Company provides that employees shall not be disciplined without a fair and impartial hearing. It also provides that:

“Where circumstances indicate, an employee shall not be permitted to continue in service, he may be suspended pending investigation.”

The Rule does not explain the “circumstances” under which an employee may be suspended pending an Investigation. However, in the Board’s view, the drafters of Rule 45(a) in all likelihood contemplated that employees could be suspended pending a disciplinary Investigation for serious alleged transgressions.

By any reasonable standard, being absent from duty without authorization for four days does not constitute a serious transgression justifying an employee’s immediate removal from service. Allowing the Claimant to continue in service pending his Hearing would not have compromised the safety and well being of any employee or the public, nor would it have jeopardized the Carrier’s property. Therefore, he should not have been removed from service on February 1, 1999. As a result of the Carrier’s violation of Rule 45(a) the Claimant must be made whole for any losses he incurred between February 1 and 17, 1999.

Absence from duty without proper authority

There is no question that the Claimant was absent from duty without proper authority on January 25, 26, 28 and 29, 1999. Indeed, he acknowledged that he was not authorized to be off duty these four days. The Claimant knew how to request vacation time off because he had obtained permission to be off on January 27, 1999. He had not been given permission to be off on vacation on any other day that week, however. The Claimant’s contention that he “assumed” he was on vacation January 28 and 29, 1999 because he was on vacation January 27, 1999 is not persuasive. There is simply no reasonable basis for his assumption.

The Level Two discipline assessed the Claimant for his failure to report for duty on four days in one workweek was not excessive or unreasonable, in our view. Therefore, his claim for removal of the discipline assessed him on March 19, 1999 must be denied.

AWARD

Claim sustained in accordance with the Findings.

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 14th day of January 2003.