

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36612
Docket No. MW-36727
03-3-01-3-233**

The Third Division consisted of the regular members and in addition Referee Barbara Deinhardt 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:

- “(1) The discipline [Level 4 with a thirty (30) day actual suspension] imposed upon Mr. S. M. Thomson for alleged violation of Union Pacific Rule 1.13 in connection with his absence on December 14, 1999 while employed as a B&B steelman was without just and sufficient cause, unwarranted and in violation of the Agreement (Carrier’s File 1229795 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. M. Thomson shall now ‘...be compensated for net wage and benefit loss suffered by him, and the alleged charge(s) be expunged from his personal record.’”**

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 employed by the Carrier since November 23, 1992. On Monday evening, December 13, 1999, he was reviewing legal papers he had received several weeks earlier. He realized that he needed to have an abstract prepared by a judge before Thursday or a warrant would be issued for his arrest. According to the Claimant, the only day he could appear before a judge in court as a walk in was the next day, Tuesday, between 8:00 and 8:30 A.M. He called his Foreman at 5:30 A.M. the following day and told him that he had to go to court that day. He asked for permission to be absent from work. The Foreman would neither grant nor deny his request. He instructed him to call the Director Bridge Maintenance. The Director Bridge Maintenance told him that he would not authorize his absence on short notice and directed him to report to work. The Claimant chose to attend to his personal matters as opposed to timely report for work as instructed.

By letter dated December 16, 1999, the Claimant was charged with failure to report for duty as instructed by his Foreman, a violation of Rules 1.13 and 1.15. An Investigation was held on January 3, 2000. On January 25, the Hearing Officer found the Claimant guilty as charged and assessed Level 1 discipline for the offense. As the Claimant had a prior Level 3 discipline on his record, he therefore was assessed Level 4 discipline in accordance with the Carriers UPGRADE Policy and received a 30-day suspension.

Rule 1.13, Reporting and Complying with Instructions, reads as follows:

"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."

Rule 1.15, Duty-Reporting or Absence, reads as follows, in pertinent part:

"Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. . . ."

The Carrier argues that the Director Bridge Maintenance instructed the Claimant to report to work as scheduled. He failed to report. The Claimant brought the problem on himself because he knew well in advance of December 14 that he had legal matters. Further, he had sufficient time that he could have made

advance arrangements to be absent. The Claimant had been previously counseled about the importance of timely attendance and his obligation to give as much advance notice as possible of anticipated absences.

The Organization argues that 1) the charges specify that the Claimant had been instructed by his Foreman to report to work, when in fact it had been the Director Bridge Maintenance, 2) the Hearing was not unbiased because the Hearing Officer was a subordinate of the one who made the decision to discipline, 3) the Director Bridge Maintenance's denial of permission to be absent to attend to his personal matters was unreasonable, and 4) there is no evidence in the record that the work was disrupted by the Claimant's absence because the Carrier never made arrangements to fill in for absent employees.

The responsibility of the Board is to determine whether 1) the Claimant received a fair and impartial Investigation, with due notice of the charges, opportunity to defend himself, and the right to be represented, 2) the Carrier proved by substantial evidence that the Claimant was guilty of the charges, and 3) the discipline was reasonable, in light of past practice and the facts and circumstances of the case. It is not up to the Board to decide if it would have reached the same conclusion or assessed the same penalty, so long as the decisions of the Carrier were not arbitrary, capricious, or discriminatory.

The Board rejects the Organization's argument that the charges are defective. The Notice as written did not in any way prejudice the Claimant in the preparation of his case. The essence of the charge - that he was advised by supervision that his absence would be unexcused - was readily apparent and fully discussed as shown within the record.

As to the Organization's argument that it was improper for the Carrier to appoint a subordinate of the Director Bridge Maintenance as the Hearing Officer, the Board notes that this issue has been raised, considered, and rejected by the Board on previous occasions. As stated in Public Law Board No. 4746, Award 92, "In the absence of any limitations in the Agreement, we must look to the actual conduct of the Hearing Officer to determine if he acted in a prejudicial manner. We do not find such conduct, and must conclude he was able to perform his task in an objective manner. Accordingly we find that the Agreement was not violated." In the instant claim where the Organization concedes that "the record does not establish direct evidence of any improprieties," there is no evidence that the Hearing Officer

was not fair and impartial. Thus, there is no evidence that the Agreement was violated on this procedural ground.

The facts are undisputed. There is no question that the Claimant did not report as directed by the Director Bridge Maintenance. The Board finds that his failure to read his legal papers until the day before action on his part was required is not the responsibility of the Carrier. The Claimant presented no viable reason why he could not have read them (and understood them) earlier and requested absences earlier in sufficient time to allow the Carrier to secure a replacement or make other plans. His failure to do so is his fault and thus his own responsibility.

Further, both the Director Bridge Maintenance and the Claimant testified that they had had discussions several weeks earlier about the Claimant's attendance, the call in policy, and the reporting to duty policy. The Director Bridge Maintenance had emphasized to the Claimant the importance of getting to work on time and giving proper notification. As the Director Bridge Maintenance testified, "The fact that just because he calls in, does not mean that he has an excused absence." Thus the Carrier was not unreasonable to deny him permission to be absent.

The fact that the Carrier chose not to have the Claimant replaced does not mitigate the offense. His absence meant at the very least that his co-workers had to do his work as well. The Carrier's operations were adversely impacted. Also, the Carrier has a Rule. It is not necessary for the Carrier to prove that a violation of the Rule in fact disrupted its operations.

Finally, the UPGRADE policy is very specific about the degree of penalty to be meted out for a particular offense. Thus, the penalty imposed was not arbitrary or capricious because it conformed to established Carrier policy.

AWARD

Claim denied.

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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 29th day of July 2003.