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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37056
Docket No. SG-37345
04-3-02-3-375

The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern (KCS):

Claim on behalf of R. T. Parker, Jr., for reinstatement to service and compensation for all lost wages, including skill pay and for all rights and benefits and his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it imposed the harsh and excessive discipline of dismissal without meeting the burden of proving the charges in connection with an investigation held on April 12, 2001. Carrier’s File No. K06015452. General Chairman’s File No. 01-050-KCS-185. BRS File Case No. 11975-KCS”

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 formerly employed by the Carrier as a Signalman until March 16, 2001. The Carrier asserts that the Claimant was terminated pursuant to Rule 47(d) of the Agreement of August 1, 1992, which states:

"The seniority and employment of an employee, who is absent from duty without proper authority, may be terminated provided such employee is so notified in writing at his last known address, by Registered or Certified Mail, Return Receipt Requested, with copy to the General Chairman, advising that his seniority and employment have been terminated due to his absence without proper authority and that he may, within 20 days of the date of such notice, if he so desires, request an investigation, which will be held, under Rule 47."

The record indicates that the Claimant did not appear for duty beginning on March 6, 2001, although the charges against the Claimant formally related to absences between March 12 and March 16.

On March 13, 2001, the Claimant's father, R. T. Parker, Sr., informed the Carrier that the Claimant had been absent due to the flu. Subsequently, on March 16, 2001, the Claimant's father indicated that the Claimant had been absent and would continue to be absent due to incarceration as of March 9, 2001. An Investigation was held on April 12, 2001 and the termination was sustained by the Carrier on April 20, 2001. At the Investigation, it was also asserted and found that the Claimant was in violation of Rules 1.13 and 1.15 of the General Code of Operating Rules, which state:

"1.13: 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.

1.15: Employees must report for duty at the designated time and place, with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority."

Although the Carrier's letter of April 20, 2001 found the Claimant in violation of all of these Rules, neither the March 16, 2001 letter notifying the Claimant of termination nor the April 3, 2001 letter scheduling the Investigation referenced these Rules. The Claimant was not in attendance at the investigation, which forged ahead despite a request by the Organization for postponement.

Rule 47 requires a "fair and impartial hearing" and has notice procedures which the Organization asserts were not followed. The transcript of the Investigation belies the latter. The Carrier demonstrated that notice was provided to the Claimant by certified mail with return receipt. Although there is no direct evidence that the General Chairman was copied, the March 16, 2001 letter indicated a "cc" to him. No objection was raised at the Hearing. The Local Chairman's letter of March 30, 2001 indicates that the Organization had actual notice of the charge. Further, although the March 16, 2001 letter failed to advise the Claimant of his right to an Investigation, there was no prejudice to the Claimant because an Investigation was timely requested. See: First Division Awards 24893 and 15579; Third Division Awards 31625, 29584, 27985, 22703, 20423; Fourth Division Award 4255.

The Organization asserted that the Investigation was neither fair nor impartial because the Claimant could not be present. However, the Organization pointed to no Rule or precedent permitting or requiring indefinite postponements of Investigations pending completion of incarceration. The Claimant was represented at the Investigation and had the opportunity to present rebuttal through the Organization. The Organization's citation to Second Division Award 7606 is misplaced because the Claimant's representative had full opportunity to cross-examine witnesses. The Organization also faults the Carrier for not calling the Claimant as a witness. See: First Division Award 23936 and Second Division Award 11626. The Board disagrees. The Carrier had no authority to release the Claimant

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from prison for this Investigation and should not be prejudiced by the Claimant's own acts leading to his incarceration and unavailability. See: Third Division Award 32936.

The Organization further asserts that inherent in Rule 47 is the principle that discipline must be progressive and neither harsh nor excessive. The Organization directs the Board's attention to several Awards supporting its assertion. See: Third Division Awards 19037 and 22085. These Awards stand for the proposition that discipline should be corrective and progressive, not punitive. However, the Organization offered no precedent demonstrating that consistent absences without notice to a carrier do not warrant discharge. The Claimant made no effort to seek proper authority for his absences. Additionally, the Carrier is correct in citing the proposition that incarceration is an acceptable basis for termination of employment. See: Second Division Awards 11128, 13738; Third Division Awards 26130, 27666, 32936, 35371 and Fourth Division Award 4993.

Based on the foregoing, we have no alternative but to deny the claim.

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 22nd day of June 2004.