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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37193
Docket No. SG-37029
04-3-01-3-651

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Canadian National/Illinois Central Railroad)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

Claim on behalf of R. A. King for reinstatement to service, compensation for all lost time and benefits and to have all reference to this matter removed from his personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 35, when it issued the harsh and excessive discipline of dismissal without the benefit of a fair and impartial investigation and without meeting the burden of proving the charges against the Claimant in connection with an investigation held October 17, 2000. Carrier's File No. IC-135-01-02. BRS File Case No. 11774-IC."

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.

On October 9, 2000, the Claimant was notified to attend a formal Investigation on charges that he had been absent from his position for an excessive number of days without permission, most recently on September 29, 2000. The Investigation was conducted on October 17, 2000. By letter dated October 24, 2000, the Claimant was notified that as a result of the Investigation, he was found guilty of the charges, and that he was dismissed from the Carrier's service. The Organization then filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier contends that there is no doubt that the Claimant was guilty of violating Rule J of the Maintenance of Way Rules. The Claimant's supervisor stated that the Claimant had been absent from work on the dates in question, and the record demonstrates that the Claimant was absent from duty without permission. The Carrier maintains that employees have been instructed that unauthorized absences will not be tolerated, and the Claimant previously had been spoken to about his poor attendance.

The Carrier asserts that a reading of the Investigation transcript demonstrates that the Claimant received a fair and impartial Investigation. The Organization's contention to the contrary is nothing more than an attempt to shift the focus away from the fact that the Claimant was absent from work without permission. The Carrier maintains that the inclusion of the Claimant's past attendance record as part of the Investigation was proper and served as a way to measure how much discipline should be assessed once it was proven that the Claimant violated the Rules. The Carrier further contends that there is no support for the Organization's assertion that the Hearing Officer had pre-judged the Claimant. The Carrier emphasizes that there is no evidence of misconduct by the Hearing Officer. The Carrier maintains that the Hearing was fair and impartial, and the Organization has not provided any evidence to prove otherwise.

The Carrier then argues that the assessed discipline was warranted. The Claimant's attendance problem was well-documented; the Claimant missed nearly 20 percent of his scheduled work days, even after his supervisors talked to him. The Claimant's discharge was a result of the failure of the Carrier's previous attempts to help correct the Claimant's poor attendance. The Carrier emphasizes that the Claimant had been excessively absent from his duties in the barely five months that he had been an employee. The Claimant missed nearly 20 percent of his actual workdays, so there is no doubt that the Claimant is guilty as charged. The Claimant's dismissal is warranted in light of his repeated attendance problems.

The Organization initially contends that the Carrier violated the Agreement, particularly Rule 35, when it failed to prove the charges against the Claimant, yet imposed the harsh and excessive penalty of dismissal. The Organization asserts that the Claimant's assigned rest days, September 29-30 and October 1, 2000, are included in the charge against the Claimant for being absent from his assignment. In addition, on September 28, the Claimant asked for and received his Foreman's permission to leave to seek treatment for his injury. The Organization points out that it submitted a doctor's note showing that the Claimant was being treated for this injury, and that he would be able to return to work on October 10, 2000.

The Organization maintains that there is no merit to the charge that the Claimant was absent without permission. The Claimant and his supervisor both testified that the Claimant asked for and was given permission to take time off. The Organization asserts that Maintenance of Way Rule J does not require employees to request permission on a daily basis for each day missed, nor does it state from whom permission is necessary. The Organization further emphasizes that the Claimant's supervisor created a document showing that the Claimant had missed work in the past. The Organization argues that the Carrier's witness could have made errors in creating this document, and the Carrier should have produced its payroll records as evidence of the Claimant's past attendance.

The Organization argues that the Carrier has the burden of proving the charges against the Claimant, but the Carrier failed to meet its burden of proof. The Carrier offered only testimony that was totally uncorroborated, instead of making its case through established facts and substantiated evidence. The Organization additionally asserts that the Carrier's bias against the Claimant was

evident on several occasions. For example, the Hearing Officer resorted to blatant leading questions when he did not get the responses that he wanted, and these leading questions demonstrate that the Carrier had pre-judged the Claimant. The Organization therefore argues that the Carrier violated the Agreement by failing to provide the Claimant with a fair and impartial Investigation. The Organization contends that the Carrier compounded this violation when it imposed the harsh and excessive discipline of dismissal. The Organization maintains that the Carrier had no basis for taking any disciplinary action against the Claimant.

The Organization points out that the Carrier's policy in cases such as the instant matter has been to first warn the employee and place a letter in the employee's file for a Rule violation of this nature. The Organization emphasizes that there is no merit to the unsubstantiated assertion of the Claimant's supervisor that the subject of absenteeism was addressed to the Claimant several times. The Organization maintains that there is no reflection of any prior wrongdoing in the Claimant's corroborated work history. The Organization asserts that the Carrier failed to prove the charges against the Claimant, yet imposed the ultimate penalty of dismissal for a relatively minor charge. The Carrier abused its managerial discretion with regard to its arbitrary decision to dismiss the Claimant.

The Organization contends that the penalty imposed on the Claimant demonstrates that the Carrier's sole intent was to punish the Claimant, rather than to guide him in the performance of his work. The Organization maintains that this represents an abuse of the Carrier's discretion. The Organization asserts that because the Carrier failed to establish that any infractions occurred, no discipline should have been issued at all.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit. The Claimant was guaranteed all of his Agreement due process rights and we find that the Hearing was fair and impartial.

The Board reviewed the evidence and testimony and finds that there is sufficient evidence in the record to support the finding that the Claimant was guilty of being absent from duty for an extended period of time without permission. The record reveals that the Claimant left work on September 28 and did not return to work until October 10, 2000. During that period of time, the Claimant made no

attempts to contact supervision or to request permission to be off. The Claimant did not have permission to be off on those dates.

Rule J states the following:

“Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. Those subject to call must not leave their usual calling place without notifying those required to call them.

Employees must not engage in other business, be absent, allow others to fill their assignment, or exchange duties without others, unless authorized to do so . . .

Employees are required to work regularly and without excessive layoffs or absences.”

It is clear that the Claimant was off work without permission and for an excessive period of time without giving notice to the Carrier. That action on the part of the Claimant violated the Carrier’s Rules.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier’s imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case had five months seniority as an employee of the Carrier. During those five months, the Claimant had missed nearly 20 percent of his actual work days. The record reveals that the Claimant had been employed for 89 days and had been absent for more than 17 of those days. Given the short term of the Claimant’s employment plus his atrocious attendance record, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim must be denied.

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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 28th day of September 2004.