

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37380
Docket No. MW-37526
05-3-02-3-629

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (letter of discipline placed in personal file) imposed upon Mr. E. C. Jacobson on October 4, 2001 for alleged violation of GCOR Rules 1.15 Duty-Reporting or Absence in connection with charges of being absent on Wednesday, September 12, 2001 when he was off for medical reasons was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D1552-13.01/8-00422).
- (2) As a consequence of the violation referred to in Part (1) above, the decision of discipline shall now be overturned and the Carrier shall remove the aforesaid letter of discipline from Mr. E. C. Jacobson's file.”

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.

At the time the events at issue occurred, Claimant E. C. Jacobson was working as a Laborer, Monday through Thursday, on Production Crew No. 3 under the supervision of Foreman P. Stinson.

On May 5, 2001, the Claimant suffered an on-duty personal injury to his right knee. He filed an accident report, but did not miss work or see a doctor. The Claimant continued to feel sore, however, and on August 3, 2001, he was examined by a doctor who told him to wait awhile to see if there was any improvement. On Friday, September 7, 2001, the Claimant returned to the doctor, and additional appointments were scheduled for Monday and Tuesday, September 10 and 11. Prior to work on September 10 and 11, the Claimant telephoned Foreman Stinson to request permission to miss work. Stinson did not answer the call, so the Claimant left a message.

On September 12, the Claimant had a court appointment in conjunction with his child custody case. Therefore, prior to work, he again telephoned Foreman Stinson for permission to be absent, but again he was only able to leave a voicemail message. Later that same day, the Claimant also telephoned Track Program Supervisor D. Balmer to inquire where to report for work on September 13. Unknown to the Claimant, Foreman Stinson had become ill and had not worked on September 10, 11, and 12, 2001. Therefore, Stinson also had not advised Supervisor Balmer of the Claimant's absences on those dates. Supervisor Balmer, upon hearing that the Claimant had been absent due to his injury, told the Claimant that he could not return to work until he had been cleared by Health Services.

On September 17, 2001, the Claimant was issued three Notices of Investigation in connection with his absences on September 10, 11, 12, and 13, 2001. Following a Hearing on September 24, 2001, the following findings were made:

"While testimony developed throughout the investigation clearly established that you did not follow the proper procedures and instructions that had been issued earlier in the year for notifying

your Supervisor if you would not be able to protect your assigned position, you did make an attempt to notify your Foreman; therefore all charges for Monday and Tuesday, September 10 and 11, 2001 have been dismissed.

Testimony developed during the investigation clearly established that on Thursday, September 13, 2001 you were instructed by Supervisor Balmer that you could not return to work until you were cleared by Medical Services; therefore charges for Thursday, September 13, 2001 have been dismissed as well."

With respect to September 12, however, it was determined that the Claimant failed to protect his position and did not make any attempt to notify his supervisor of his absence. Consequently, the Claimant was assessed a letter of warning for violating GCOR Rule 1.15 Duty-Reporting or Absence. On November 16, 2001, the Organization filed the instant claim on behalf of the Claimant which, having been properly processed is now before the Board for adjudication.

It is undisputed that the Claimant was charged with identical violations in connection with his absences on September 10, 11, 12, and 13, 2001. Significantly, he was cleared of the charges relative to September 10 and 11 because he had attempted to contact his Foreman to explain his need to be absent. The charges in connection with September 13 were dismissed because although the Claimant wanted to return to work on that date, Supervisor Balmer told him that he could not come back until he had obtained clearance from the Health Services Department.

As to the day in question, September 12, the Claimant gave unrebutted testimony that he called Foreman Stinson that morning and left a message, just as he had on the two prior days. He followed that call up with a call to Balmer later in the afternoon of September 12 because he had been unsuccessful in talking personally to Foreman Stinson.

The Carrier contends that discipline was appropriate because Balmer had instructed employees to contact him when they were going to be absent, and the Claimant had not complied with that instruction. However, the Claimant's conduct on September 12, when he called Foreman Stinson, was exactly the same as his conduct on September 10 and 11. Inasmuch as the Carrier dismissed the charges against the Claimant in connection with the method he used to report his absences

on September 10 and 11, it was unfair to discipline him for using the same method on September 12. Clearly, the Claimant attempted to report his absences to his immediate supervisor, Stinson. It was not the Claimant's fault that Stinson, due to his own absence, never relayed the Claimant's messages to Supervisor Balmer. In these circumstances, the claim must be sustained, and the letter of discipline imposed upon the Claimant must be removed from his file.

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 24th day of February 2005.