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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37382
Docket No. MW-37893
05-3-03-3-297

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
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 2 thirty (30) day suspension] imposed upon Mr. T. C. Brown for alleged violation of Rule 1.15 (Duty-Reporting or Absence) on October 31 and November 1, 2001 while assigned as a grinder on W717 was unwarranted, excessive and in violation of the Agreement [System File C-02-S090-6/10-02-0203(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline imposed upon T. C. Brown shall now ‘... be overturned and all mention of this case be removed from his personal record. I also request that Mr. Brown be made whole for any and all losses suffered account of this discipline being assessed.’”

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, a Truck Driver with about seven years' service who was filling a temporary assignment as a Grinder, was instructed by supervisor J. Wiederholt on October 30, 2001 to attend training classes in Kansas City, Missouri, on October 31 and November 1, 2001. The Claimant testified that although he was feeling sick, he was in the process of driving to the training class on October 31 when his car broke down in Platte City. He telephoned his aunt and asked her to call supervisor Wiederholt to notify him that he would be unable to attend the training session and would see a doctor instead. Wiederholt testified that he did not receive notification from anyone that the Claimant could not attend the training session. It was not until November 2, when the Claimant's supervisor A. Castellano telephoned Wiederholt to advise him that the Claimant had not attended the training classes, that Wiederholt learned that the Claimant had not attended the classes on October 31 and November 1. According to Wiederholt, employees under his area of responsibility, including the Claimant, were required, prior to the start of their shift, to contact the Foreman in charge of their crew or Wiederholt to obtain authority to be absent from duty that day.

The Claimant's prior disciplinary record included a Level 1 censure for being absent without leave in 1995, a Level 1 formal reprimand for being absent without leave in 1997, and a Level 2 five-day suspension for being absent without leave in December 2000.

The Claimant testified that on November 1, 2001 from 6:30 to 7:00 A.M. (his regular starting time) he attempted to telephone Wiederholt to report off sick with bronchitis but his line was busy. The Claimant also testified that he had been prescribed bronchitis medication with codeine that made him drowsy.

By letter dated November 5, the Carrier notified the Claimant of an Investigation on November 14 to determine his responsibility, if any, in connection with his alleged failure to report for duty on October 31 and November 1, 2001. At

the request of the Organization, the Investigation was postponed until November 20. In a certified letter December 19, the Carrier notified the Claimant that he was being assessed a Level 2 30-day suspension for his violation of Maintenance of Way Operating Rule 1.15 (Duty – Reporting or Absence) which provides:

“Duty – Reporting or Absence

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.”

The Organization appealed the discipline in an undated letter received by the Carrier on February 6, 2002, raising both procedural and substantive issues. In response, the Carrier denied the appeal in a letter dated March 1, 2002. Because the parties were unable to resolve the dispute on the property, it was submitted it to the Board for final and binding resolution.

As a threshold matter, the Organization raises two alleged procedural defects: (1) the Carrier violated Rule 40(D) by failing to render its decision within 30 days after the Investigation; and (2) the Carrier failed to attach five of the exhibits to the transcript transmitted to the Organization and the Claimant.

With respect to the timeliness issue, the certified mail receipt showed that the Carrier mailed its decision on December 19, 2001, 29 days after the November 20, 2001 Hearing. Accordingly, the Carrier satisfied its obligation under Rule 40(D) to render its decision within 30 days following the Investigation.

According to the Organization, because five of the exhibits were missing, the Carrier’s officer reviewing the record would not have had a complete record to review, thereby denying the Claimant his Agreement due process rights. However, the Organization failed to prove that five exhibits were not attached to the transcript. Division General Manager B. D. Andrews wrote on March 21, 2002 that all such exhibits were entered into the transcript of the Investigation and that copies were included in the file. Further, the Carrier supplied the Organization with a

second copy of the exhibits under cover of a letter dated June 28, 2002. Given this record, the Board cannot make a determination that the five exhibits were missing.

On the merits, the Organization argues that because the Claimant made reasonable efforts to contact supervisor Wiederholt on October 31 and November 1, he should not have been suspended. In support, the Organization cites the fact that the Claimant, after his car broke down, asked his aunt to call Wiederholt on October 31 and that the Claimant himself tried several times without success to telephone Wiederholt on November 1 between 6:30 and 7:00 A.M. The Board finds, however, that because the Claimant had the responsibility to notify his supervisor that he would be absent, his delegation of that obligation to his aunt on October 31 and his unsuccessful attempts during a one half-hour period on November 1 fell far short of satisfying his responsibility. That is particularly true because the Claimant, who had received discipline for being absent without leave on three prior occasions, was on clear notice that he was required to notify supervision when he was absent.

The Organization also argues that the Claimant should not have been suspended because he was legitimately sick with bronchitis, citing corroborating medical documentation. That argument, however, misses the point. The Claimant was obligated to notify his supervisor of his absence and failed to do so. That notification requirement presumes that the Claimant was legitimately sick.

With respect to the penalty imposed by the Carrier, the Organization protests that it was excessive and disproportionate to the violation. The Board disagrees. The Claimant violated Maintenance of Way Operating Rule 1.15 (Duty – Reporting or Absence) on two separate occasions – on October 31 and November 1. Moreover, the Claimant had been disciplined for similar offenses on three prior occasions, the last of which was a five-day suspension in December 2000. Accordingly, the Board finds that the discipline was not unduly harsh or excessive, appropriately taking into account the seriousness of the Rule violation and the Claimant's prior record.

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 24th day of February 2005.