

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37418
Docket No. MW-36918
05-3-01-3-537**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) calendar day suspension effective immediately] imposed upon Mr. R. E. Gawel under date of May 10, 2000 for alleged violation of General Code of Operating Rule 1.15 and Safety Instruction General Rule 744 in connection with alleged failure to protect an assignment on a full-time basis was arbitrary, capricious and excessive (System File D-18-00-380-05/8-00401 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, all reference to this matter shall now be expunged from Mr. R. E. Gawel's record and he shall be compensated for all lost wages, ' . . . including but not limited to five (5) days (40 hours) at the straight time rate of pay, all overtime to which entitled but disallowed, paid and non-paid allowances and safety incentives, vacation, health & welfare benefits, and any and all other benefits to which entitled, but lost as a result of Carrier's arbitrary, capricious, and excessive discipline assessed by Manager-Engineering Services R. Wedel, namely the assessment of a five (5) calendar day suspension. A simple joint inspection of the payroll for his crew should reflect his loss.'"**

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 February 9 - 10, 2000, the Claimant's infant daughter was seriously ill. It was necessary for the Claimant to be absent from work in order to care for his daughter. The Claimant was again absent on February 24, March 10 and March 22, 2000. According to the Claimant, he called into work on each of those three days before 7:00 A.M. and spoke with D. Hendricks who indicated that a message would be relayed to Track Maintenance Supervisor P. L. Poeschel. The Claimant was absent again on April 4, 2000.

By letter dated April 11, 2000, the Claimant was directed to attend an Investigation to be held on April 24, 2000, "... for the purpose of developing all facts and circumstances and placing responsibility, if any, in connection with your failure to protect your assignment on a full time basis when you were allegedly absent from your assignment on February 9, 10, 24, March 10, 22 and April 4, 2000 in violation of the General Code of Operating Rule 1.15 and Safety Instruction General Rule 744."

The Investigation was held on April 26, 2000. In a letter dated May 10, 2000, the Carrier notified the Claimant that as a result of the Investigation, he was suspended for a period of five days for violating General Code of Operating Rule 1.15 and Safety Instruction General Rule 744.

By letter dated May 22, 2000, the Organization filed a claim on behalf of the Claimant appealing the discipline and alleging that it was unwarranted. The Organization asserts that the burden of proof in a discipline matter such as this is

on the Carrier and that burden has not been met. The Organization contends that the Carrier imposed harsh and excessive discipline against the Claimant. According to the Organization, the Carrier's decision to discipline the Claimant particularly violated Rule 18 in that the Carrier failed to hold the Hearing in a timely manner. Further, the Organization contends that the Carrier should now be required to expunge the discipline from the Claimant's record and compensate him for all lost wages, "including but not limited to five (5) days (40 hours) at the straight time rate of pay, all overtime to which entitled but disallowed, paid and non-paid allowances and safety incentives, vacation, health & welfare benefit, and any and all other benefit to which entitled. . . ."

Conversely, the Carrier takes the position that the Claimant was afforded a fair and impartial Investigation and was guilty as charged. According to the Carrier, the record contains substantial evidence to support the Claimant's culpability. It contends that it met its burden of proof and that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325, Third Division Award 16166.

After a review of the record, the Board cannot find that there was substantial evidence to uphold the Carrier's position. The Carrier failed to prove that the Claimant violated General Code of Operating Rule 1.15 and Safety Instruction General Rule 744. It failed to prove that the Claimant was absent without authority.

AWARD

Claim sustained.

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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 22nd day of March, 2005.