

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37553
Docket No. MW-37611
05-3-02-3-741

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 (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) calendar day suspension effective immediately] imposed upon Mr. R. E. Gawel under date of November 15, 2001 for alleged violation of General Code of Operating Rule 1.15 and Safety Instruction General Rules 744 in connection with alleged failure to protect an assignment on a full time basis for alleged absence on August 9, 10, 15, 2001 and tardy on August 14, 2001 was arbitrary, capricious and in violation of the Agreement (System File D-37-01-380-13/8-00424 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 fifty-six (56) hours at the applicable straight time rate of pay, inclusive of the Thanksgiving and Day after Thanksgiving holidays; all overtime to which entitled but disallowed; paid and non-paid allowances and safety incentives; vacation, health & welfare benefits; and any and all benefits***’ and he shall ‘. . . be made whole for all time lost on November 8, 2001, as well as to be reimbursed for approximately 400 miles travel round trip to attend the hearing held on November 8, 2001.’”

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.

Claimant R. E. Gawel, a Foreman holding seniority from October 9, 1990, left work shortly after arriving on August 9, 2001, and was absent for the remainder of the day. He was not paid for August 9. The Claimant was also absent on August 10 and 15. He applied for and was paid vacation time for both days. On August 14, 2001, the Claimant arrived late for work and was docked one-half hour's pay.

On August 21, the Carrier notified the Claimant that a formal Investigation would be conducted to develop the facts and place responsibility, if any, for the Claimant's alleged failure to protect his assignment on a full time basis because of absence on August 9, 10, and 15, and being tardy on August 14, in violation of General Code of Operating Rule 1.1.5 and Safety Instruction General Rules 744. Following a Hearing on November 8, the Carrier advised the Claimant by letter dated November 15, 2001 that he had been assessed a ten-calendar-day suspension.

The Organization appealed the Carrier's decision, and the Carrier denied the appeal. Failing to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

There is no dispute that the Claimant was tardy on August 14, 2001. According to the Claimant's supervisor, P. L. Poeschel, the Claimant was one-half hour late. Testifying at the Hearing on his own behalf, the Claimant stated that he was about ten minutes late, that he was reporting to a site farther away than usual to attend a Safety and Health Meeting, and - as verified by documentation from the Wisconsin DOT submitted into evidence by the Organization - there was extensive road construction along the route that the Claimant was required to take. The Board finds that although

the existence of road construction may provide some mitigation for the Claimant's tardiness, it cannot excuse it. All employees are responsible for ensuring they arrive timely for work, allowing extra time as necessary.

With regard to his absence on August 15, 2001, the Claimant testified that he had asked for the day off two weeks in advance, in order to take care of his child. As corroboration, the Organization offered an unnotarized written statement by another Foreman, F. E. Kriefall, stating that Kriefall had been present when the Claimant requested August 10 and 15 off "for financial reasons." Poeschel, however, testified that the Claimant never asked for August 15 off, only August 10. In addition, the Claimant stated at the Hearing that the August 10 absence was for financial reasons, not the August 15 absence. In light of the discrepancies between Kriefall's statement and the Claimant's own testimony, as well as the fact that Kriefall's statement was unsworn and Kriefall himself not present at the Hearing for questioning, the Carrier was entitled to find Poeschel's testimony regarding the Claimant's August 15 absence more credible than the Claimant's.

The Board finds on the record, however, that the Carrier failed to prove that the Claimant's absences on August 9 and 10 were proper grounds for discipline. With regard to August 9, the Claimant testified that he had received a call from his pregnant wife, who was hemorrhaging and on her way to the hospital, so the Claimant returned home. The Organization submitted into evidence documentation of the Claimant's wife's pregnancy complications. This documentation may not have been as detailed as the Carrier would have liked, but it should be noted that the Claimant's wife is not the Carrier's employee and is entitled to keep her medical information private. The Carrier offered no evidence refuting that the Claimant had returned home on August 9 because of an emergency. Poeschel admitted that a family emergency is a legitimate reason to be absent from work and that it is permissible to leave because of such an emergency provided an affected employee "told someone." Poeschel further admitted that the Claimant had indeed told a coworker the reason for his departure on August 9. Under these circumstances, the Carrier cannot properly base discipline on the Claimant's absence on August 9, 2001.

With regard to August 10, Poeschel testified:

"Q. So you're saying that he put in for vacation pay, but it wasn't authorized?

A. Vacation pay wasn't authorized. He did tell me ahead of time that he was going to be gone that day.

Q. Okay, he did tell you ahead of time?

A. On that day, yeah, that day.

Q. When did he tell you?

A. A couple of days before, I believe. . . .

Q. Did you tell him that he could not go?

A. No."

Poeschel further admitted that it was permissible for employees to take vacation one day at a time as long as they gave notice 48 hours in advance. It was reasonable in these circumstances for the Claimant to believe that he had authorization to be absent on August 10, 2001, and the Carrier cannot properly discipline the Claimant for that absence.

The Board finds, therefore, that although the evidence of record supports the Carrier's finding that the Claimant was absent without authorization on August 15 and tardy on August 14, the evidence does not support the Carrier's findings regarding August 9 and 10, 2001. Accordingly, the suspension will be reduced to five days, and the Carrier will be required to pay the Claimant backpay for the five days restored to him.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of July 2005.