

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40970
Docket No. MW-40320
11-3-NRAB-00003-080112**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Montana Rail Link, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [fifteen (15) working days beginning October 30 through and including November 17, 2006] imposed upon Mr. J. D. Barnes under date of October 23, 2006 for alleged violation of Montana Rail Link General Code of Operating Rule 1.15 in connection with charges of failure to report for duty to Gang 1955 at the designated time and place on October 2, 3, 4, 5 and 6, 2006, was improper, unwarranted and in violation of the Agreement (System File MRL-207-O).**
- (2) The discipline (dismissal) imposed upon Mr. J. D. Barnes under date of October 23, 2006 for alleged violation of Montana Rail Link General Code of Operating Rule 1.15 in connection with charges of failure to report for duty to Gang 1955 at the designated time and place on October 9, 10, 11, 12 and 13, 2006, was improper, unwarranted and in violation of the Agreement (System File MRL-208-O).**
- (3) As a consequence of the violation referred to in Part (1) above, Mr. J. D. Barnes shall now have the discipline and all references to the charges removed from his record and paid for all time lost.**

- (4) As a consequence of the violation referred to in Part (2) above, Mr. J. D. Barnes shall now have the discipline and all references to the charges removed from his record and he shall be reinstated to service and compensated for all lost wages, as well as receive all rights and benefits, that were lost to him as a result of this discipline.”

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.

As noted in the Statement of Claim, the instant case consists of two separate claims that arose out of two different Investigations held on October 12 and 19, 2006. Although the background circumstances are similar, the record does not show that the Carrier agreed to consolidate the two claims for joint handling. Accordingly, in the absence of a consolidation agreement, we will address the two claims separately herein.

[Claim No. 1]

The Claimant was disciplined for failing to report for work as scheduled on October 2–6, 2006. According to the record, the Claimant was a short-term employee with the Carrier. The record references him as having worked only ‘. . . two seasons. . . .’ In that time, he had accumulated some 21 reporting-for-duty infractions, the majority of which came during the second season.

Our review of the record pertaining to this claim does not reveal any procedural irregularities of significance. On the merits, it is undisputed that the Claimant had gotten in trouble with the police authorities in Montana for reasons that are not explained in the record. The record references that he was under orders from his Probation Officer not to leave Missoula County for an unspecified period of time. Given the involvement of a Probation Officer, it appears that the Claimant's trouble with the Montana authorities had progressed beyond mere charges of criminal conduct.

The Claimant did not report for work during the period of September 27–29, 2006. According to the record, he was in jail at the time. He did not inform anyone in his chain of supervision about his absence until September 29 when he called and left a message on the recorder of his Roadmaster. The message said only that he had missed work because he was in jail. The Claimant's message said nothing about any inability to report for work beginning Monday, October 2. The Claimant left a call-back number. The Roadmaster assumed he would see the Claimant at work on October 2. When the Claimant did not report that day, the Roadmaster telephoned the call-back number and received a recorder. He left a message that he had returned the Claimant's call. The Claimant did not attempt to return the call or make any contacts with anyone in his chain of supervision thereafter.

Unbeknownst to his chain of supervision, the Claimant went to the Carrier's headquarters on September 29 and informed a manpower official that his Probation Officer restricted him from leaving Missoula County, Montana. The Claimant's Gang 1955 had been working outside of Missoula County installing ties that week and would be continuing to do so. The Claimant inquired about work opportunities for him within Missoula County but was informed he did not have the seniority to hold anything. Thereupon, the Claimant completed a leave of absence request for October 2 through November 3. The Claimant was not told his request was granted. Indeed, the request form contained the following advisory:

“I understand flex days and/or leave of absence will be granted when service requirements permit on a seniority basis.”

The Claimant admits he knew the leave request had neither been granted nor denied when he left the Carrier's headquarters on September 29. Nonetheless, the

record does not show that he made any inquiries about its approval status at any time during October 2–6, 2006. He neither reported for work on any of those days nor attempted to communicate with anyone in his chain of supervision to explain his situation or keep them advised. Importantly, the record does not establish that the Claimant made any effort with his Probation Officer to obtain a work-release exception that would allow him to leave Missoula County for work purposes only. After submitting his leave of absence request, the Claimant effectively went his way and did not check back with the Carrier. Interestingly, however, the transcript shows he did attend the Investigation into his absence that was conducted on October 12, 2006. It was held in Helena, Montana, which is outside of Missoula County.

According to the record, the proper Carrier official denied the Claimant's leave of absence request on October 9, 2006.

Article 8 of the Agreement provides the Carrier with discretion to deny a leave of absence request when service requirements do not permit the absence of the employee. It is undisputed in the record that Gang 1955 had to work short-handed during the Claimant's absence.

Given the foregoing factors, we find the record to contain substantial evidence in support of the Carrier's determination that the Claimant had violated Rule 1.15 as charged. Incarceration, or an equivalent type of restriction imposed by the criminal justice system, has not been shown to be an acceptable excuse for failure to report for work. Under the circumstances, the 15-day overhead suspension that was assessed was reasonable. Therefore, Claim No. 1 must be denied.

[Claim No. 2]

In this claim, the Claimant was disciplined for failing to report for work as scheduled during the period of October 9–13, 2006. The alleged reason for his inability to leave Missoula County to work in the Helena vicinity was the same, i.e., his Probation Officer restricted him from leaving Missoula County. Once again, no procedural issues of significance to this claim were noted.

The record once again establishes that the Claimant did not attempt to contact anyone in his chain of supervision about his alleged inability to report for work during the period of October 9–13, 2006. There was no contact by him despite his admission that he learned on October 9 that his leave of absence request had been denied. In addition, although he had five flex-days credited in his accrual bank, he did not ask to use them to excuse his absence.

It is clear from the record that the Claimant was able to attend the Investigation regarding Claim No. 1 that was held in Helena on October 12. How he was able to leave Missoula County to attend that Investigation but not leave Missoula County to report for work during the period of October 9–13 was not explained in the record.

Although the Organization did object that the Carrier was attempting to make two disciplinary events out of what was only one continuous period of absence, it appears that the parties' Agreement effectively required such treatment. Article 13 requires that notice of a disciplinary Investigation be furnished within seven days of first knowledge of the triggering circumstances. Thus the first notice regarding Claim No. 1 had to be furnished within seven days of October 2. It was. It was dated October 6, 2006. On that date, the Carrier did not know how long the Claimant would be absent because he was not communicating with anyone in his chain of supervision. When the Claimant was again absent on October 9, the Carrier was again required to act within seven days of that date. This is especially so when the Claimant attended the October 12 Investigation regarding Claim No. 1 outside of Missoula County but provided no explanation as to how he was able to do so without violating the alleged restriction by his Probation Officer. Given these circumstances, we do not find that the Carrier acted outside of the Agreement when it handled these matters as it did.

Once again, the record regarding Claim No. 2 is found to contain substantial evidence in support of the Carrier's determination that the Claimant was in violation of Rule 1.15. Under all relevant circumstances, the record does not establish that the Carrier's disciplinary decision was unreasonable. Therefore, this claim must also be denied.

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AWARD

Claims 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 14th day of April 2011.