

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 42826
Docket No. MW-43245
17-3-NRAB-00003-150212

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

- “(1) The discipline (dismissal) imposed on Mr. S. Januszewski by letter dated November 14, 2013 for alleged violation of General Code of Operating Rule (GCOR) Rule 1.15 Duty-Reporting of Absence in connection with his alleged ‘*** tardiness/absenteeism from work on October 14, 2013’ was without just cause, excessive and in violation of the Agreement (System File B-1434D-101/8-0018 DME.
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Januszewski shall ‘*** have his personal record cleaned of the assessed charges and dismissal, as well as he must be made whole for all loss incurred as a result, such as but not limited to, wages, retirement, months of service under RRB, reimbursement for loss of health and welfare benefits, or expenses incurred throughout the discipline process and subsequent assessed 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.

Claimant S. Januszewski had established and held seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute and subsequent filing of this instant claim, Claimant had less than one year of service with the Carrier and his status at this time was as a temporary employee.

July 29, 2013; August 5, 2013; September 27, 2013; October 14, 2013.

“Process

All discipline assessed will be done in a single stream. No discipline will be assessed until a fair and impartial formal hearing has been held or the employee has waived the right to hearing for accepting responsibility unless applicable contract provisions provide for automatic forfeiture of seniority.

Infractions will be dealt with using progressive discipline, unless they warrant outright dismissal.

Managers retain the discretion to handle appropriate minor matters through informal coaching.

First Infraction	5 working days unpaid suspension
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Infractions occurring within 24 months of compensated active service of a previous infraction will be handled as follows:

Second Infraction **10 working days unpaid suspension**

Third Infraction
Fourth Infraction

30 working days unpaid suspension
Dismissal”

The first AOR signed by Claimant dated July 30, 2013 in connection with his first authorized absence committed on July 29, 2013, waived the first step in the above progressive disciplinary policy of a 5 working days unpaid suspension. Since all AORs read identically except for the date signed, the quantum of discipline associated with each successive instance of an unauthorized absence, and the date of the unauthorized absence, the first AOR and subsequent AORs read as follows with taking into account the aforementioned exceptions:

“This will acknowledge that I, Samuel Januszewski, #976250 have agreed to the waiver process for my 5 day record suspension as my first infraction per Policy 5612-U.S. Discipline Policy. I acknowledge responsibility for failing to properly notify my supervisor of my failure to report for work on July 29, 2013. This is a violation of GCOR 1.15 Duty-Reporting or Absence. In addition, I acknowledge and understand that:

There will be no formal investigation hearing.

The suspension will appear as a record suspension only, no actual days off.

No grievance / appeal will result from this suspension.

A copy of this letter will be placed on my file.

Other conditions:
None”

The AOR in connection with Claimant’s second unauthorized absence signed August 7, 2013 by Claimant waived the progressive discipline of a ten working days unpaid suspension with the additional language not set forth in the first AOR as follows:

“This waiver will remain in effect for 24 months, during which time additional rule violation could result in additional discipline, up to and including dismissal.

Other conditions:
None”

Notwithstanding the warning set forth in the AOR in connection with Claimant’s second unauthorized absence from work that additional violations of such absenteeism would remain in effect for 24 months and, if committed could result in additional

discipline up to and including dismissal, Claimant again committed a third instance of unauthorized absence from work on September 27, 2013. The AOR in connection with this third unauthorized absence was dated October 14, 2013 and was signed by Claimant on October 15, 2013. No satisfactory explanation was provided as to the 17 day delay by Carrier in addressing this third infraction of unauthorized absenteeism committed by Claimant. Nevertheless, Claimant signed the AOR thereby waiving the discipline associated with this third infraction of a 30 working days unpaid suspension.

On the very same date of October 14, 2013, the date of the third AOR associated with Claimant's unauthorized absence from work on September 27, 2013, Claimant committed a fourth instance of unauthorized absence from work. The record evidence reflects that at approximately 7:49 a.m., 19 minutes after the designated start time of his tour of duty, Claimant phoned his supervisor, Remington Hill informing he had over slept and would not be reporting to work. On October 18, 2013, Supervisor T. Goffinet held a conversation with Claimant advising him to contact the Employee Assistance Program (AEP) representative by October 25, 2013 for the purpose of determining the root cause of his personal problems that was causing him to infract Carrier's attendance policy. In this conversation Goffinet advised Claimant that if he did not contact EAP by October 25, 2013, Carrier would take further action. As Claimant failed to contact EAP by the deadline date of October 25, 2013, Carrier by letter dated October 30, 2013 directed Claimant to attend an investigation scheduled to convene on November 7, 2013. Said letter reads as follows:

"Dear Mr. Januszek: A formal investigation will be conducted in Mason City, Iowa . . . at 10:00 on November 7, 2013. The purpose of this investigation/hearing will be to determine all of the facts and circumstances and to place responsibility, if any, in connection with you being absent from work on October 14, 2013.

You are entitled to a representative of your choice at this investigation/hearing as is provided for you in the collective bargaining agreement.

Any reasonable request for a postponement must be made in sufficient time prior to the date of the investigation/hearing.
Please arrange to be present on the above date, time, and place specified."

The hearing was held as scheduled with Claimant in absentia. The Organization argues that holding the investigation/hearing without Claimant present constitutes a fatal procedural flaw which prevents the Board from consideration of the merits of the claim.

Under all the prevailing circumstances as to the reason Claimant was not present we find to reject the Organization's argument. First, it is asserted Claimant never received the notice of formal investigation as Carrier did not have Claimant's correct address or telephone number. Even assuming arguendo this is absolutely true, the burden falls on the employee to keep Carrier apprised of any changes in address and/or telephone numbers or both. Additionally, the Organization contacted Claimant after serendipitously securing his correct telephone number and informed Claimant on November 6, 2013 that an investigation was being convened the following day presumably also apprising Claimant the investigation had to do with his unauthorized absence from work on October 14, 2013 as the Organization also was given notice of the investigation/hearing. The Organization then attempted by request to the Carrier to postpone the hearing but Carrier did not concur in this request. Second, the Organization argues that Carrier knew Claimant would be unavailable as Claimant was on a three week vacation that included the date of the investigation which had been authorized by the Carrier. This argument is bogus as Claimant at the time was being held out of service as a result of his failure to contact EAP by the deadline date of October 25, 2013 and Carrier maintained no such required written request for an authorized vacation was ever received from Claimant. Third, the Organization asserts Carrier violated applicable provisions of the Collective Bargaining Agreement by declining to postpone the investigation/hearing on a first request to do so as this is generally a courtesy extended on such a first request. The applicable Agreement provision makes quite clear that any postponement has to be by mutual consent and in sufficient time to accommodate moving the date of an investigation. The Organization's request to postpone was by one (1) day notice and certainly did not qualify as a timely request. In any event, Claimant was apprised one day in advance he was to attend an investigation and if he was at all interested in saving his job, he would have made every effort to return to Mason City, Iowa to attend the investigation.

On the merits, there is no dispute that Claimant called his supervisor on the morning of October 14, 2013 to report he had overslept and would not be reporting to work. The only defense raised by the Organization in Claimant's behalf was that the start time for his tour of duty had been changed and Claimant was never apprised of the change. Again, this is bogus. If he had not been informed of the change how did he know by oversleeping he had missed the beginning of his tour of duty. Even assuming he had not been told of the change in the start time of his tour of duty, the undisputed fact is, that by his own admission, he had committed a fourth unauthorized absence from work regardless of the fact he called in to report off from work. Claimant's call does not shield him from a fourth occurrence of unauthorized absence from work as his call to the supervisor was after the start time of his tour of duty. Assuming that the change in his tour of duty was later than 7:30 A.M. Claimant's call in to report off from work was still a late call in and again did not shield him from Carrier determining this was his fourth

occurrence of an unauthorized absence within the 24 month period he was warned about when committing his second unauthorized absence in signing the associated AOR. Under Carrier's progressive disciplinary policy, the discipline assessed Claimant of dismissal was contractually warranted.

On these above stated findings, the Board rules to deny the subject claim in its entirety.

AWARD

Claim 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 28th day of November 2017.