

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42839
Docket No. MW-43669
17-3-NRAB-00003-160448**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Claimant R. Scott by letter dated September 25, 2015 for alleged violation of Safety Rules PGR-C and PGR-N in connection with purportedly failing to notify his supervisor that on August 27, 2015 he was apprehended by local authorities while acting as a trackman on the East Deerfield I&R crew was without just and sufficient cause and in violation of the Agreement (Carrier’s File MW-15-34 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Scott shall have his record cleared of any wrongdoing and be returned to service immediately and compensated for all losses of pay and benefits as a result of the Carrier’s improper 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.

The Claimant was a Trackman with 15 months' tenure with no prior discipline when dismissed. On August 27, 2015, he was arrested on Carrier property at about 1:30 P.M. for an alleged misdemeanor offense committed off the property while off duty. The Claimant asked Foreman Howell, present at the arrest, to inform the Carrier. On August 28, the Claimant told Foreman Howell that he would be off work attending court that day and he told Supervisor Levasseur that he would not be at work on August 31, 2015. A September 18, 2015 hearing followed and thereafter the Claimant was found to have violated the above-noted Safety Rules and was immediately terminated. A timely claim followed.

The Carrier contends that when he was arrested at work on August 27, 2015, the Claimant told Foreman Howell that he had to leave early, but did not tell his Supervisor, as required. By the time of the on-property hearing, the Claimant had been arraigned but did not provide his impending court date. Also, on the Friday night after he was arrested, the Claimant called his Supervisor to say that he would be late Monday morning due to a court appearance. The arrest and a subsequent guilty plea was public knowledge, with local publicity on a news website. The Carrier was subjected to a loss of good will and the Claimant had left work when arrested without the permission of his Supervisor. The dismissal was not arbitrary and capricious.

The Organization asserts that the Carrier has not proven a violation of either cited rule. The Claimant told Foreman Howell to tell the Carrier what had transpired since there was no west end Supervisor at the time. Rule PGR-C was not discussed or entered into evidence during the hearing, so the Carrier cannot show a violation of that rule. There was no showing that the Claimant's arrest subjected the Carrier to criticism or loss of goodwill. A newspaper report did not identify the Claimant as a Carrier employee or criticize the Carrier. No nexus has been shown between the Carrier's business and the Claimant's off-duty behavior. Prior awards in the industry show that discipline for far more serious off-duty behavior has been set aside. The dismissal was arbitrary, capricious, and excessive and should be corrective rather than punitive.

This is a case involving the Claimant's off-duty conduct that resulted in a dismissal based on his alleged violation of two Safety Rules. The first is PGR-C: "Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of goodwill." The second is PGR-N: "Employees must not absent themselves from duty or engage a substitute to perform their duties without permission of a supervisor." Neither rule was referred to in the hearing notice. PGR-C was not referred to, discussed or provided as an exhibit during the hearing, but appears for the first time in the dismissal letter. PGR-N was discussed and introduced during the hearing and is included in the dismissal letter.

For reasons relating to both process and substance, the Carrier cannot prove a violation of Safety Rule PGR-C. Article 16.1 requires that the Claimant receive a fair hearing. Insofar as PGR-C is concerned, there was no fair hearing. The rule was not mentioned and that failure deprived the Claimant and the Organization of an opportunity to address questions of a loss of goodwill and possible criticism related to the Claimant's off-duty behavior. The hearing is not fair if the Claimant and the Organization are left to speculate about which rules the Carrier deems to have been violated once the hearing is over. Additionally, without a copy of the relevant rules in evidence, there is no basis for this Board to judge whether or not the rule has been violated.

Inclusion of the rule in the dismissal letter does not cure the failure to have introduced the rule during the hearing, but it does allow the Board to speak to the matter of a possible substantive violation. The Board agrees with the standards for judging off-duty conduct set forth in Third Division Award 20874:

“. . . an employee's off duty misconduct may be the subject of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business. The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs (emphasis in the original)."

The Claimant's employer was identified in the Arrest Report, but there is neither testimony nor documentation that ties public reports of the Claimant's off-duty theft to his employer. There is nothing in the evidentiary record to indicate that Claimant's off-duty misbehavior had an adverse impact on the business. No

witness testified that he would not work with the Claimant because of the off-duty misbehavior. There is no evidence that the Claimant's misbehavior created a concern about his qualification to perform assigned work. In other words, there is not a scintilla of evidentiary support for the Carrier's contention that the Claimant's off-duty behavior resulted in criticism of or loss of support for the Carrier. No "actual or reasonably foreseeable adverse effect on the business" has been shown.

The Claimant received a fair hearing insofar as Safety Rule PGR-N is concerned. He was responsible for knowing and complying with the rule. His testimony that on Thursday, August 27, 2015 he was unaware of the requirement to call his supervisor does not excuse his failure to do so. However, the Board notes that when the Claimant told Foreman Howell to inform the Carrier of what was occurring, there was no West End Supervisor and the Claimant was in the midst of being arrested and had no choice but to go with the arresting officer. The Board finds no intent on the Claimant's part to mislead or withhold information from the Carrier. The violation of PGR-N is viewed as minor.

In addition, Foreman Howell relayed word to Superintendent Gerossie that the Claimant would be late on August 28, 2014 due to a need to be in court. And, the Claimant complied with the rule when he called Supervisor Levasseur to say that he would be late on Monday because of a court appearance. While the Claimant apparently was not completely forthcoming about why he had to be in court, he did attempt to communicate the impending absences to the Carrier. Safety Rule PGR-N was violated, but not with nefarious intent.

The Board finds that the unproven charge related to Safety Rule PGR-C is by far the more serious charge of the two and that the proven charge does not include any intent on the Claimant's part to absent himself without communicating with his employer. He did not intend to go AWOL and was not charged with AWOL. Even considering the Claimant's short tenure, the Board views dismissal as arbitrary and excessive. A one-day suspension is viewed as corrective discipline sufficient to impress upon the Claimant the need to communicate with a supervisor should future absences be necessary. Otherwise, the Claimant's record is to be revised to show the brief suspension and he is to be reinstated and made whole in accordance with Articles 26.5 and 26.7. Compensation shall include pay for overtime that the parties believe the Claimant likely would have worked but for the dismissal.

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 12th day of December 2017.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42839 - DOCKET NO. MW-43669

(Referee I.B. Helburn)

The Carrier dissents in part and concurs in part with this Award. First, this Board concluded that “...*it finds no intent on the Claimant’s part to mislead or withhold information from the Carrier*”, with respect to Carrier Safety Rule PGR-N. (Emphasis added here.) The applicable portion of Rule PGR-N involved in this case states that “*Employees must not absent themselves from duty or engage a substitute to perform their duties without permission of a supervisor.*” [Carrier’s Exhibit A, p. 33] It is necessary to clarify for the record that no portion of Carrier Safety Rule PGR-N requires that “*intent*” be established in order for a violation of the rule to be proven. Nonetheless, the Carrier does concur with the Board’s ultimate conclusion in this case that the Claimant was in violation of Rule PGR-N, which is plainly obvious from the facts on record.

In further dissent to this Award, this Board erroneously concluded, “*For reasons relating to both process and substance, the Carrier cannot prove a violation of Safety Rule PGR-C. Article 26.1 requires that the Claimant receive a fair hearing. Insofar as PGR-C is concerned, there was no fair hearing. The rule was not mentioned and that failure deprived the Claimant and the Organization of an opportunity to address questions of a loss of goodwill and possible criticism related to the Claimant’s off-duty behavior. The hearing is not fair if the Claimant and the Organization are left to speculate about which rules the Carrier deems to have been violated once the hearing is over. Additionally, without a copy of the relevant rules in evidence, there is no basis for this Board to judge whether or not the rule has been violated.*” In response, the Board isolated the first line of Article 26.1 and utilized a non-contractual standard in applying that isolated language, thereby causing it to arrive at the erroneous conclusion that the Claimant was not afforded a fair hearing. By agreement, this Carrier must provide the Claimant with “...*information sufficient to apprise the employee of the act or occurrence to be investigated.*” [Article 26, at Carrier’s Exhibit A, p. 148] Such is the manner in which the Carrier is contractually required to provide the Claimant and Organization with “...*an opportunity to address questions of a loss of goodwill and possible criticism related to the Claimant’s off-duty behavior.*” It must additionally be pointed out that regarding Safety Rule PGR-N, the Board affirmed that the Claimant “...*was responsible for knowing and complying with the rule.*” The Board should have applied the same exact principle to Carrier Safety Rule PGR-C, since the Claimant was responsible for knowing and complying with that rule as well. Moreover, the Claimant confirmed on the record [Transcript p. 5] that he had received the Carrier’s Safety Rule book and thus, he had (or reasonably should have had) Rule PGR-C in his possession at all times during the course of his employment, let alone during the handling of this particular case. Furthermore, the

relevant portion of Safety Rule PGR-C was cited in the notice of discipline, which the Claimant, Organization and this Board all had at their disposal.

As for applying Safety Rule PGR-C to the facts of the case, the Claimant acknowledged that his arrest report is in the public domain and that it lists this Carrier as his employer. [Transcript p. 24] (In fact, this Award even acknowledges the public nature of the arrest report.) In addition, at the time of the hearing it was already public knowledge that the Claimant pleaded guilty at his arraignment and his crime had been covered on the local news. While the Board takes the myopic view that there was no witness testimony showing unwillingness by an employee to work with the Claimant, such a factor is not a prerequisite to establishing a “loss of good will”. Nor is it reasonable for the Board to conclude that *“There is no evidence that the Claimant’s misbehavior created a concern about his qualifications to perform assigned work.”* The central point of the matter was that the Claimant is not considered to be qualified to perform assigned work for the Carrier, due to his admitted theft in the local community. Using the standard that this Board borrowed from Third Division Award 20874, it is *“reasonably foreseeable”* that the Claimant’s conduct (i.e. stealing money from a local farm stand) will have an adverse effect on the Carrier, by virtue of his continued employment. It is unreasonable to come to any other conclusion. Accordingly, the Carrier must dissent.

Anthony Lomanto

Carrier Member

Matthew R. Holt

Carrier Member

December 12, 2017