

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43753
Docket No. MW-45022
19-3-NRAB-00003-180522**

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: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. S. Medford, by letter dated January 3, 2017, for alleged violation of GCOR 1.15 Duty – Reporting or Absence and ES Safety Rule E-23 – Personal Protective Equipment and Clothing was without just cause, on the basis of unproven charges and in violation of the Agreement (System File J-1734D-401/USA-BMWED_DM&E-2017-00018 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Medford shall have the charges dismissed and be returned to work and shall be made whole for all loss suffered as a result of the violation, including lost straight time, holiday pay, lump sums and overtime without deduction of outside earnings, health, dental and vision insurance premiums, deductibles and co-pays, all months restored and credited for the purposes of Railroad Retirement and vacation.”**

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 Medford, assigned as a Utility Crew Foreman on November 30, 2016, did not appear for service and did not call off work. He did not appear or call thereafter. On December 1, 2016 the Claimant was sent a “notice of a formal investigation and hearing” (NOI) to take place at 1000 hours at the Canadian Pacific Office, 3420 Miller Avenue, Davenport, IA 52802. The NOI stated that: “The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with your alleged failure to report for duty or notify Carrier of absence on November 30th and December 1st, 2016.” The NOI indicated possible violations of GCOR 1.15 Duty – Reporting or Absence and ES Safety Rule E-23 – Personal Protective Equipment and Clothing. The NOI, sent by certified mail, was neither signed for by Mr. Medford nor returned to the Carrier. The Claimant did not appear for the investigation and could not be reached by telephone. His representative’s request for a postponement was denied and the investigation was held without the Claimant, who still had not been heard from.

By certified letter dated January 3, 2017, the Claimant was notified of his dismissal for having violated the above-noted rules. The Organization states that it filed a claim on Mr. Medford’s behalf on January 9, 2017 and, not having had a response from the Carrier, a request for payment of the claim on March 29, 2017. The Carrier responds that it received nothing from the Organization until April 8, 2017. The April claim was progressed on the property without resolution, whereupon it was timely progressed to this Board for final adjudication.

The Carrier contends the Claimant received a fair and impartial investigation. No postponement was requested or granted prior to the investigation. The required substantial evidence is contained in Roadmaster Volden’s unrefuted testimony that the Claimant has been absent without contacting the Carrier from November 30, 2016 through the day of the investigation. The dismissal for what amounts to job abandonment is in accord with GCOR 1.15. The Claimant, with eighteen (18) months’ tenure has been assessed a series of suspensions, showing that he cannot follow rules.

The Organization asserts that the claim must be sustained because the Claimant did not receive a fair and impartial investigation because the request for a postponement so that he could attend was not granted. The Carrier did not meet its burden of proof to show that either ES Safety Rule 3-23 or GCOR 1.15 was violated. Nothing at all was said during the investigation about the Safety Rule. Since at least one of the charges has not been proven, the dismissal should be reduced as excessive. In accordance with Policy 5612 U.S. Discipline Policy at most the Claimant should receive is a record suspension.

The Claimant received what was apparently a thirty (30) day suspension with time served on November 28, 2016, as he was to report for work on November 30, 2016. He did not report either on November 30 or December 1 and did not call off on either day. He neither signed for the subsequent NOI sent via certified mail nor was the NOI returned to the Carrier. The only reasonable conclusion available to the Board is that the NOI was ignored by the Claimant.

The Claimant did not appear for his investigation on December 15, 2016 and could not be reached by phone that morning. The Claimant, employed by the Carrier for approximately eighteen (18) months, had previously been assessed with a five (5) day suspension for failure to report at the designated time, a ten (10) day record suspension for being late to work and a thirty (30) day suspension for sleeping on duty. This is not the case of an employee who from time to time is either late or a no-show, no-call. Rather, the record shows that this is a short-term employee who is now deemed to have abandoned his job. He was given proper notice of the investigation and apparently had not contacted his representative. Given these circumstances, the denial of the postponement request and the decision to proceed with the investigation was entirely appropriate. Nothing in the record suggests that a postponement would have resulted in the Claimant's appearance at a later date.

While the charge of a violation of the E-23 safety rule puzzles the Board and cannot be sustained, we are still left with a short-term employee who has not demonstrated an interest in protecting his seniority. In view of the facts in this case, even though only one of two charges has been proved, the Board finds no point in reducing the dismissal to lesser discipline. The Carrier cannot operate with a grossly unreliable work force and the Board cannot justify saddling the Carrier with an employee such as the Claimant.

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 16th day of July 2019.