

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44119
Docket No. MW-45301
20-3-NRAB-00003-190100**

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

**(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(Kansas City Southern Railway Company
(Former Gateway Western Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day suspension] ‘*** Five days to be served as actual time off commencing November 27, 2017, continuing through and including December 1, 2017, and a twenty-five (25) day record suspension, which will not be served, but recorded in your personnel file as an actual suspension. ***’ (Emphasis in original) imposed upon Mr. R. Hart, by letter dated November 16, 2017, for alleged violation of General Code of Operating Rules 1.13 – Reporting and Complying with Instructions, GCOR 1.15 – Duty - Reporting or Absence and the Kansas City Southern Railway Company’s Maintenance of Way and signal Rules 30.3A – Roadway Worker Responsibilities Regarding Notification and Documentation of the Need for Leave was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File 17 11 16/2017-0564 GAT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hart shall now ‘*** be enered (sic) of all charges and be reimbursed for all wage loss sustained as a result of the Carrier’s action. Said Claimant should have his record cleared of all charges and not affected by this decision.’”**

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. Hart established and maintained seniority in the Carrier's Maintenance of Way and Structures Department with tenure of approximately 28½ years and a clean disciplinary record. On September 30, 2017 the Claimant allegedly shortened his on-call schedule by four (4) hours without making proper notification, thereby failing to protect his assignment. He was said to have missed multiple telephone calls at home, resulting in a forty (40) minute train delay. An investigation was held, after which the Carrier concluded that there was sufficient proof of the rules violations and imposed the above-noted discipline. The resulting timely filed claim was properly processed on the property and after no resolution was achieved, progressed to this Board for final adjudication.

The Carrier asserts that there is overwhelming evidence showing a violation of the above-noted rules, because the evidence shows that the Claimant laid off without proper notification so that he failed to protect his assignment. He had complied with his schedule until the date of the incident. Mr. Hart received a fair and impartial investigation, with his representative agreeing with objections upheld by the Presiding Officer. The suspension was in accordance with Carrier policy, considering that the Claimant committed a major infraction but also that he had no prior discipline within the three (3) years prior to the incident. The arbitrator should not substitute his judgment for that of the Carrier because doing so "would only promote vigilante scheduling and feigned ignorance as to one's own schedule and delays in our industry."

The Organization contends that the Carrier has abandoned or waived an earlier insistence that the instant claim is procedurally barred because the appeal referenced the wrong rule number. This was a simple, harmless clerical error that did not

prejudice the Carrier's ability to present its case. The Claimant did not receive a fair and impartial investigation because the Conducting Officer refused to accept written statements despite hearsay being admissible in arbitration. Moreover, the Organization was not allowed to introduce evidence that the 40-minute delay was not out of the ordinary. These reasons alone should bring a sustaining Board response without consideration of the merits. In addition, there is no proof of a rules violation. The "conduct unbecoming" charge was abandoned at the investigation, leaving only the "failure to protect" charge. The Claimant was never shown a copy of the schedule change requiring him to be on duty until 0300 on September 30, 2017 rather than only until 2300 on September 29, 2017. The discipline was "arbitrary and unwarranted" and punitive, not progressive, in light of his service and clean record. The Claimant rectified the situation when called and the train would have been delayed regardless.

The analysis begins by noting the rules allegedly violated. GCOR 1.13 states: "Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

GCOR 1.15 states: "Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal."

Rule 30.3A states in relevant part:

"Notification: Maintenance of Way and Signal Department Roadway Workers may not lay off for any reason (including but not limited to leave for sickness, vacation, personal time, and safety days), without first making "proper notification" and obtaining prior permission from the "appropriate management supervisor." For purposes of this rule, "appropriate management supervisor" means an (sic) Roadway worker's immediate management supervisor or other management supervisor designated by the Company to receive leave requests. "Proper notification" means notification to the appropriate management supervisor, with as much advance notice as reasonably practicable. Leaving a message, voice mail or text, on a management supervisor's phone or electronic device is not considered proper notification. Similarly,

notifying a non-management Roadway worker (such as a working foreman) of a layoff does not satisfy this notification requirement.”

The Board concludes that the Organization’s contention that the Claimant did not receive the fair and impartial hearing required by Rule 32(a) because the Presiding Officer refused to accept certain written statements and refused evidence that showed that the forty (40) minute delay was not unusual in the event of a callout is not appropriate for consideration. The Claimant’s representative did, indeed, object to the omission of the hearsay statements, but he agreed with the decision not to include evidence of prior delays. Neither the Claimant nor his representative mentioned the refusal of the hearsay statements and the delay evidence in their closing statements. In fact, the Claimant’s representative said that “I think the investigation was handled rather well.” Moreover, the Organization’s January 13, 2018 claim on Mr. Hart’s behalf is premised solely on the contention that the discipline was “inappropriate and exceedingly harsh” (upper case omitted). It is well established that in the appellate grievance procedure used in this industry, Boards are limited to consideration of evidence adduced and contentions made during the on-property proceedings. The Rule 32(a) contention was not made on the property and, therefore, is not properly before this Board.

Neither will this Board entertain the Carrier’s contention that the Organization’s reference to Rule 34 Duly Accredited Representative rather than Rule 32 Disciplinary Procedure so poisons claim that it should not be considered by this Board. While the claim mistakenly refers to Rule 34, the record is clear that from the outset the parties have focused solely on the appropriateness of the discipline. The Board’s refusal to consider the claim would be ill-considered.

This leaves the usual two questions that arise in a disciplinary matter: 1) Has the Employer carried the burden of proving the alleged Rules violations? and 2) If so, is the resulting discipline reasonably related to the infraction? As the Organization has noted, an initial “conduct unbecoming” allegation has been abandoned. Therefore, it is not considered by the Board. Implicit in the Carrier’s contention is that the testimony and evidence provided by Bridge Supervisor Hamilton and Bridge Tender Wallis is persuasive while that of the Claimant is not. Briefly, Supervisor Hamilton testified that he went over the relevant schedule with each Bridge Tender, the Claimant included, and that the Claimant previously had complied with the scheduling policy. In essence, Mr. Wallis confirmed that he was aware of the schedule and that Supervisor Hamilton said that he had discussed it with the Claimant. Conversely, Mr. Hart said that he was unaware that the schedule change had been implemented because he had never received

a copy. Having considered the record, the Board finds that the Carrier has met the burden of proving the charges by substantial evidence. While violations of GCOR 1.13 and 1.15 are minor violations, the violation of Rule 30.3A is a major violation.

To an extent, the Claimant's exemplary disciplinary record was considered, as the three clean years prior to the violations—the look back period—resulted in the reduction of discipline from what otherwise would have been imposed. The discipline is consistent with the Carrier's policy and in the Board's view, a reasonable exercise of managerial authority.

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 11th day of August 2020.