

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44356
Docket No. MW-45718
21-3-NRAB-00003-200043**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK) –
(Other than Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) working day suspension] imposed upon Mr. A. Konieczki, by letter dated December 18, 2018, in connection with his alleged failure to follow Carrier rules in Amtrak’s Standards of Excellence and National System Attendance Policy For All Agreement-Covered Employees was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier’s File BMW-153408-S NRP).**
- (2) The claim* as appealed, by letter dated January 3, 2019, to Lead Labor Relations Specialist A. Parker shall be allowed as presented because said claim was not disallowed by Mr. Parker in accordance with Rule 15.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant A. Konieczki shall be made whole restoring all lost wages and benefits beginning December 5, 2018 through and including January 9, 2019. Additionally, we request these charges be expunged from his personnel file and otherwise be made whole.**

***The initial letter of claim will be reproduced within our initial**

submission.”

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 established and maintains seniority under the Carrier's Maintenance of Way Agreement. At the time of the instant dispute, he held the position of Foreman.

On December 4, 2018, when the Claimant arrived at work, he was late and did not swipe into the TED system, because he did not have his identification badge. At the end of his shift, the Claimant filled in his time as though he had been there a full eight hours. When the Claimant was questioned whether he and his gang had worked the full eight hours, he was dishonest and did not admit that he had been late. After the Claimant was shown video evidence of his late arrival, he admitted the charged conduct, but brushed it off as “no big deal.” During the hearing, it was established that the Claimant had not clocked in at 3:00 PM but had clocked in and out at 11:30 PM, the same day at the end of his shift.

On December 6, 2018, the Carrier directed the Claimant to attend a formal investigation, in connection with the Claimant's alleged failure to follow Carrier rules in Amtrak's Standards of Excellence and National System Attendance Policy For All Agreement-Covered Employees.

“Charge: While employed by Amtrak in Jackson Michigan as a Foreman you were late to work and allegedly didn't swipe into the TED system to avoid being charged with a late arrival. You then filled out a 2306 stating that you worked the entire shift with no

mention of the late arrival on your 2306. When you were questioned by the supervisor and ADE, you told them you worked the entire shift. When you were told we had video evidence of your late arrival you told the ADE, Track Supervisor and Assistant Supervisor that it was no big deal and put you down for the late arrival.”

After a formal investigation on December 13, 2018, the Claimant was found in violation of the Carrier’s Standards of Excellence and National System Attendance Policy For All Agreement-Covered Employees, part D, “Progressive Counseling and Discipline”, and was assessed a ten (10) day working suspension.

By letter dated January 3, 2019, the Organization appealed the assessed discipline. Thereafter, by letter dated March 11, 2019, the Organization notified the Carrier that it had failed to respond to the Organization’s appeal within thirty (30) calendar days from the date that the appeal was received as required by Rule 15.3 of the parties’ Agreement. By letter dated March 14, 2019, the Carrier denied the Organization’s appeal. The parties were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Carrier contends that it has shown with substantial evidence that the Claimant is guilty of the charges. The Carrier contends that there is no question that the Claimant was late and was dishonest when he reported his time, trying to cover up his late arrival. Furthermore, the Carrier contends, the Claimant did not admit his violation until after he was shown video evidence proving it.

The Carrier contends that the penalty imposed was neither arbitrary nor excessive. The Claimant was dishonest and he had prior attendance violations on his disciplinary record. The Carrier contends that the discipline of a ten-day suspension and Final Warning was fully warranted, and if anything, lenient.

With respect to the Organization’s procedural contentions, the Carrier contends that the Organization’s claim was conference on January 17, 2019 and the Carrier’s denial is dated March 14, 2019. The Carrier contends that the parties’ Agreement does not make an untimely response to a discipline appeal a fatal flaw. Any error was correctable and should not outweigh the Claimant’s admitted guilt. The Carrier contends that previous decisions of this Board make clear that a time violation with respect to appeals of discipline will not overturn the assessed discipline.

The Carrier contends that the Agreement permits it to remove employees pending investigation and that the Claimant was paid for his time out of service. The Carrier further contends that there was nothing improper with a Carrier official serving as a witness and also assessing the discipline after a Hearing Officer found that the charges were proven.

The Organization contends that the Carrier committed a fatal procedural error when it failed to timely respond to the Organization's appeal dated January 3, 2019, as required by Rule 15 of the parties' Agreement.

The Organization further contends that the Claimant was denied a fair and impartial hearing based on the fact that Carrier manager Simmons was a Carrier witness and assessed the discipline against the Claimant. In addition, the Carrier contends that the Claimant was improperly withheld from service pending an investigation.

With respect to the merits, the Organization contends that the Claimant admitted that he was late and was only paid for the time he worked. The Claimant arrived five minutes late on December 4, 2018 and was paid for seven hours and 55 minutes. Finally, the Organization contends that even if the Carrier met its burden of proof, this Board should follow arbitral awards which have found that the imposed discipline was arbitrary and excessive.

The Carrier has shown with substantial evidence that the Claimant was late to work on December 4, 2018 and was dishonest about it until he was shown the video evidence. Once it could not be denied, he admitted his violation. Where there is an admission of guilt, there is no need for further proof. This Board finds that sufficient evidence exists to support the findings against the Claimant.

In addition, this Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. Although the Carrier's response in the appeal process was late, the Organization has not shown how this minor delay prejudiced the Claimant. The Claimant was dishonest in order to avoid receiving an additional attendance violation, and the imposed penalty was neither arbitrary nor excessive.

AWARD

Claim denied.

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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 6th day of January 2021.