

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44575
Docket No. MW-46055
22-3-NRAB-00003-200223**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

**PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that

- (1) The discipline (dismissal) imposed upon Mr. R. O'Leary, by letter dated September 26, 2018, for alleged violation of MWOR 1.15 Duty-Reporting or Absence and MWOR 1.13 Reporting and Complying with Instructions for an alleged failure to report at 0700 hours as required without proper authorization from his supervisor on July 12, 2018 on the Lakes Subdivision while working as a machine operator on Gang TMGX0133 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-5688-M/11-19-0063 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. O'Leary shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses, benefits and 401K.”**

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.

Factual Background:

The Carrier has alleged that on July 12, 2018, the Claimant failed to report at 7:00 A.M. as required without proper authorization. He was found guilty of violating MWOR 1.15 - Duty Reporting or Absence and MWOR 1.13 - Reporting and Complying with Instructions and assessed immediate dismissal. The Claimant was hired in June of 2008. His record is free of discipline until April of 2018 when he received a Formal Reprimand with a 12-month review period for use of an electronic device. Then in June of 2018 he was issued another Formal Reprimand with a 12-month review period for failure to report. When he failed to report again in July, his discipline was escalated to a 10-day Record Suspension with a 12-month review period. The incident of concern was July 12, 2018 when he overslept and again failed to report. At the time he was under three different review periods.

Position of Organization:

In the Organization's assessment, the behavior of the Hearing Officer at the investigation undeniably placed the Claimant at a disadvantage and demonstrated a distinct bias in favor of the Carrier. Prior awards have held that a combination of procedural errors can accumulate to deny a claimant a fair and impartial hearing in violation of Rule 40.

It further asserts that the Carrier violated the Agreement in this dispute when it determined that Mr. Jones, who did not attend the Claimant's investigation, would evaluate the testimony and exhibits presented, make any needed credibility determinations and issue the disciplinary decision in this case.

The Claimant overslept on July 12, 2018. At the investigation, he testified that he sent gang foreman J. Kilichowski a text message advising that he had overslept and would be late.

Roadmaster M. Holty testified that he called the Claimant and instructed him to stay home since he did not report to work on time. The Organization contends that

a review of the record reveals that the Claimant did not violate the rules in the context alleged by the Carrier because the transcript plainly reveals that he did not intend to fail to report for duty on time.

The Organization maintains there are extensive mitigating circumstances in the case: the Carrier failed to take into consideration that: (1) the Claimant was going through a lengthy life-changing divorce process, (2) cell phone records show that Claimant's ex-wife had been calling him in the early morning hours of July 12, 2018, (3) Claimant sought assistance and requested FMLA in order to deal with his personal matters, and (4) Claimant went a total of fifty-five problem-free days following the incident on July 12, 2018. The Claimant's record was unblemished from the date of his hire on June 2, 2008 up until recent extenuating circumstances altered his way of life over the four-month span leading up to the morning of July 12, 2018.

Position of Carrier:

The Claimant failed to not only report for work, but failed to comply with instructions and contact his Supervisor prior to start of shift on July 12, 2018. At the investigation, he admitted that he neither called nor showed for work on time that day. In the Carrier's view, he never offered an excuse for this incident.

The Carrier insists it has offered ample, un rebutted evidence that the Claimant failed to follow the instructions of his supervisor in accordance with MWOR 1.13 and also failed to report to work at the designated time and place in accordance with MWOR 1.15. It concludes that the claim must be denied. Since it was his fifth standard violation within twelve months, the result should have been and was dismissal.

Analysis:

The Organization correctly points out that Hearing Officer Mihalik questioned a Carrier witness and elicited background and factual information before turning the witness over to the Organization's representative. We do not find the nature of the questions to be leading to the degree found in Award 31635, where the hearing officer was found to have "made the case" for the Carrier. Further, the Organization did not pose an objection when this began, and therefore must be deemed to have waived the procedural claim in this regard.

The Organization also points out that Hearing Officer Mihalik did not issue the disciplinary decision in the case; that was done by Division Engineer Keith Jones. However, it must be noted that there were no credibility issues in the case. The Claimant acknowledged that he neither came to work nor called ahead of his shift. The Hearing Officer at no time served in the capacity of weighing the credibility of competing witness testimony, or deciding which to believe. It follows that there was no prejudice to the Claimant. In this regard, PLB 7602-000038 and Third Division Award 21040 are distinguishable, because the person making the disciplinary decision had actually testified against the claimant during the investigation.

We recognize the Claimant's situation was both temporary and severe. He was going through a difficult situation and was under palpable strain. However, these circumstances must be deemed a cumulative plea for lenience, and such lenience can only be granted by the Carrier. This Board does not have such discretionary authority. The Claimant had received no less than three escalating disciplinary actions within four months; his opportunity to understand the gravity of his situation was ample, yet he showed no improvement. There was no indication that the Claimant grasped the necessity of coming to work on time.

In sum, we do not find adequate basis in the record for making a determination that the Claimant herein has been prejudiced by a procedural violation of Rule 40. The Carrier has established that the Claimant failed to report for work at the start of his shift on July 12, 2018 and failed to notify his supervisor in advance. In view of his history of multiple violations, we find no mitigating circumstances in the case.

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 29th day of October 2021.