

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44626
Docket No. MW-45736
22-3-NRAB-00003-190639**

The Third Division consisted of the regular members and in addition Referee Paul S. Betts when award was rendered.

(Petitioner Kenneth Zackery

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company (former Missouri Pacific)

STATEMENT OF CLAIM:

The following statement of claim is quoted from the August 9, 2019, letter by Petitioner Zackery to Arbitration Assistant Linda Gathings of the Third Division of the National Railroad Adjustment Board, advising the Division of his intent to file an ex parte submission.

“...I Kenneth W. Zackery strongly feel like I was wrongfully terminated due to the actions of Supervisor Joe Dominy on gang 9167. I feel like I was retaliated on because Supervisor Joe Dominy did not want to report my injury after I requested to report my Carpal Tunnel Diagnose. I was only under Supervisor Dominy's supervision for a short period of time before these incidents took place. On 3/16/2019 I was on my way to work. I had to drive a few hours. Shortly into me driving I started experiencing awkward pain and feelings in my hands. I have felt it before but not to that extreme, I did at that point feel like I needed to seek medical treatment. I at that time called Supervisor Dominy but he didn't answer so I left a voicemail and turned around to proceed back home. With 3/16/2019 being on a Saturday, I had to wait until Monday 3/18/2019 to seek medical treatment. Although I was in pain, I did not feel like I needed to go to the emergency room so that's why I just waited until the Dr. opened that Monday. On 3/18/2019 I did seek medical treatment and I was diagnosed with having Bilateral Carpal Tunnel Syndrome. I was giving medication and 2 splints until further evaluation could be done to determine the severity. I returned to work on 3/19/2019 seeing that the Dr. did not put me on any restrictions at that time. When I arrived at job Briefing on 3/19/2019 I did in fact present my Dr. forms to Supervisor Joe Dominy. I showed him the

return to work slip from the Dr. office and my diagnose. At that point Supervisor just looked at my paper and handed it right back to me. I then asked Dominy if I could file an injury report because I knew with this new diagnose it will require future treatment. Supervisor Joe Dominy then informed me that he did not know the proper forms to file because he had never filed an injury report before. Dominy moved me off the Spiker Machine and put me on the Anchor Squeezer which he felt like was lighter duty. He told me he had to make a couple calls to get the proper forms for me to fill out. I never got the forms or got to report my injury on 3/19/2019 when I returned to work. Instead the next day at work Supervisor Dominy brings me a waiver to sign on 3/20/2019. I was a little confused because I thought he was going to bring me the forms to fill out my injury report. I was then told that if I did not sign the waiver I would've been taken out of service. I was hours away from home, on pain medication and had to wear 2 splints so no I did not feel like attending a hearing nor did I want to be taken out of service. I did sign the waiver under duress but after presenting Supervisor Dominy with proper Dr. forms I did not think he would give me UA's for those days which he did. I received unauthorized absences for 3/16-3/18 even though I did at the time have several unused vacation/sick days that could've even been applied. Supervisor could've just marked me as absent but instead he put UA's on my record which lead to me receiving a 2nd offense violation. I had received my 1st offense violation that prior year when my wife had got suddenly sick and was diagnosed with an Autoimmune disease which was out of my control. Shortly after I was given those false UA's and a 2nd offense charge after showing proof of medical treatment I was wrongfully charged again. I took some of my vacation days in early April but at that time Joe Dominy had still not gotten back to me about filing my injury report. I was unaware of the procedures also at that time and myself had never filed an injury report either. I asked the supervisor in good faith. On the morning of 4/16/2019 I was a few minutes late to job briefing. Row call was in Van Horn, TX which was a 10 hour drive from my home. Job briefing started at 2am that day. Well while I was traveling to work my van started running hot so I pulled over to let it cool off and I notified Supervisor Joe Dominy by text message that I was going to be a few minutes late because my van was running hot on me. When I did arrive to job briefing it was still in session but the eye scanner that we usually use to scan in was broke or just not working that morning on 4/16/2019 so I could not scan in like I would've

normally done. After job briefing was over Supervisor Dominy called my name and told me to try again tomorrow. I was in shock and quite embarrassed that he was sending me home in front of everyone after I had just drove 10hrs to be there and was literally only a few minutes late. Row call was at 2a.m so I had to sleep in my vehicle until the hotels started checking in. After Supervisor Dominy decided to send me home for being only a few minutes late he then purposely gave me a UA for 4/16/2019 after he looked me in my face and told me he put me down as being Tardy on 4/16 but that was not the case. I was taken out of service on 4/17/2019 for failure to report to service on 4/16 and for my past. When I arrived too job briefing on 4/17/2019 Supervisor Dominy publicly in front of everyone took my hard hat and vest and sent me home. I was again embarrassed and in shock not to mention out of pocket money I had spent on a room for the week. I have worked at Union Pacific for going on 13 years and I have never nor have I ever seen another employee been sent home for being a few minutes late then given a UA. I have been late before while the eye scanner was working and I just scan on in and go to work but the eye scanner will mark a tardy down on your record not an unauthorized absent. I strongly believe that if Supervisor Dominy would have just marked me as tardy and let me work that day I would still have my job. But because Supervisor Dominy chose to target me out and give me false UA's which lead to a 3rd offense charge and I was dismissed from service. Supervisor Dominy never again even mentioned my injury report. When questioned about rather or not I tried to report my injury by union Rep Ricky Richard Dominy told him I never reported my injury to him which is totally not true. I would never seek medical attention then return to work with an excuse and not report it to the supervisor. I feel like I had an unfair hearing, witnesses that were in my support were ignored and not called to hearing. My evidence was ignored. I was told that I couldn't bring up old evidence because I signed the waiver and Ricky Richard also told me that we were not to include employees. At the hearing the only thing that was brought up was my past. The day in question 4/16/2019 failure to report to service was the reason I was taken out of service. I feel like my past absents were used against me at Union Pacific's convenience. They were on Supervisor Dominy's side and even though I had evidence that I presented to Union Rep Ricky Richard it was not even brought to light at the hearing instead Ricky Richard said they are making their decision because of my past. If my past was such a problem and they felt like I was such a poor worker, why did Union Pacific wait until after I try

to report an injury to terminate my employment? I am seeking full reinstatement of my Job as a M/0 with Union Pacific Railroad. I am seeking backpay, lost wages and punitive damages. I am the sole provider of my family and my wife is currently on disability and is unable to work. This incident has left me in a financial crisis and very depressed. I'm about to lose my house as I have already lost my car and bank account over drafted and closed because of lack of funds. I have 4 kids that have been impacted also by this situation. Although my past does show me having excessive absents, I have excuses for those past incidents. I had also completed any probationary period I've ever been on so my past should not have been brought up and used against me for their convenience. When I started working for Union Pacific Railroad in August, 2006 I was 22 years old with no kids and now I'm 35 years old with 4 kids. The past years I've been employed with Union Pacific Railroad my wife has had 3 high risk pregnancies that had required me to miss days. I also have had twins born prematurely weighing lib each that required me to miss days in my past an also when my wife was dealing with her Lupas I missed days. Which lead to my 1st offense charge. I was referred to FMLA which I was on at one point. FMLA is no pay and I'm the sole provider so I had to work to provide for my family. I would like reconsideration for my employment as I need my Career. I plan to make better accommodations in the future if I am reinstated and will not miss any days without it being a serious emergency..."

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.

At the time of incident, the Petitioner was working as a Machine Operator and had approximately 12.5 years of service with the Carrier. On April 16, 2019, the Petitioner failed to report for work on time, triggering a possible third offense attendance violation under Carrier Policy. As a result, an investigation was conducted regarding the matter on April 24, 2019. Following the investigative hearing and by letter dated May 3, 2019, the Carrier notified the Petitioner of his dismissal based upon a third offense under the Carrier's Attendance Policy.

The Organization (BMWED) filed a claim on behalf of the Petitioner on May 22, 2019, which was then denied by the Carrier on July 11, 2019. Thereafter, the claim progressed and is now before this Board for final adjudication. It should be noted that the Petitioner represented himself during the Board's hearing on the matter.

The Board has carefully reviewed the record created on-site, as well as the Statement of Claim provided to the Third Division by the Petitioner, and finds the Carrier provided substantial evidence to support its decision to dismiss the Petitioner. Prior to the current incident before this Board and reviewing the most recent past of the Petitioner's attendance status, the record reveals the Petitioner received an attendance policy alert on May 31, 2017, a waiver and attendance policy 1st offense on May 25, 2018, and a waiver and attendance policy 2nd offense on March 2, 2019. The Petitioner either knew, or should have known, of his attendance obligations under the policy based upon this history.

That said, the Board notes that the Statement of Claim provided by the Petitioner differs significantly from the record that was created on-site. The Statement of Claim sets forth a host of new arguments / justifications that were never raised on-property. This Board is charged with reviewing the record that was created on-site, and under Circular No. 1, will not consider new arguments or evidence that are presented for the first time in the Statement of Claim, and to which the Carrier was unable to respond. Simply put, the Petitioner cannot amend or perfect his claim at this point. The Petitioner was given ample opportunity to both question his manager [See Transcript, pages 29, 31 and 37] and present these new arguments / justifications at the April 24, 2019, investigative hearing but failed to do so.

Given the fact that the Statement of Claim differs so significantly from the record before the Board, the Board finds the Claim to be defective, and is therefore dismissed.

Although the Board may not have repeated every item of documentary evidence or testimony nor all of the arguments presented, we have considered all of the relevant evidence, testimony, and arguments presented in rendering this Award and Order.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Petitioner(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2021.