

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6041**

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
GENE L. SHIRE, CARRIER MEMBER
DON HAHS, EMPLOYEE MEMBER**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF SANTA FE, GENERAL COMMITTEE**

and

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

**Award No. 33
Case No. 33
Engineer C. D. Mooneyham**

*Date of Hearing - March 21, 2000
Date of Award - April 30, 2000*

Statement of the Issue:

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

**Was Carrier justified in dismissing Claimant
Engineer C.D. Mooneyham from service in connection
with his alleged failure to report for duty on June 12,
1998?**

FINDINGS:

Public Law Board No. 6041, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

According to the record before this Board, Claimant, a Denver Extra Board engineer, was called for Train K-DENDEN-12A, ordered for 3:00AM on June 12, 1998. He accepted the call, and while enroute to work from Pueblo, was stopped by police for speeding. During the handling of that violation, it was discovered by police that there existed an outstanding warrant for Claimant's arrest in connection with a previous and unrelated traffic violation, and he was taken into custody pending resolution of that warrant. As a result, Claimant was unable to protect the assignment for which he was called on that date. It is noted that he did, upon his incarceration, advise Carrier to that effect, at which time Carrier called in another engineer. Train K-DENDEN2-12A, albeit delayed, operated as anticipated.

By letter dated June 16, 1998, Claimant was directed to attend a formal investigation in connection with the following charge:

You are hereby notified to attend Formal Investigation at the Second Floor Conference Room, 3700 Globeville Road, Denver, Colorado, at 0900 hours on July 2, 1998, to develop all the facts and circumstances concerning your alleged failure to report for duty on June 12, 1998 at 0300 for train K-DENDEN2-12A at Denver, Colorado and to place responsibility, if any for possible violation of Rules 1.13, 1.15, and 1.29 of the General Code of Operation Rules, effective April, 1998.

Rules 1.13, 1.15, and 1.29 of Carrier's General Code of Operating Rules, the basis for the instant charge, were read into the record of investigation which was held as scheduled on July 2, 1998, and contain the following provisions:

Rule 1.13 - Reporting and Complying with Instructions

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.

Rule 1.15 - Duty-Reporting or Absence

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.

Rule 1.29 - Avoiding Delays

Crew members must operate trains and engines safely and efficiently. All employees must avoid unnecessary delays.

When possible, train or engine crews wanting to stop the train to eat must ask the train dispatcher at least one hour and thirty minutes before the desired stop

The essential facts as described above were confirmed at the hearing, to which Claimant added the following statement in his own behalf at page 7 of the investigation transcript:

I just want to say it was, I had no control of the situation. I was pulled over for reasons unbeknown to me. I try to take care of my business as well as possible. If I had an inkling of a clue that I had a warrant for my arrest for no proof on insurance out of Pueblo, two years ago I would have taken care of it. And, nothing was purposeful, that's all I have to say.

Following the hearing, by letter dated July 23, 1998, Carrier acted to dismiss Claimant from service, the propriety of which is now before this Board for consideration. It is noted that the entire transcript of investigation, all correspondence applicable to the instant claim, and a copy of Claimant's service record were furnished us for our deliberations in this matter.

Carrier, as the moving party, argues initially, and simply, that Claimant accepted an assignment for which he failed to report. Citing Third Division Award No. 27727, wherein Referee Carter held that "...incarceration is not a valid excuse for not protecting an assignment," Carrier does not find Claimant's unfortunate run-in with the police on his way to work in any way exculpatory, and as such, maintains that it acted appropriately in assessing discipline following the July 2, 1998 hearing. With respect to the magnitude of that discipline, Carrier asserts that Claimant's dismissal was effected entirely within the progressive guidelines established by its Policy for Employee Performance Accountability. In its letter to the Organization during the handling of the case on the property dated November 3, 1998 (Carrier Exhibit 7), Carrier states as follows with respect to Claimant's service record:

[T]his is not Claimant's first offense. After the Carrier Officer determined that the Claimant had violated the listed rules, it was entirely appropriate to refer to his record and determine the level of discipline to assess. The record revealed that; the Claimant received a 20 day level S suspension in 1996, for being absent without permission. In 1997, he had a level S 90 day suspension for passing a red board without permission. Dismissal for another serious offense within a year is certainly appropriate in this instant case.

In response, the Board notes that our Award No. 27, dated January 29, 1999 (Organization Exhibit 11), overturned the above referenced 90-day suspension for lack of merit, and ordered Carrier to clear Claimant's personal service record of any allusion to the incident. While we, in Carrier's defense, observe that the above letter predated our Award, we strongly object to its potentially misleading and prejudicial mention of "two suspensions in 1996 and 1997" at page 6 of the Ex Parte Submission before us now.

In Claimant's behalf, the Organization argues that he accepted his call for duty fully intending to protect that assignment. It asserts that what transpired in the ensuing hours (i.e. his detention by police), were circumstances unforeseen and, as a result, completely out of his control. It is noteworthy and commendable, according to the Organization, that Claimant,

immediately upon his incarceration on the morning in question, notified Carrier of his predicament in order to facilitate the securing of a replacement engineer for Train K-DENDEN2-12. The Organization further maintains that even if discipline for such a minimal and unintentional failure were warranted, Carrier's actions in this case, when examined in light Claimant's record, were harsh and excessive. In support, it cites, among others, First Division Award 27022, in which Referee Meyers held as follows:

"Once this Board has determined that there is sufficient evidence in the record to support the Carrier's finding of guilty, we next turn our attention to the amount of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find that the action taken by the Carrier was unreasonable, arbitrary, or capricious."

In view of the above, the Organization reminds this Board that the 90-day suspension removed from Claimant's service record in Award No. 27, also, in effect, removed a key brick in Carrier's foundational assertion of progressive discipline in this case. It argues, persuasively, that *"missing a call has never been a dismissal offense on this property"* (Organization submission at pg. 9), and reiterates its allegation that Carrier's actions were "overly severe for the nature of the rule violation".

Based upon the whole of the record, this Board agrees with both Referees Carter and Meyers. There already exists substantial foundation in the industry that incarceration does not, in fact constitute a valid excuse for failure to protect an assignment, and the record in this case presents no basis whatever for finding otherwise. The unfortunate timing of his arrest notwithstanding, Claimant failed to cover an assignment for which he was called, and Carrier's determination of guilt was therefore authentic.

Having said that, the Board finds, however, that the punishment in this case did not fit the crime. The Organization's assertions of harshness are well founded, particularly when the whole of Claimant's employment history is taken under advisement. While Carrier may have considered the discipline assessed in this case to be progressive prior to the rendering of Award 27 of this Board, it failed to re-examine its position with regard to the instant claim subsequent to its findings. By that Award, Claimant's service record was cleared, in its entirety, of any and all reference to the 90-day actual suspension addressed in that case, and we must, as a matter of duty, treat that particular incident as if it had never occurred. We note that the discipline last assessed against Claimant, was a 20-day actual suspension in 1996 for failure to protect his assignment (Carrier Exhibit 11), a fact relevant to this case when held in tension with Carrier's acknowledged practice of appropriating discipline on a progressive scale. In light of the foregoing and upon careful consideration of the entire record, this Board finds that dismissal was, indeed, excessive under the circumstances at bar.

Accordingly, the discipline under consideration herein is hereby reduced to an actual suspension of 90 days in keeping with Carrier's policy of

progressive discipline, and Carrier is ordered to reinstate Claimant Engineer C.D. Mooneyham to service with all seniority rights unimpaired. Carrier is further ordered to make Claimant Mooneyham whole for all time lost over and above that actual suspension.

AWARD

The issue before this Board:

"Was Carrier justified in dismissing Claimant Engineer C.D. Mooneyham from service in connection with his alleged failure to report for duty on June 12, 1998?"

is answered in the negative, "No". Claim is sustained as set forth in the findings.

ORDER

Carrier is directed to comply with this Award within thirty (30) days of the date indicated below, and make any payments that may be do Claimant within that time period.



John C. Fletcher, Chairman & Neutral Member



Gene L. Shire, Carrier Member



Don Hahs, Employee Member

Dated at Mt. Prospect, Illinois, April 30, 2000