

**PUBLIC LAW BOARD NO. 7988**

**CASE NO. 11  
AWARD NO. 11**

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

**and**

**Soo Line Railroad Company**

**Claimant: J. Feist  
System File No. D-52-20-380-05  
Carrier File No. 2020-00018341**

---

**BACKGROUND:**

On July 14, 2020 the Carrier issued to Claimant J. Feist a notice of formal investigation and hearing which stated, in part, as follows:

The purpose of the investigation and hearing is to develop all the facts and place responsibility, if any, in connection with your alleged failure to report for work at your designated start time and location on Monday July 13, 2020. This indicates a possible violation of, but not limited to, the following rules:

- **US Rulebook for Engineering Employees 1.13 Reporting and Complying with Instructions**
- **US Rulebook for Engineering Employees 1.15 Duty - Reporting or Absence**

The Carrier issued another notice, also dated July 14, 2020, informing Claimant that he was "held out of service until the facts of this circumstance can be determined through a hearing investigation."

On July 24, 2020 the hearing investigation convened. Claimant, assisted by his representative, presented testimony, an exhibit and examined the Carrier's witness and two (2) exhibits.

On August 7, 2020 the Assistant Chief Engineer - St. Paul notified Claimant of his dismissal from service effective immediately:

Based on the facts and evidence in the hearing record and your past discipline history with specific attention to the Waiver that you signed on May 18, 2020 acknowledging that you were at the Final Step of the Hybrid Discipline & Accountability Process, that it was your Last Chance to prove you could comply with the Rules, and that any additional discipline would subject you to dismissal[.]

After completion of on-property exchanges and proceedings including conference, the parties are deadlocked. In accordance with the Agreement dated December 16, 2021, the dispute is before the Board for adjudication and decision.

---

## **FINDINGS:**

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Agreement's Paragraph (H) states documentation comprising the record "will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on-property, as applicable." Additionally "[t]he Neutral Member shall have the authority to require the production of such additional evidence, either oral or written, as he or she may desire from the parties." The Neutral Member did not require additional testimony or evidence.

In 2003 the Claimant entered service with the Carrier. Beginning 2015 and continuing into 2020, Claimant incurred the following discipline:

June 25, 2015	5-Day Suspension: Failure to Report for Work Monday June 22 <sup>nd</sup>
June 25, 2015	5-Day Suspension: Attendance (March 26 <sup>th</sup> - May 6 <sup>th</sup> )
April 28, 2017	10-Day Suspension: Waiver
January 5, 2018	5-Day Record Suspension: Waiver - Attendance
July 18, 2019	10 Demerits: Waiver
May 18, 2020	25 Demerits: Last Chance Waiver - Attendance

Regarding the Last Chance Waiver ("LCW") dated May 18, 2020, Claimant acknowledged his responsibility when he failed to be present at the start of his shift on April 21 and 27, 2020 and failed to report for work on May 4 and 5, 2020. These incidents indicate a potential violation of Rule 1.15 – Duty - Reporting or Absence. In addition to twenty-five (25) demerits, the LCW states:

**WARNING:** You are currently at the final step of the *Hybrid Discipline & Accountability Process* (the "*Process*"). The next step of the *Process* is dismissal. As such, your employment with the Company is in jeopardy if you commit another offense for which discipline is warranted. Please consult the *Process* to learn how you can improve your discipline standing.

By your signature below you acknowledge your understanding that this is your **last chance** to improve your discipline standing and upon any proven violation of the Company's Operating Rules, Safety Rules, Policies, Procedures and/or failure to comply with instructions from proper authority within 24 months of the date of this agreement you may be subject to disciplinary action up to and including dismissal.

In early July 2020 the Carrier issued a bid award to Claimant for the P-5 utility crew which was assigned to build track panels at Humboldt Yard (the "Yard"), Minneapolis, MN. Prior to the bid award Claimant was on furlough.

On Thursday - July 9, 2020 Claimant contacted the Production Manager - Utility Crews to obtain the start time and place to report for work on Monday - July 13, 2020. The Manager instructed Claimant to report to the Yard at 0600 hours; Claimant indicated that he knew the Yard's location. The Manager provided Claimant with the lodging arrangements where the crew would stay beginning Sunday - July 12, 2020. On the 12<sup>th</sup> Claimant left his residence in Harvey, ND, at 2330 hours to report to the Yard in Minneapolis on the 13<sup>th</sup> at 0700 hours. Harvey, ND, is approximately six hundred (600) miles from Minneapolis, MN.

On July 13 the crew reported at 0600 hours, received a job briefing and commenced working. Claimant arrived at approximately 0845 hours. In a series of telephone exchanges with his Manager beginning at 0645 hours, Claimant indicated he understood start time was 0700 hours and, at the time of this conversation, he had been stopped by law enforcement for speeding. He was a "few minutes out" from the Yard and anticipated arriving in or around 0705 hours. Claimant, aggravated by the law enforcement stop, continued driving although he was lost and did not have the address for the Yard.

At 0730 hours the Manager texted the address to Claimant which he inserted into his mobile map for directions. At 0815 hours the Manager contacted Claimant by telephone to determine his whereabouts; Claimant indicated he was still lost but soon to arrive. During this discussion the Manager provided Claimant with directions and instructed him to report to the depot in the Yard. Upon arriving at 0845 hours, the Manager conducted a job briefing with Claimant and directed him to the lodge.

The next day (July 14) the Carrier issued notice to Claimant that he was held out of service pending an investigative hearing into the circumstances of July 13. Thereafter the Organization presented an appeal dated November 5, 2020; the Carrier's response dated December 22, 2020 denied the appeal; and conference convened on September 1, 2021 as recorded by letter dated September 2, 2021.

The well-established and recognized function of the Board is to conduct an appellate review of the record which is comprised of documentation itemized in Paragraph (H) of the Agreement. When the record presents substantial evidence in support of the Carrier, the discipline assessed remains undisturbed unless exposed as arbitrary, capricious, discriminatory or an abuse of discretion.

Whether the Carrier prejudged Claimant's culpability and denied him due process when it held him out of service prior to a fair and impartial hearing are reviewed as presented in the Organization's appeal and the Carrier's denial of that appeal. The Board finds that the Carrier did not prejudice Claimant's culpability when it held him out of service for "serious rules violations" - - a term undefined in the collective bargaining agreements in this record but subject to interpretation in the context of the *Process* which classifies infractions into three (3) categories - - major, non-major and attendance. The severity of an attendance infraction is emphasized in the LCW **WARNING** where Claimant was advised that he was at the final step in the *Process* yet afforded - -

... your **last chance** to improve your discipline standing and upon any proven violation of the Company's Operating Rules, Safety Rules, Policies, Procedures and/or failure to comply with instructions from proper authority within 24 months of the date of this agreement you may be subject to disciplinary action up to and including dismissal.

In addition to not prejudging Claimant, the Carrier afforded Claimant due process and a fair and impartial hearing. In this regard, the hearing officer developed the record which was reviewed by the deciding official prior to that official assessing discipline.

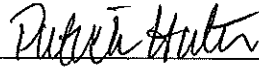
The burden of proof resides with the Carrier to establish the charged rules violations as well as show that dismissal is an appropriate sanction and not harsh or punitive. There is substantial evidence to sustain the rules violations and dismissal. Claimant did not arrive at the designated place by 0600 hours or 0700 hours. Claimant arrived at 0845 hours. Claimant's late report violates Rule 1.13 Reporting and Complying with Instructions ("Employees will report to and comply with instructions from supervisors who have the proper jurisdiction") and Rule 1.15 Duty - Reporting or Absence ("Employees must report for duty at the designated time and place" and "continued failure by employees to protect their employment will be cause for dismissal"). Claimant's reasons for late reporting - - stopped by law enforcement for speeding and could not find the Yard - - do not insulate him from the consequences of his rule violations.

Given the **WARNING** in the LCW, Claimant's prior disciplinary history, and his placement at the final step in the *Process* where dismissal is an appropriate sanction, the Board will not disturb the Carrier's assessment of discipline. Repeat violations of rules over an extended period of time shows progressive disciplinary measures are ineffective. Violating the LCW two (2) months after executing it is the most recent example.

Since the Carrier did not act or decide in an arbitrary, capricious, or discriminatory manner nor abuse its discretion, this claim will be denied.

**AWARD:**

Claim denied.



Patrick Halter  
Neutral Referee

Dated: 8/11/2022



Erica Barnard  
Carrier Member  
Dated: August 11, 2022



John Schlismann  
Employee Member  
Dated: August 11, 2022