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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25142
Docket No. 44885
00-1-99-1-U-2120

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of Engineer D. W. Smith for removal of Level 5 Discipline, for immediate reinstatement, all lost time, fringe benefits, vacation and seniority rights unimpaired, and clearing of this notation of discipline from his record.”

FINDINGS:

The First 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.

Claimant, Engineer D. W. Smith, was charged on July 8, 1998, with failure to protect his assignment and being absent from his assignment without proper authority. This Notice was hand delivered to the Claimant at a Hearing in another matter that eventually resulted in First Division Award 25141.

The Hearing in the instant case was held on August 18 and 19, 1998. At the outset of the Hearing, the Hearing Officer read into the record a revision of the charge

letter that was originally handed to the Claimant. The original letter did not identify the Carrier Rules that were violated or when the Claimant was to have violated these rules:

"Dear Mr. Smith:

Please arrange to report to the Office of Senior Manager of Terminal Operations, 3412 Carondelet Avenue, Dupon, Illinois, on July 13, 1998, at 10:00 A.M., for formal investigation to develop the facts and place responsibility, if any, in connection with your alleged failure to protect your assignment and being absent from your assignment without proper authority.

The investigation will be conducted in accordance with applicable provisions of the collective bargaining agreement between the Company and the Organization representing your craft or class. You are entitled to representation as provided in the agreement. You may produce such witnesses as you desire at your own expense.

The proposed discipline is a Level 5.

Any discussion regarding this investigation or any request for postponement from the union representative or the charged, must be made personally to the hearing manager.

Yours truly,

R.E. Richardson
Director Quality Transportation"

As a result of the August 18 and 19 Hearing, the Claimant was found guilty of the charges and assessed a Level 5 penalty. Level 5 equates to permanent dismissal from the Carrier's service. The Board has reviewed the record of this case, including the transcript of the Hearing. As a result of that review, the Board has concluded that, based on the record presented to it, the Carrier has acted in an arbitrary and capricious manner in finding the Claimant guilty as charged and dismissing him from service.

There is no acceptable evidence contained in this record to prove that the Claimant did not attempt on numerous occasions between May 29 and July 8, 1998 (the day charges in this case were presented to him) to mark up for duty. There is also no acceptable evidence presented in the record to demonstrate that Carrier attempted on 50 occasions to call the Claimant during this period, with no success. The Carrier bases its case against the Claimant on the fact that because he did not work between May 26, and July 8, 1998, he abandoned his job. It has not carried its required burden of proof on these charges, just as it has not proven that the Claimant did not attempt to mark up or that the Claimant was called by the Carrier on 50 occasions and received no response.

The Organization presented numerous procedural arguments alleging fatal errors on the part of the Carrier. The Board does not find it necessary to address these issues at this point. There is, however, one major theme in this case that is critical. It concerns Carrier's absenteeism policy and how that policy was applied to the Claimant.

While the Board does not have the advantage of the absenteeism policy to review, it can be concluded from Mr. Lowery's testimony that employees who are identified as attendance problems are contacted by the Attendance Officer, either by mail or in person, and informed that regular attendance is required and violators will be disciplined, perhaps even be dismissed, if no improvement in attendance results from the contact. Mr. Lowery is the absenteeism officer and the Carrier's only witness in this case. The charges were developed by Mr. Lowery, based on what he stated was Claimant's work record (the work record is not contained in the record before the Board). He testified at the Hearing that he never contacted the Claimant in any manner prior to or after he reviewed his record and developed the charges. The Board considers that procedure to be arbitrary and an example of disparate treatment of an employee by an employer. If any employee who is considered an attendance problem by local management receives the benefit of the Carrier's absenteeism policy, all employees with serious attendance problems should be included in the program. The Carrier did not offer a reasonable explanation of why the Claimant's attendance problem was not discussed with him prior to his being brought up on charges.

Based on the record presented to the Board, it is our conclusion that the Carrier fell short of providing the Claimant with the same counseling and consideration granted other employees with attendance problems. The Claimant therefore shall be returned to work with seniority, but with no pay for lost time and benefits.

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AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 13th day of July, 2000.