

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36166
Docket No. MW-36219
02-3-00-3-420

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific (Western Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that

- (1) The discipline (letter of reprimand) assessed Grinder Operator B. R. Davis for his alleged violation of Rules 1.15 and 1.13 on February 24, 1999 when he allegedly told his foreman he had permission to drive his personal vehicle to the job site and allegedly left the work site early was without just and sufficient cause, based on unproven charges and in violation of the Agreement (Carrier's File 1195741 SPW).
- (2) The dismissal (Level 5 Discipline) of Grinder Operator B. R. Davis for his alleged reporting time not worked on January 13 and 20, 1999 was without just and sufficient cause, unwarranted, an abuse of discretion, excessive and in violation of the Agreement (Carrier's File 1195588).
- (3) As a consequence of the violation referred to in Part (1) above, Grinder Operator B. R. Davis shall have his record cleared of this incident
- (4) As a consequence of the violation referred to in Part (2) above, Grinder Operator B. R. Davis shall now be reinstated to service with seniority and all other rights unimpaired, compensated for all wage loss suffered and have his record cleared of the incident."

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.

~~On May 18, 1981, the Claimant established seniority as a Welder Helper in the Track~~
Subdepartment. On January 13, 1999, he was assigned to System Welding Gang 8485 as a Grinder Operator. His normal working hours were 6:00 A.M. to 4:30 P.M. Monday through Thursday.

On January 12, 1999, the Claimant learned that his wife and new child were to be released from the hospital. The Claimant attempted to contact Supervisor J. B. Bondurant and Director R. L. Davis to advise them that he would have to leave work early on January 13 in order to bring his wife and child home from the hospital because no one else was available to transport them home. Supervisor Bondurant was away from the gang so he could not be contacted and the Claimant was unable to reach Director Davis on the telephone.

The Claimant drove his personal vehicle to the worksite the morning of January 13, 1999, and informed Acting Gang Foreman Flores that he would have to leave work at 11:00 A.M. to bring his wife and child home from the hospital. Foreman Flores did not take any exception to the Claimant leaving the gang before 4:00 P.M. that day.

In January 1999, the Claimant was required to record his own time worked. He did this by either telephoning in his time to the Carrier or by recording it via a computer. The Claimant reported working 10 hours on January 13, 1999, although he actually worked only five hours that day because he left the gang at 11:00 A.M. On January 20, 1999, the Claimant again reported working ten hours although he actually worked only about seven hours that day.

On or about February 11, 1999, the Claimant was notified to attend an investigation for allegedly leaving work at 11:00 A.M. on January 13, 1999, and reporting working ten hours that day; and for allegedly reporting working ten hours on January 20, 1999, when he left work at 1:00 P.M. The investigation commenced on February 9 and reconvened on February 24, 1999.

On March 15, 1999, the Claimant was issued Level 1 discipline (letter of reprimand) under the Carrier's UPGRADE Discipline Policy for telling his Foreman that he had

permission to drive his personal vehicle to the job site on January 13, 1999, and for leaving the job site early that day without proper authority.

On March 15, 1999, the Claimant was also issued Level 5 discipline (dismissal from service) for his purported dishonesty in reporting that he worked ten hours on January 13 and January 20, 1999, when, in fact, he only worked five hours and seven hours, respectively on those days.

The Organization appealed the Claimant's March 15, 1999 letter of reprimand and his March 15, 1999 dismissal. The Carrier denied those appeals insisting that there was just cause for this discipline. The Organization combined the two disputes into one Submission which it filed with the Board on September 1, 2000.

Level 1 discipline (letter of reprimand)

The Claimant was given a letter of reprimand purportedly for: (1) telling Foreman Flores that he had permission from Director Davis to drive his personal vehicle to the job site on January 13, 1999; and (2) leaving the job site early without proper authority. There was no substantial evidence produced at the Claimant's Investigation to support either allegation, in the Board's opinion.

The Claimant did not have permission from anyone in authority to drive his personal vehicle to where System Welding Gang 8485 was working on January 13, 1999. He emphatically denied telling Acting Gang Foreman Flores that he had been granted permission to drive his personal vehicle to the job site. The Board can discern no reason to question Foreman Flores' testimony. However, it was not corroborated by any other witness. We therefore are constrained to conclude that the Carrier has not proven by substantial evidence that the Claimant told his Foreman that he had been given permission to drive his personal vehicle to work on January 13, 1999.

Nor was there substantial evidence adduced at the Claimant's Investigation that he left the job site early on January 13, 1999 without proper authority. It is true that neither Supervisor Bondurant nor Director Track Maintenance Davis gave the Claimant permission to leave the gang at 11:00 A.M. on January 13, 1999. However, when the Claimant reported to Gang 8485 on January 13 he explained his personal circumstances to Acting Gang Foreman Flores and specifically told him that he had to leave the gang around 11:00 A.M. Foreman Flores took no exception to the Claimant leaving work before the end of the workday.

Under the circumstances of this case, Acting Gang Foreman Flores must be considered "proper authority." Accordingly, the Claimant did not leave the job site early on January 13,

1999 without proper authority and the letter of reprimand issued him on March 15, 1999 must be removed from his record as a result.

Level 5 discipline (dismissal)

It is undisputed that the Claimant reported working ten hours on January 13 and January 20, 1999 when, in fact, he left the gang prior to 4:00 P.M. each day. Nevertheless, the Board does not believe that he intentionally misrepresented the hours he worked on these two days. Rather, it appears that he made a mistake when he telephoned in his time because he was unfamiliar with the system used to report one's work hours. ~~It is instructive to note that the Claimant worked most of his career on System Gangs where employees' hours are kept for them.~~ The Claimant should be given the benefit of the doubt due to the extenuating circumstances extant in this case and his 19 years of railroad service.

For all the foregoing reasons, the Board finds that the Claimant must be reinstated to service with his seniority unimpaired but without compensation for any lost wages.

AWARD

Claims 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 Third Division

Dated at Chicago, Illinois, this 20th day of August 2002.