

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13747

Docket No. 13645

03-2-02-2-2

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Burlington Northern Santa Fe Railway Company)

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 35 in particular, Electrician Mikel White was unjustly issued a Level I Formal Reprimand, placed on probation for a period of one (1) year and ordered to develop a joint action plan following an investigation held November 30, 1999.
2. That the investigation held on November 30, 1999 was not a fair and impartial investigation under the terms required by the rules of the current Agreement and that the discipline assessed Electrician Mikel White was unjust and unwarranted.
3. That accordingly, the Burlington Northern/Santa Fe Railroad Company be directed to rescind the Level I Formal Reprimand, the one (1) year probationary period and the requirement to develop a joint written action plan. Further, that all record of this matter be removed from Electrician Mikel White’s personal record.”

FINDINGS:

The Second 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.

The Claimant entered the Carrier's Electrician's Apprenticeship Program on September 22, 1997, at Alliance, Nebraska. He began his work at the Alliance, Nebraska, Locomotive Maintenance Facility. After his apprenticeship, he was assigned to the Guernsey, Wyoming, facility.

On October 9, 1999, the Claimant reportedly advised his Relief Foreman that he would not be able to protect his assignment the next morning because he was incarcerated. The Relief Foreman was new and informed the Claimant he would notify the supervisor who was to replace him.

By letter dated October 15, 1999, the Carrier directed the Claimant to attend a formal Investigation to be held in the Yard Office Conference Room, Guernsey, Wyoming, on October 27, 1999. The stated purpose of the Hearing was to develop facts and determine his responsibility, if any, in allegedly failing to comply with proper authority by failing to properly absent himself on October 9, 1999.

The Hearing was postponed and held on November 30, 1999. After reviewing the evidence presented, the Carrier arrived at its findings. By letter dated December 15, 1999, the Carrier advised the Claimant that there was substantial evidence that he violated Rule S-28.14 by failing to comply with proper authority and failing to properly absent himself on October 9, 1999. He was assessed a Level I Formal Reprimand and required to develop a written action plan with his supervisor.

The Organization took exception to the discipline and filed an appeal on behalf of the Claimant. The claim was progressed through the appeals procedure and the time limits were extended by mutual agreement. The case is therefore properly before the Board for review.

The Carrier maintains that it violated none of the Rules cited by the Organization. In this regard, the Carrier contends the Organization has failed to meet its burden of proof.

The Carrier claims there is no doubt the Claimant did not properly request time off work on October 9, 1999. The Carrier points to his admission of this fact. Therefore, the Claimant violated Rule S-28.14, which provides:

“Rule S-28.14 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.

Employees must not be absent from duty without proper authority. Except for a scheduled vacation period, authorized absence in excess of ten (10) calendar days must be authorized by formal leave of absence, unless current agreement differs.”

The Carrier submits the Claimant was not given permission to be absent when he called in. The Carrier finds unpersuasive the Organization’s contention that the Claimant’s absence was somehow excused because he was unavoidably delayed and called in as soon as possible. The Carrier notes calling in does not automatically grant an employee permission to be absent. The Carrier also notes that the Claimant’s version of why he was arrested was contradicted by the local police report. Although the Claimant portrayed himself as the victim, he was actually arrested for assaulting his mother-in-law. The Carrier insist it was the Claimant’s actions which resulted in his arrest and cites Board Awards which hold that incarceration is not a valid excuse for missing work.

The Carrier argues the discipline assessed the Claimant was extremely lenient. It denies the Organization’s assertion that the Hearing was unfair and not impartial. The Carrier also challenges the Organization’s contention that the Notice of Investigation was invalid because there was no specific Rule violation cited; that the practice on the property has been not to quote specific Rules in the Notice of Investigation nor does Rule 35 require such specificity.

The Carrier insists they have met their burden of demonstrating by substantial evidence that the Claimant violated the cited Rule.

The Carrier contends that in the event this Board sustains the claim, the only remedies to which the Claimant is entitled are those contained in Rule 35 (g).

The Organization argues the Investigation was not fair and impartial and in violation of Rule 35 of the controlling Agreement. Therefore, they contend, the Claimant was unjustly disciplined.

The Organization maintains the question the Board must answer is whether the Claimant properly absented himself from duty on the date in question. It insist he did. The Organization contends he should not be found guilty simply because he was incarcerated since the Claimant called in, as required, and reported his inability to come to work to the Relief Foreman, who had assumed all the responsibilities of a regular supervisor.

Furthermore, the Organization asserts, the Claimant believed he was in compliance with the Rules and all that was necessary was that he call in and report to the supervisor. The Organization also references the Relief Supervisor's testimony as support that such was also the accepted practice.

The Organization submits the Claimant attempted to do the proper thing by being honest and up front in reporting his absence and the reasons therefore. The Organization says there is no evidence that his actions indicated an indifference to his duties or to his position. The Carrier has failed to meet its burden of proof in this respect.

The Board has reviewed the facts of this case, particularly keeping in mind the Organization's contention that the Claimant should not be considered in violation of the Rule since he called in and honestly reported the reason for his absence. Although this was the correct thing to do, we do not find that, in and of itself, it gave the Claimant authority to be absent. To the contrary, it is well established in this industry and certainly in the practices of this Carrier, reporting off does not mean that the absence is excused or authorized. Arbitral authority has long established that incarceration is not a valid excuse for failing to protect an assignment.

The discipline issued in this case was reasonable by all standards.

AWARD

Claim denied.

ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 30th day of June 2003.