

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13830

Docket No. 13722

05-2-03-2-68

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(BNSF Railway Company)

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 35 in particular, the Burlington Northern Santa Fe Railway Company on December 9, 2002, unjustly and arbitrarily removed from service Electrician Larry F. Beuerlein pending a formal investigation.
2. That in violation of the governing Agreement, Rule 35 in particular, the Burlington Northern Santa Fe Railway Company, as a result of an unfair and unwarranted investigation held on January 9, 2003, at Springfield, Missouri, unjustly suspended Mr. Beuerlein for a period of ninety (90) days and assigned a three (3) year probation period to follow said suspension.
3. That, accordingly, the Burlington Northern Santa Fe Railway Company be ordered to promptly make Electrician Larry F. Beuerlein whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of the investigation and unjust assessment of discipline, and further that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 35, Paragraph G of the controlling Agreement.”

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.

At the relevant time, the Claimant held an electrician's position from 4 p.m. to midnight at the Springfield, Missouri service track and had been employed for 35 years. Tr. 30.

By letter dated January 24, 2003, the Claimant received a 90 day suspension and was placed on a three year probation.

The Claimant was given an instruction to work a vacation relief position for one day to cover for another employee on the 11:59 p.m. to 8 a.m. shift on December 7, 2002. According to Mechanical Foreman R. L. Cisneros during a conversation with the Claimant on December 6, 2002 (Tr. 8-9):

"A. I told Mr. Beuerlein that we didn't have anybody to put on the job and that I needed him to work the job. His job was vacation relief.

Q. And what was his reply to that?

A. He said he didn't care. He wasn't going to work the job.

Q. Did he give you any other reason for not working other than he didn't feel it was right to have to work the single day?

A. He had things to do.

Q. Did he elaborate on that?

A. No, he did not."

Cisneros further testified that he later told the Claimant (Tr. 10):

A. ... I'm an officer of the BNSF Railroad. I'm giving you a direct order to work this job Saturday night at midnight and if you don't work this job it's going to be, if you don't come in it's going to be considered insubordination. Do you understand that insubordination is a dismissal offense?" He said he didn't care, he wasn't working the job, he had things to do."

The Claimant does not dispute that he was given a direct order to work and he refused to follow that order (Tr. 30-31):

"A I came to work on December the 5th and I noticed that my name had been placed on the vacation board to work to fill a vacancy that was to take place at midnight on December 7th. ... Next morning I called in work and talked to Mr. Cisneros and basically the conversation was that I told him I wouldn't be working that job. There was no other conversation other than I told him that wouldn't be working the job and there was no conversation with Mr. Cisneros until the next evening when I came to work, which would have been Friday, December the 6th, to work my regular job from 4 p.m. At that time, Mr. Cisneros seemed upset and told me he wanted to talk to me in the office Mr. Cisneros began questioning me saying, "What do you mean you won't be working that job, Saturday night?" And seeing that evidently my phone call telling him that I wouldn't be working that job hadn't sunk in, I again told him that I would not be working that job. He then asked me why that I wouldn't be working the job. I did tell Mr. Cisneros that I had personal business to attend to and that working that

midnight job, being up all night, wouldn't allow me to take care of that personal business on Sunday, December the 8th. At that point, Mr. Cisneros asked me what my personal business was. I did tell Mr. Cisneros that even if the business was to see a whore it was not of his business and that if I told him what my business was it would no longer be a personal matter and, therefore, I was declining to tell him what that personal business was. At that time, Mr. Cisneros told me that he was an officer of the Carrier and, as an officer and the Carrier, he had the authority to give me a direct order, pull me out of service, charge me with insubordination subject to investigation, and that he would do that at 4 p.m. the next day when I came in if, at that time, I refused to work the midnight shift. I told Mr. Cisneros again that I wouldn't be working that midnight shift and that I would be coming in at 4 o'clock to work my regular assigned job."

The Claimant testified that he was allowed to work his 4 p.m. shift the next day. Tr. 31. Then, according to the Claimant, near the end of his shift (Tr. 31-32):

"A [Terminal Manager] Robert Johnson ... proceeded to ask, to tell me that he was giving me a direct order to work the midnight shift and that if I didn't comply that I would be charged with insubordination, pulled out of service, removed from the property, would not be allowed to get back on the property, and he asked me if I understood the seriousness of those charges. I said, "Yes, I do understand." I said, "Mr. Cisneros has threatened to me these charges earlier." He then said that he wanted me to realize how serious it was and that if I didn't comply, with his direct order that it was going to get real nasty and get nasty real fast. ... I asked Mr. Johnson if there was anything I could say that would change his mind or change the charges being brought against me. At that time, he told me nothing that you could say whatsoever would change my mind about this direct order or the charges being brought against you. I told Mr. Johnson that being that was the case

that there was no sense in me wasting his time and wasting my time to try to change his mind and that I would be leaving the property.

* * *

Q. You understood the consequences of leaving with no authority?

A. I understood, I understood, I've been a local chairman for six years. I understood that anytime someone doesn't obey a direct order, unless it involves safety, they can be charged with insubordination and pulled out of service pending investigation. Yes, I do know that.

Q. And you elected to take that end?

A. Like I said, I had told my immediate supervisor I needed to lay off and, as far as I was concerned, the matter should have ended there and he decided to press it further. So yes, I did leave and yes, I knew that he was determined to see that something was done to me if I didn't stay and work.

The Claimant also admitted that he was the proper person to fill the vacation position (Tr. 33):

Q. Who, who was the proper person to fill this electrician's vacancy? Was you first in line for that vacancy?

A. I am the only vacation relief man. ...

Q. So you was the proper person to fill that vacation?

A. If, if there was a vacancy and it was an electrician, I was the proper one and if I couldn't fill that job then it was opened to anybody else that wanted to work it as overtime.

Substantial evidence exists in this record for this Board to find that the Claimant was insubordinate, failed to comply with instructions and refused to report for duty. The Claimant was given an assignment consistent with his position

to fill a vacation vacancy. When he refused the assignment, the Claimant was given direct orders by Carrier officials to fill the assignment and was told that discipline would result if he did not follow those orders. The Claimant refused to comply with those orders. The Claimant's obligation was to obey the instructions and orders given to him. If the Claimant felt those instructions and orders were incorrect, he could have raised that position later. Misconduct has been shown.

The Organization argues that a 90 day suspension for a 35 year employee with no prior discipline record is arbitrary, harsh and excessive. In the ordinary case, we would agree. However, this is not the ordinary case.

The Claimant's degree of insubordination as demonstrated by his testimony was nothing short of remarkable. As the Claimant testified, he was the proper employee to fill the vacancy. Further, according to the Claimant, after Mechanical Foreman Cisneros told the Claimant that he had to work the vacancy, the Claimant refused. When the topic was discussed again, according to Claimant, "... evidently my phone call telling him that I wouldn't be working that job hadn't sunk in, I again told him that I would not be working the job." When questioned by Cisneros about why he could not work, again according to the Claimant, he told Cisneros he had personal business to attend to and "... that even if the business was to see a whore it was not of his business ...". Claimant also testified that based upon his service as a local chairman, he "... understood that anytime someone doesn't obey a direct order, unless it involves safety, they can be charged with insubordination ... Yes, I do know that."

The purpose of discipline is to send a corrective message to an employee who engages in misconduct that he is obligated to conform his conduct to the Carrier's rules — here, to obey the instructions and orders of his superiors. The evidence here shows that not only did the Claimant fail in that regard, he did so purposefully and defiantly, knowing full well what the consequences could be. For this Board to reduce the discipline given to the Claimant for such egregious misconduct would only send the message to the Claimant that he can act in a similar manner in the future. There are no mitigating circumstances demonstrated in this record. Perhaps after the Claimant learns of the result of this award, the corrective message that he must obey the instructions and orders of his superiors will, in his words, have "sunk in". Quite frankly, given the egregious level of misconduct admitted by

the Claimant and utter lack of any notion that he did something wrong, the Claimant is lucky that he did not receive even more severe discipline — even with his 35 years of service and good record. The discipline was not arbitrary.

The Organization's other arguments do not change the result. The claim shall be denied.

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 1st day of April 2005.