

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13917
Docket No. 13802
07-2-06-2-11

The Second Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

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

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Rule 40 in particular, the BNSF Railway Company, as a result of an unfair and unwarranted investigation held on January 26, 2005 at Kansas City, Missouri, unjustly and arbitrarily assessed Mechanical Department Electrician Brian Powell with a record suspension of ten (10) days and probationary period of one (1) year.**
- 2. Accordingly, the BNSF Railway Company be ordered to promptly make Electrician Brian Powell whole for any and all lost wages, rights, benefits and privileges which were adversely affected as a result of the unjust assessment of discipline and that all record of this matter be expunged from Brian Powell's personal record, all in accordance with the terms of Rule 40, Paragraph 1 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.

On December 28, 2004, Carrier notified Claimant to appear for a formal Investigation on January 12, 2005 which was postponed and subsequently held on January 26, 2005 concerning the following charge:

"Please report to the office of the Shop Superintendent, 2201 Argentine Blvd., Second Floor, Kansas City, Kansas on Wednesday, January 15, 2005, at 2:00 P.M. for the purpose of ascertaining the facts and determining responsibility, if any, in connection with your alleged violation of Rule S-28.13 Reporting and Complying with Instructions from the BNSF Mechanical/P&M Safety Rules and Policies dated January 31, 1999 and all revisions to current date.

On Sunday, December 19, 2004, you allegedly were forced to work 3rd Shift and allegedly were told that if you did not report to work that you would be cited for failure to follow instructions. You allegedly failed to report to work as instructed."

On February 14, 2005, Claimant was notified that he had been found guilty as charged and was assessed a record suspension of ten days and probationary period of one year.

It is the position of the Organization that Claimant was deprived of a fair and impartial Investigation because the charges were not specific and he was disciplined for a different Rule than charged with. On the merits it states Carrier erred in issuing discipline to Claimant because it did not follow its empowerment protocol to discuss and develop a plan of resolution with Claimant. Additionally, it argues that Claimant had empowered himself on several prior occasions without repercussions thus it was unreasonable for the Carrier to discipline him without any forewarning.

Carrier argues that Claimant failed to protect the assignment he was called for. He was instructed to report for overtime service at the Argentine facility, but instead advised his Supervisor he was "empowering" himself to not protect the assignment because he was too tired to continue working. His timing in this

instance indicates he was not interested in dealing with the "Empowerment Policy" as it is written. He did not work with his Supervisor to resolve the issue, but simply told him he would not work the overtime and left. Claimant did not follow instructions and the discipline assessed was appropriate.

The Board has reviewed the transcript and record of evidence and finds no merit to the Organization's procedural arguments that Claimant was deprived of a fair and impartial Hearing. It is clear by its able and vigorous defense of the Claimant it and Claimant both understood the charges and was fully prepared to defend against them.

The dispute will be resolved on its merits. The record reveals that Claimant is employed as an Electrician at the Carrier's Murray Yard facility in Kansas City, Kansas. The Carrier has two shop facilities in the Kansas City area, the aforementioned and the Argentine mechanical facility located in Kansas City, Kansas. The employees at both facilities work under the same Agreement. When employees are needed for overtime, the Carrier first calls from employees at the facility where workers are needed. In those instances when the Carrier cannot get an adequate amount of workers from the facility where they are needed, it assigns employees from the other mechanical facility in the area.

On December 19, 2004, the Carrier had overtime assignments to fill at the Argentine mechanical facility. It was unable to fill all of the overtime assignments with employees who worked at that location. It then decided that the Claimant would be assigned to fill an overtime shift at the Argentine facility beginning at 11:30 P.M. on December 19th. The Claimant was working the second shift at the Murray facility where he was told by his Supervisor that he was being forced assigned to report for an 11:30 P.M. shift at the Argentine facility. He was also advised that if he failed to protect the assignment he would be cited for failure to comply with instructions.

About 11:25 P.M., as Claimant was clocking out at the Murray facility, he informed his Supervisor that he would not be working the 11:30 P.M. shift at Murray because he was empowering himself not to work due to safety reasons.

The Organization and the Claimant argue that the Carrier's "Empowerment Policy" allows the Claimant the right to refuse to work the forced overtime assignment because he was too tired to continue working, whereas, the Carrier

argues it requires interaction between the employee and the Supervisor for resolution.

It is clear there was no interaction in this instance. Claimant made his "empowerment announcement" to his Supervisor while leaving that he would not be working the overtime shift at Argentine. If the Claimant believed he had a safety issue which would not allow him to safely perform his duties that night, the time to address it would have been when he was initially forced, not just before clocking out. Under the "Empowerment Policy" the Claimant and his Supervisor were both responsible to try and see if they could find a mutually viable solution to the Claimant's perceived "fatigue" issue and the Carrier's need to fill an overtime assignment. Claimant was informed he was required to work the overtime and that if he failed to do so a Hearing would be scheduled. In spite of this knowledge the Claimant left work without trying to resolve his alleged "fatigue" issue on the basis that he believed by seeking empowerment he could not be required to work.

The Claimant's perception of the "Empowerment Policy" is in error. However, there is some basis for that misconception which is revealed in the testimony of the General Foreman. On page 33 of the transcript he testified that he had personally been involved in having the Claimant called to work forced overtime four or five times over the previous 12 months. In each prior instance Claimant had empowered himself and had never worked any of the overtime assignments. The record further reveals that Claimant was never counseled or disciplined for having refused to work any of those forced overtime shifts.

However, it appears in this instance the General Foreman became tired of Claimant's refusal to work overtime and decided to remedy the matter by calling an Investigation if he did not work. Claimant was given short notice or forewarning that his prior pattern of refusing overtime would not be accepted and refusal could result in discipline. Nonetheless, he would have been well advised to have obeyed and grieved later as the evidence does not rise to the level to indicate that Carrier's directive was too dangerous to comply with. The Carrier has proven that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had approximately 12 years of service (accident free) with a good work record. Discipline should be corrective and that is accomplished in this case by reducing the discipline to a Formal Letter of Reprimand.

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 Second Division**

Dated at Chicago, Illinois, this 6th day of August 2007.