

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 26276
Docket Number **MW-26673**

Edwin H. **Benn**, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of **Way Employees**
(Burlington Northern Railroad Company
(former St. Louis-San Francisco Railway Co.)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of **Trackman** D. R. Brown on March 26, 1984 for alleged Insubordination and absence from duty **without** proper authority at 2130 Hours on March 23, 1984, was arbitrary, capricious and without just and sufficient cause (**System File** B-1957).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Claimant, a **Trackman** with a seniority date of October 9, 1979, **was** assigned to System Tie Gang T-2.

Notice of Investigation was given for April 3, 1984, concerning the following charges:

"This investigation **is** for the **purpose** of ascertaining the facts and determining Mr. Brown's responsibility, if any, in connection with his being dismissed from service of Burlington Northern Railroad on March 26, 1984 by **Road-**master Steve **Gunn** for his alleged insubordination by failing to comply with instructions from Asst. Foreman **M. Marion**, and his absence from duty without proper authority at 2130 Hours on March 23, 1984 while working near Holly Springs, Mississippi.

Previous dates relating to Mr. Brown's failing to comply with instructions will be referred to at this investigation."

Claimant was dismissed from service on March 26, 1984. **The** record shows that on March 23, 1984, Claimant **was** a member of Roadmaster S. **Gunn's** Tie Gang. **Gunn** testified **at** the Investigation that he told Claimant that the Tie Gang would be going to **work** at a derailment near Holly Springs, **Mississippi** and instructed Claimant to remain at his current location until **Gunn** assembled **the other** members of the Tie Gang. **Gunn** also instructed Claimant to inform other employee not to leave the area until he returned.

Claimant asked **Gunn** if he could take his automobile to the derailment since the derailment site **was** on the way to Claimant's home. **Gunn** gave **Claimant** permission to do so. When **Gunn** returned, however, Claimant had already departed. **Ultimately**, Claimant arrived at the derailment site and joined the Tie Gang after the other employees arrived.

Assistant Foreman **M. Marion** testified that while at the derailment site, he instructed the members of the Tie Gang, including Claimant, to proceed to an area where the power plant **was** located. All of the employees followed Marion's instructions with the exception of Claimant. Marion did not speak with Claimant for approximately three and one-half hours thereafter. At approximately **9:15 P.M.**, Claimant told Marion that Roadmaster **Dunkin** said he could go home and that he **was** going home. **Marion** told Claimant that he could not do so. Marion testified that he and Claimant:

"...talked and he came back walked up a short distance and came back, and I told him again I said 'Donnie Ray, you can't go,' and he told me 'F... you' and then he said he were going away, and I said 'Well, it's your job.' He said 'Well, it's my job.' I said 'You go you will be released from service for walking off and without proper authority.'"

According to Marion, **Claimant** then walked off the job. At the Hearing, written statements (prepared by Marion) from other employees corroborating Marion's account of the incident were introduced. The Organization's representative objected to the receipt of those documents "as these people are not here for me to cross-examine . . ."

According to Claimant, he **was** at the assembling point on March 23, 1984, but denies that he **was** given instructions to go to the derailment site with the members of his Tie Gang. Claimant further denies that he arrived late at the derailment site. Claimant testified that while at the derailment site, he and other employees were assigned work away from the remainder of the Tie Gang and performed duties with a Maintenance Gang under the supervision of Roadmaster **G. Dunkin**. This assignment caused Claimant to eat at a different time than Marion's Tie Gang. Claimant denied telling Marion that he was leaving to go home. According to Claimant, after he returned from his allotted meal period, the Tie Gang had **already** departed from the derailment site.

Roadmaster **Dunkin** denied that he instructed Claimant to work with the Maintenance Gang. **Dunkin** also testified that he observed Claimant standing around and talking to other employees beside a car at the derailment site.

By letter dated April 9, 1984, the Carrier confirmed the decision to dismiss Claimant from service.

The **Organization** argues that Claimant was denied a fair and impartial investigation as required by Rule 91 of the applicable Agreement. First, the **Organization** asserts that the charge against Claimant **was** not precise. We disagree. The charge specifies a date (March 23, 1984), time (2130 hours),

location (near Holly Springs, **Mississippi**) and asserted misconduct (alleged insubordination by failing to comply with **instructions** from Asst. Foreman M. Marion, and his absence from duty without proper authority). We find the charge sufficiently precise concerning the March 23, 1984 incidents to put Claimant on notice of the allegations against him and to permit Claimant to adequately prepare his case to defend against those allegations. Aside from the pro forma objection raised during the Hearing, we do not find any indication that Claimant was surprised or otherwise prejudiced by the nature of the charges framed. **Nor** do we find any indication in the record to show that Claimant sought to postpone or otherwise **continue** the Hearing as a result of his being unable to prepare a defense against the allegations as framed after the evidence concerning the charges **was** brought forward. Further, the fact that the Carrier introduced **Claimant's** prior **disciplinary** history is not in error. **We** do not consider those prior events as matters being raised for the first time at the Investigation without proper prior notice to Claimant. Cf. Third Division Award 26177. Notwithstanding the reference in the charges to "[p]revious dates relating to [Claimant's] failure to comply with instructions" as discussed below, we shall only consider **Claimant's** prior disciplinary record in determining whether the Carrier abused its discretion by imposing **dismissal** as a penalty. See Third Division Award 26180 and Awards cited therein.

Second, the Organization **asserts** that a fair and impartial Investigation **was** not given by **virtue** of the fact that the April 9, 1984 letter of **dismissal** relies upon Rules 500, 502 and 502(b) and Claimant was not advised in writing that he **was being** charged with a violation of those rules. Those rules prohibit employees from being insubordinate (Rule 500), absents themselves from duty (Rule 502) and require that employees comply with instructions from the proper authority (Rule 502(b)). We do not deem the lack of specific citation to the above stated rules as defective so as to require a different result in this case. Nothing in Rule 91 requires that reference be made to the rule numbers allegedly violated. The requirement is for the charge to be "precise." A reading of the charge against Claimant shows that he **was** specifically charged with the substance of those rules and he had adequate notice of the charges against him. Therefore, the charges were sufficiently "precise." Citation to the specific rule number is not always required. See Third Division Award 24666; Public Law Board No. 2206, Award No. 25; Public Law Board 2746, Award No. 15.

Third, the Organization contests the introduction of statements of alleged corroborating witnesses to the March 23, 1984 conversation between Claimant and Assistant Foreman Marion. **We** find it unnecessary to resolve this issue in this matter since the statements were merely corroborative and cumulative to Marion's testimony, which testimony Claimant had full opportunity to cross-examine. Statements of witnesses who have not been present at a hearing to be cross-examined **have** been permitted by this Board. See Third Division Award 23352. On the basis of this record, even if we disregarded those statements, the result would not be different.

Fourth, **we find** the remaining procedural arguments raised by the **Organization** to be without merit and thus conclude that Claimant received a fair and impartial Investigation within the meaning of Rule 91.

Finally, with respect to the merits of the dispute, in our review function we **only** pass upon the question of whether or not substantial evidence exists in the record to sustain the Carrier's conclusion that discipline **was** appropriate. If we find such evidence, then the penalty imposed is within the discretion of the Carrier unless we can say the record demonstrates that the penalty **was discriminatory**, unjust, unreasonable, capricious or arbitrary so as to constitute an abuse of that discretion. See Third Division Award 16280; Fourth Division Award 3490. We find substantial evidence in the record to support the Carrier's decision to impose discipline. The record shows that on March 23, 1984, Claimant was given instructions by his Supervisor Marion, which instructions Claimant did not follow and further, Claimant left the derailment site without permission. Such conduct clearly violates Rules 500, 502 and 502(b). In light of our review function limiting us to the search for substantial evidence rather than a redetermination of the facts, the fact that Claimant denies certain aspects of the events does not change the result. Third Division Awards 26152; 13117. With respect to the penalty imposed, we cannot say that dismissal **was** of a degree to constitute an abuse of discretion. Claimant's prior disciplinary record demonstrates **similar** conduct and further shows that in the past, the Carrier has taken progressive steps in an effort to correct Claimant's problem. Nothing in this record **can cause** us to say that dismissal was an abuse of discretion.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment **Board** has jurisdiction over the dispute involved herein; and


That the Agreement was not violated.

A W A R D

Claim denied.

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

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.