

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32287  
Docket No. MW-32481  
97-3-95-3-261**

**The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.**

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

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

- (1) The dismissal of Truck Driver R. G. Snow for alleged failure '\*\*\* to follow instructions issued by your foreman' at approximately 9:15 A.M. on February 5, 1994, was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (Carrier's File 940351 WPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."**

**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 February 5, 1994 the Claimant was employed by the Carrier at Pulga, California on System Gang 9077. On that day at 8:00 A.M. the Claimant reported for work at the assembly point at Oroville, California. At approximately 9:15 A.M. when the Claimant arrived at the Pulga work site he was told by Foreman Swan that the Carrier experienced a major derailment. According to the Carrier's version of the events of that day, Swan instructed the employees in System Gang 9077 to move their personal vehicles out of the way and he would provide transportation for them to work at the derailment site.

It is undisputed that the Claimant left the work site and went home. What was said by Swan to the Claimant is at the crux of this dispute.

On February 7, 1994, the Claimant was served with a Notice of Investigation by the Carrier, which in relevant part, stated:

"At approximately 9:15 a.m. on February 5, 1994 in the vicinity of Pulga, Ca. You were instructed during the job briefing to move your personnel vehicle to a different parking area where you would then be brought back to the job site. After moving your vehicle, you allegedly failed to report back to the job site and thus allegedly failed to follow instructions issued by your foreman, indicating a possible violation of General Rule B and Rules 600, 704 and 607 of Form 7908 'Safety, Radio and General Rules for All Employees (Rev. 10/89).'"

The formal Investigation and Hearing was held on February 8, 1994. Based upon the Investigation and Hearing, by letter dated February 19, 1994, the Carrier dismissed the Claimant from service because he failed to report back to the job site on February 5 and thus failed to follow instruction from Swan.

According to the Claimant, he proceeded to the Pulga work site on February 5. Upon arriving at Pulga, Swan told him to unlock the phone in the tool house. Due to the derailment, he "needed to use it."

As the Claimant and Swan were "walking toward the phone" located in the tool house, the Claimant said that Swan told him "to get your truck and get out of here. There's been a derailment—or he said there had been a derailment you need to get in your truck and get out of here. This is gonna' turn into a zoo."

As he proceeded to leave the area, the Claimant said, Concrete Foreman Slyter signaled him to stop. Slyter, according to the Claimant, asked him what he was doing and he replied that Swan "told me to get in my truck and get out of here." Continuing with his testimony, the Claimant said that Slyter "looked at me and turned, walked away."

The Claimant went home to Quincy, California. He "stayed by the phone, expecting to get a phone call some time during the day" so that he could return to work.

The Claimant testified that in light of the derailment, he felt that there was going to be a long delay "before the hook got down from Portola." He added that a crew has to be called and that it takes about "five hours, probably to get down there. You can't do anything until they get the wreckage out of the way."

There was limited parking in Pulga. As a result, Swan wanted the Claimant's personal vehicle to be moved to provide access to the area for contractors, the "State Hazmat people, Fish and Game, special agents" and to provide enough space for the special equipment that was needed. Swan acknowledged that he said to the Claimant "it was gonna' be a zoo." He testified that he said to the Claimant, "[T]ake your rig up the road, and I'd send someone to bring you back down, so we could work on the derailment." Swan also said that he wanted his personal rig up the road to the top \*\* so it wouldn't get hit."

As he continued with his testimony, Swan qualified what he said to the Claimant. Swan's testimony included the following: "I was fairly sure I worded it in such a way that I wanted him back down there" — "the way I phrased it, I was fairly sure he [the Claimant] understood what was going on" — "he [the Claimant] should've got the impression that anybody was goin' anywhere, except up to the derailment." Finally,

when Swan was asked whether he "actually" told the Claimant "about the plan to work on the derailment, and [whether] everybody was going to be there all day", Swan responded "Not specifically straight to him."

**Based upon the record, this Board concludes that on February 5, 1994, the Claimant exercised a reasonable but mistaken judgment in leaving Pulga and going home to wait for a telephone call from the Carrier to report back to the site to work on the derailment. Swan acknowledged that he failed to clearly instruct him to return to the site; and he failed to specifically disclose that he would be working on the derailment that day.**

**However, the Claimant should have known that (a) the derailment was considered an emergency; and, (b) that one hour and 15 minutes after reporting to work it would have been unusual to be released from work, given the emergency that had occurred, and that he would be needed to work on the derailment. Furthermore, Swan did not specifically release him from work; nor did he tell him to go home and that he would call him later in the day to report to work.**

**In support of its position that the Claimant failed to comply with Swan's instructions, the Carrier relies upon the testimony of Foreman Joe Mayoral who said that he overheard Swan telling the Claimant that he was to "take your vehicle up on the hill and I [would] send a driver to pick you guys up, bring you guys down to go to work." Mayoral said that Swan's instructions were given in the telephone or tool house while the Claimant was sitting by the heater.**

**By contrast, Swan said that his instructions or job briefing were issued to the Claimant when he and the Claimant "were just kind of walking along together" towards the tool house. Contrary to Mayoral's testimony, Swan said that he and the Claimant were the only persons in the tool house. Swan estimated that his job briefing to the Claimant lasted about "thirty seconds"; Mayoral said that the conversation between Swan and the Claimant took "[T]hree or four minutes." The record demonstrates that Mayoral's testimony with respect to the instructions that were given by Swan to the Claimant are at variance with the testimony of Swan. Accordingly, Mayoral's testimony cannot be credited and is of no assistance to the Carrier.**

**Slyter, Foreman of Gang 9099, K. A. Willis and Truck Driver C. E. Bradford in Gang 9099 were not present when Swan gave his job briefing to the Claimant on**

February 5, 1994. Thus, their testimony is of no weight in this case. The fact that the other members of Gang 9099 remained at the site in Pulga to work on the derailment is irrelevant. As Swan acknowledged, in job briefing to the Claimant was given solely to the Claimant while they walked to the tool house.

This Board is of the opinion that the Claimant's dismissal from service is excessive. However, to reinstate the Claimant with back pay is unreasonable in light of his reasonable but mistaken judgment that he was authorized to leave the work site. Accordingly, the Board concludes that the Claimant is to be reinstated to his former position, with seniority, and all other rights, benefits and privileges restored, but without back pay.

### **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 Third Division**

Dated at Chicago, Illinois, this 13th day of November 1997.