

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35306
Docket No. MW-35188
01-3-99-3-23

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri-Kansas-
(Texas Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 2 requiring one (1) day of alternate assignment with pay to develop a corrective action plan] imposed upon Foreman B. R. Cossey in connection with ‘ . . . while working as Foreman, on September 5, 1997, in Enid, Oklahoma, you allegedly did not comply with instructions, when Supervisor Wade Miller instructed you to leave Enid, Oklahoma and tie up at Parsons, Kansas, which you allegedly failed to do, this is in possible violation of Union Pacific Rule 1.13 effective April 10, 1994.’ (Emphasis in original) was arbitrary, capricious and in violation of the Agreement (System File Y97336/1111608 MKT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. R. Cossey’s record shall be cleared of the charges leveled against him.”

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 September 22, 1997, the Claimant was instructed by the Carrier to appear for an Investigation and Hearing on the following charges:

“ . . . to develop the facts and place responsibility, if any, that while working as Foreman, on September 5, 1997, in Enid, Oklahoma, you allegedly did not comply with instructions when supervisor Wade Miller instructed you to leave Enid, Oklahoma and tie up at Parsons, Kansas, which you allegedly failed to do, this is in possible violation of Union Pacific Rule 1.13 effective April 10, 1994.”

The Investigation was postponed and held on October 7, 1997, with the Manager of Track Maintenance acting as the Carrier Hearing Officer. The Claimant was subsequently notified by the Director of Track Maintenance that he was found guilty of the charges. The Claimant was assessed with a Level 2 Discipline. He was required to attend one day of alternative assignment with pay to develop a Corrective Action Plan.

The Carrier's position is that the testimony contained in the record of Investigation contains probative evidence, including the Claimant's own admission, that the Claimant's course of conduct constituted failure to comply with his Supervisor's instructions. No extenuating or exceptional circumstances are here present which would have excused the Claimant from following the supervisory directive, the Carrier argues. Moreover, the Organization's attempt to assert a procedural defect - based on the theory that the Hearing Officer should have rendered the decision - stands unsupported by any provision in the Agreement. In light of the proven misconduct in this case, the Claimant should consider himself fortunate that the discipline imposed was so lenient.

The Organization raises several defenses in support of its claim that the discipline was unjust and unwarranted. First, it contends that the Claimant was deprived of a fair and impartial Investigation when the Director of Track Maintenance rendered the disciplinary decision rather than the Hearing Officer. On the merits, the Organization argues that the Claimant had been subjected to profane and abusive language by his Supervisor and the fact that the Claimant became “upset and incapacitated after being

abused by Mr. Miller cannot be validly construed as insubordination.” Moreover, the Claimant had taken a personal day on September 5, 1997 and he should not have been required to report for work in any event. The Organization also points out that the Claimant has held an unblemished record since he began his employment with the Carrier on September 16, 1969. For all these reasons, the claim should be sustained in its entirety.

At the outset, the Board considered the Organization’s objection that the determination of guilt and assessment of penalty was rendered by a person other than the officer who conducted the Hearing. The Organization cited precedent Awards finding that an employee may be deprived of due process under those facts because it is the Hearing Officer who resolves credibility conflicts. In the absence of a determination by the designated Hearing Officer on those points, a finding of guilt and the imposition of discipline by a Carrier Officer who was not present at the Hearing, and is therefore not qualified to make findings as to credibility, may result in a less than fair Hearing. See, Third Division Award 30015.

We need not reach that issue in this case, however, because the record developed at the Hearing shows that the misconduct alleged has been proven by the Claimant’s own testimony and no significant credibility conflicts exist as to the critical elements of the Carrier’s case. Additionally, there is nothing in the Agreement that specifies which Carrier Officer is to render the disciplinary decision. The controlling Rule in this case, Article 23, Rule 5, merely provides that “Decision will be rendered and the employee notified in writing . . . within ten (10) days of completion of the hearing.” (Emphasis added) Accordingly, we find the Organization’s objection to be without merit.

The Board further finds, notwithstanding the Organization’s arguments to the contrary, that the record substantiates that the Claimant’s actions on September 5, 1997 constituted a failure to comply with a legitimate supervisory directive in violation of Rule 1.13. That rule states:

“Employees will report to and comply with instructions from their supervisors who have proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to the duties.”

It is undisputed that the Carrier's Supervisor received a call from the Track Manager on the morning of Friday, September 5, 1997 telling him to notify the Claimant to load a push cart on the back of the gang truck at Enid, Oklahoma, to be taken to Parsons, Kansas that day. It is further undisputed that when the Supervisor paged the Claimant, the Claimant advised him that he was not at the work site but was at home. The Claimant said nothing about taking a personal day. The record further shows that when the Supervisor specifically instructed the Claimant to contact his men and go to Parsons, Kansas that morning, the Claimant responded that he would do so.

The Claimant testified that he understood the directions but did not report. His explanation for disobeying the directive was as follows:

"On September the 5th, it was around 7:30. Mr. Miller, he called me, paged me is what he done, and I called him back. And informed me that Mr. Ringle had called him, wanted me to get my god-damn sorry ass to Parsons, Kansas right now, that he was madder than shit. And when he told me that, I had first told that I'd try to get a hold my men and go, then I got upset just thinking about that, what he told me. And I just didn't feel like driving to Parsons, Kansas after that."

The Claimant's testimony speaks for itself. Even fully crediting his testimony as to the nature and extent of the profanity used by his Supervisor, there was no justifiable basis for the Claimant's refusal to obey Supervisor Miller's legitimate instructions. The Claimant may have been unhappy with the Friday work assignment and offended by the profanity, but he was obliged to report as instructed, a fact that this employee with nearly 30 years of service knew or certainly should have known.

Similarly, the Claimant's assertion that he properly refused the work assignment because he was off on a personal day is not supported by the evidence. The Claimant readily admitted in his testimony at the Hearing that he had neither discussed with nor received permission from any Carrier Officer to observe September 5, 1997 as a personal day. Apparently, and the record is not altogether clear on this point, Supervisor Miller approved the day as a personal leave day sometime later, perhaps to avert even further discipline being imposed on the Claimant. However, at the time the Claimant was contacted by his Supervisor, he admitted he had no permission to be absent. He was therefore compelled to take his crew to the work site.

Having established the Rule violation, we find no basis to modify the penalty imposed. The Claimant has a long and unblemished record, as the Organization points out, but that fact was taken into consideration by the lenient assessment of discipline. The Level 2 discipline was consistent with the Carrier's UPGRADE policy and not unreasonable or arbitrary under these circumstances. Accordingly, we must rule to deny the claim.

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 Third Division**

Dated at Chicago, Illinois, this 24th day of January, 2001.