

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35374
Docket No. SG-35709
01-3-99-3-682**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of V. G. Sauls, for payment for all time lost plus skill differential pay and benefits and reimbursement for all out of pocket expenses incurred, including but not limited to, travel time, meal expense and mileage, as a result of his dismissal and for any reference to this matter to be removed from his record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 41, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving its charges in connection with an investigation conducted on February 10, 1998. Carrier’s File No. SIB 98-08-10AA. General Chairman’s File No. S9810641. BRS File Case No. 11065-ATSF.”

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 December 27, 1997, the Carrier was advised that the Claimant had been stopped by the Borger, Texas, Police Department at 3:10 A.M., for traffic violations while driving a company vehicle. Borger, Texas, is approximately 195 miles from Syracuse, Kansas, where the Claimant was headquartered. According to the police, the vehicle was seen parked in a known drug and crack cocaine trafficking area. When the police drove around the corner, the Claimant drove away at a high rate of speed. When he was stopped, the police officers determined that the Claimant's driver's license had been suspended until April 27, 1998, due to a July 20, 1996 offense for driving under the influence. He was ticketed for driving without a license and making an illegal turn, and issued a warning for speeding. The company vehicle was impounded by the police at the request of the Carrier's Resource Operation Center.

The Claimant was consequently directed to attend a formal Investigation at which he was charged with "unauthorized use of a company vehicle #95625 when the vehicle was impounded as a result of your alleged traffic violation and alleged failure to have proper drivers license at approximately 03:10 am, December 27, 1997 in Borger TX." At the Investigation, the Claimant denied he was aware his license had been suspended, but acknowledged that he did not have permission to drive the vehicle to Borger, and did not comply with Rule S-28.18.1 of the Carrier's Safety Rules and General Responsibilities for All Employees, reading as follows:

"Drivers of Company vehicles must:

1. Unless authorized, not use Company vehicles for personal business or for commuting to and from personal residence."

Following the Investigation, the Claimant was dismissed from service. The letter of dismissal, dated March 27, 1998, read, in pertinent part, as follows:

"This letter will confirm that as a result of formal investigation on February 10, 1998, concerning your unauthorized use of a company vehicle, #95625, failure to have proper drivers license, your Driving Under the Influence and Hit and Run accident with a BNSF leased vehicle, which occurred on July 20, 1997 [sic], at Woodward, Oklahoma, and your failure to report this incident to the carrier, you are dismissed from employment with Burlington Northern Santa Fe. You are being dismissed for violation of Rules S-12.1.1, S-12.14, S-28.18.1 and S-28.5 of the Safety Rules and General

Responsibilities for All Employees, effective March 1, 1997 (and as revised April 15, 1997)”

The Organization maintains the Claimant was denied a fair and impartial Investigation when testimony was given in connection with the July 20, 1996 incident, and when the Claimant was then dismissed for that incident. The Organization argues the Carrier went beyond its notice of charge, thereby rendering the discipline violative of the Claimant's right to due process under the Agreement.

We agree that the Carrier's discipline notice cited offenses for which the Claimant was not charged. Clearly, he was charged with his unauthorized use of the vehicle. Although it is ambiguous, the charge could also be read to include his operation of the vehicle without a license. As the Claimant denied he was aware his license had been suspended, some exploration of how that happened would have been appropriate. It was not appropriate, however, to include a reference to that earlier incident in the letter dismissing the Claimant. An employee has a right to advance notice of the scope of the Investigation. In this case, the notice only addressed the December 27, 1997 incident. There is substantial evidence in the record to support a finding that the Claimant was guilty of that charge, particularly in light of the Claimant's admission that he did not have authority to take the vehicle.

The question before the Board, then, is whether the inclusion of the earlier incident in the discipline letter entirely voids the Carrier's action. The Awards cited by the Organization refer to circumstances where carriers had disciplined employees for offenses other than those stated in the notice of charges. Apparently the employees were not disciplined for the offenses for which they were cited. That is not the case here. The Claimant was disciplined for the offense covered by the notice of charges. The problem was that he was also disciplined for offenses not covered by the notice. We do not find this improper inclusion to void discipline for the offenses for which the Claimant was properly found guilty. The appropriate approach is to disregard that portion of the discipline notice that was not covered in the charge, and then determine if the discipline imposed was warranted by the remaining offenses. If so, the discipline may stand; if not, it must be modified to make it commensurate with the offense.

The unauthorized use of a company vehicle to make a 400 mile round trip is a serious offense. The ramifications of the Claimant using this vehicle for personal purposes include potential liability to the Carrier should he be involved in an accident. The circumstances surrounding his being stopped by the police tie into this unauthorized use, and may be a consideration in determining the measure of discipline. The Board further

finds the Claimant to be less than credible as to his explanation for his taking the vehicle. He testified that his "sole purpose" for going to Borger was because his sister was almost raped. But he then testified that he had told the Special Agent that he had gone back because his wife could not find a baby-sitter, and that was, in fact, another reason for his return to Borger. According to the Claimant's written statement, his wife paged him between 9:00 and 9:45 P.M. to ask him to come home because she had to work that night. Sometime between 1:30 and 2:00 A.M., though, the Claimant decided to visit his brother and an out-of-town friend. Apparently, this is where he was when he was observed by the police at 3:00 A.M. in what they described as a "known drug and crack cocaine trafficking area." When the Board considers it would take approximately three hours to drive the distance between Syracuse and Borger, it is not clear when he would have had time to baby-sit and see his sister before leaving to see his brother. The facts, as suggested by the Claimant, simply do not add up.

Under the circumstances, the Board finds that the discipline imposed was neither arbitrary nor excessive. The Agreement, therefore, was not violated.

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 20th day of March, 2001.