

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35968
Docket No. SG-36290
02-3-00-3-523

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 Burlington Northern Santa Fe Railroad Co. (Former Burlington Northern Railroad):

Claim on behalf of W. T. Brothers for reinstatement to service with compensation for all lost time and benefits and seniority unimpaired, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it dismissed the Claimant from service without meeting the burden of proving the charges against him, and without the benefit of a fair and impartial investigation, and issued harsh and excessive discipline against him in connection with an investigation held on June 1, 1998. Carrier File No. SIA 98-11-18AA. General Chairman’s File No. C-9(d)-98. BRS File Case No. 11329-BN.”

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.

The Claimant was first employed by the Carrier on June 11, 1979. On May 12, 1998, the Claimant was assigned to a Signal Foreman position on Special Projects Crew 151, working in Red Oak, Iowa, with Signalmen T. S. Anderson, C. V. Tewart and G. D. Magnison. Due to a strike by another craft, picket lines were up at certain locations on Carrier property. The Claimant and crew, by honoring the picket lines, were unable to report to their work location.

At approximately 8:30 A.M., Signal Construction Supervisor Tom Marsh and Signalman Magnison arrived at the motel parking lot where the Claimant and his crew were staying. Signalman Magnison was returning after taking a random drug test. They discussed the strike situation and Signal Construction Supervisor Marsh reminded the crew that they would not be receiving salary or expenses while the strike lasted. He then advised the crew that they were to attend a "Safety Concepts Training" meeting in Omaha, Nebraska, at 8:00 A.M. the next day.

The Claimant told Signal Construction Supervisor Marsh that they did not want to go to the meeting in Omaha, and would prefer instead to attend the safety meeting scheduled in Galesburg, Illinois, where three of the four crew members lived. Signal Construction Supervisor Marsh advised the Claimant that they had been rescheduled to attend the May 13, 1998 meeting in Omaha, at the gang's request and that was the meeting they were to attend. He said he would check to make sure it was still to be held. The Claimant renewed his objection, but Signal Construction Supervisor Marsh again told the Claimant they were to attend the meeting in Omaha.

Signalmen Anderson, Tewart and Magnison testified that it was uncertain how long the strike would last. They decided not to stay at the motel headquarters, which was located five to six hours from their homes, without the benefit of salary or remuneration for their expenses. Accordingly, they informed the Claimant, their Foreman, that they were marking off and going home. The Claimant testified that he had "no problem" with the crew's decision to leave.

At approximately 11:00 A.M., after the Claimant's crew had gone home, the Claimant called Signal Construction Supervisor Marsh and advised that he was taking two personal leave days off and that his crew had also taken the next two days off. Signal Construction Supervisor Marsh told the Claimant that the strike was over; that he was to return to work; and that he and his crew were to attend the meeting in

Omaha the next morning. The Claimant repeated that the crew preferred to attend the meeting in Galesburg. According to Signal Construction Supervisor Marsh, he repeated his orders to the Claimant three times; each time, the Claimant argued with him. Finally, Signal Construction Supervisor Marsh told the Claimant it was "up to him," and ended the conversation. The Claimant testified that he interpreted this last comment as consent for taking time off.

Payroll records indicate that the Claimant marked off on vacation May 13 and 14. He did not attend a safety meeting on either one of those dates. Signalmen Anderson, Tewart and Magnison did not return to work on May 13 and did not attend the Safety Concepts Training meeting in Omaha, but rather attended the Safety Concepts Training meeting in Galesburg on May 14, 1998.

The record evidence also shows that the Claimant allowed Signalman Magnison ten hours pay on May 12, 1998. There is no dispute that the Claimant had been instructed by Signal Construction Supervisor Marsh to allow Signalman Magnison four hours pay on May 12 to compensate him for the time he was required to submit to random drug testing. Signalman Magnison testified that the change in compensation was made after he informed the Claimant that the Local Chairman told him to put in for a full day's pay.

After a Hearing on June 1, 1998, the Claimant was dismissed from the Carrier's service based on the Carrier's determination that he: (1) failed to comply with instructions by not attending the scheduled safety training in Omaha; (2) submitted ten hours' pay for Signalman Magnison when instructed to submit four hours on May 12, 1998; (3) absented himself without authorization on May 13 and 14, 1998; and (4) acted in an insubordinate manner by failing to return to work following the strike on May 12, 1998.

The Carrier contends that the record in this dispute fully supports the discipline assessed. Even if the Claimant disagreed with his Supervisor's directives, he should have followed the old maxim, "comply now, grieve later." Instead, the facts developed at the Investigation established that the Claimant did not comply with his Supervisor's instructions, thereby subjecting himself to discipline. Moreover, the Carrier asserts that the discipline was commensurate with the proven misconduct and was appropriate in light of the prior violation by the Claimant for similar misconduct.

The Organization defends by arguing that there are mitigating and extenuating circumstances in this matter that compel the conclusion that the Claimant's dismissal was arbitrary, capricious and unreasonable.

Perhaps the most vigorously asserted argument presented by the Organization is that the Claimant should not have been disciplined for the chain of events set in motion as a result of his and the crew's decision to honor the picket line. The crew was working away from home, the Organization reminds the Board, and when Signal Construction Supervisor Marsh told the Claimant and his crew that they would not receive any expenses or pay during the strike, they had a legitimate reason to return home.

The Board does not find that argument persuasive, at least from the standpoint of the Claimant's case. The significant point to remember with respect to the Claimant is that, as of 11:00 A.M. on May 12, 1998, he had been specifically informed that the strike was over. The Board need not address the question of whether conduct during the strike was protected. Whatever justification might have existed for leaving the work site while the strike was in progress ended when the strike itself ended. The Claimant should have returned to work at that point as his Supervisor directed and attended the safety meeting in Omaha the following day.

Also unpersuasive is the Organization's contention that the Claimant had permission to mark off. When the essentially undisputed conversation between the Claimant and Signal Construction Supervisor Marsh on the morning of May 12 is carefully reviewed, it is evident that Marsh communicated to the Claimant not once, but several times, that he did not have permission to be off and that he was expected to attend the safety meeting. A reasonable employee would not have interpreted Marsh's final comment to the Claimant that it "was up to you" as assent to mark off in this context.

An employee is obligated to follow the instructions and orders of supervision, even when he disagrees with the order or directive. Failure to do so subjects the employee to discipline. The Claimant failed to comply with the legitimate directives of his supervisor in this case. He did not attend the meeting in Omaha and instead marked off without supervisory permission. He compounded that misconduct by allowing Signalman Magnison ten hours pay, apparently on Magnison's say so, despite the clear directive to allow four hours pay for the time Magnison spent taking the random drug test.

The Claimant's acts of misconduct, proven on this record by substantial evidence, constituted a serious dereliction of duty and a questionable exercise of judgment. In assessing the propriety of the penalty, it should also be noted that the Claimant was dismissed from the Carrier's service in 1994 and was returned to service in June 1996 without pay for time lost in Award 21 of Public Law Board No. 5616. In returning the Claimant to service, the Board stated that "Claimant should be on notice that any further incidents of insubordination or assault will most assuredly result in his permanent termination from Carrier's service." Given this state of the record, we must affirm the Carrier's determination that discharge was not an unreasonable or arbitrary penalty.

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 8th day of March, 2002.