

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36111
Docket No. MW-36234
02-3-00-3-440**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employes
(The Burlington Northern Santa Fe Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) day deferred suspension with a three (3) year probation period] imposed upon Mr. S. M. Malay for his alleged violation of General Code of Operating Rules, Rule 1.15 Reporting of Absence and Maintenance of Way Rules, Rule 1.13, Reporting and Complying with Instructions in connection with an alleged absence from duty without authority on October 26, 27 and 28, 1998 was without just and sufficient cause, based on unproven charges and in violation of the Agreement [System File C-99-S090-1/MWA 10-99-0061 (MW) BNR]**
- (2) As a consequence of the violation referred to in part (1) above, Mr. S. M. Malay shall now have all reference of this discipline cleared from his record."**

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.

In May 1998, the Claimant was working as a Sectionman on the Knoxville, Iowa, section crew. He typically worked under the direct supervision of Roadmaster D. D. Vanderpool. In the first week of May 1998, the Claimant was given a leave of absence to care for his 18-month old son and the mother of his son who was suffering from clinical depression. Under Rule 15A of the parties' Agreement except for physical disability, leaves of absence in excess of 90 days in any 12 month period will not be granted without mutual agreement between the parties.

On or about September 14, 1998, the Claimant requested an indefinite extension of his leave of absence so that he could continue to care for his 18-month old son. His son's mother planned to attend college and was trying to arrange for daycare for the child. On October 19, 1998, the Carrier declined the Claimant's request to extend his leave of absence and instructed him to return to his position as a Sectionman by October 26, 1998.

The Claimant did not return to the Knoxville section gang on October 26, 1998. He maintains that he telephoned Roadmaster Vanderpool that morning to notify him that he would not be reporting to work that day and Roadmaster Vanderpool said, "Okay." The Claimant assumed that he had been granted permission from Roadmaster Vanderpool to be off work.

On October 29, 1998, the Claimant was notified to attend an Investigation on November 6, 1998, to ascertain the facts and to determine his responsibility, if any, for allegedly absenting himself from duty without authority on October 26, 27 and 28, 1998; and for allegedly failing to comply with the instructions given him by letter dated October 19, 1998, to return to work no later than October 26, 1998.

The Investigation was held on November 17, 1998. At his Investigation, the Claimant admitted that he did not report to his position as Sectionman on October 26, 27 or 28, 1998. He said that Roadmaster Vanderpool had given him permission to be off work these three days.

On December 1, 1998, the Claimant was issued level S discipline consisting of a 30-day deferred suspension and three years' probation for his reputed violation of General Code of Operating Rule 1.15 and Maintenance of Way Operating Rule 1.13.

On December 20, 1998, the Organization appealed the Claimant's discipline contending that it should be overturned because the Carrier failed to furnish the Organization a copy of the transcript of the November 17, 1998, Investigation as required by Rule 40E. On December 29, 1998, the Carrier denied the appeal and furnished the Organization a copy of the transcript of the November 17, 1998, Investigation. The Organization subsequently appealed the Claimant's discipline to the Board.

Rule 40E requires the Carrier to furnish the Organization a copy of the transcript of an employee's Investigation, but it does not impose a time limit for submitting it. In the instant case, the Organization had until January 30, 1999, to appeal the Claimant's discipline. It received the transcript of the November 17, 1998, Investigation on December 29, 1998. Therefore, the Organization had more than enough time to review the transcript before filing its appeal. In the light of these circumstances, there was no violation of Rule 40E, in the Board's opinion.

The Claimant insists that Roadmaster Vanderpool gave him permission to be off work on October 26, 27 and 28, 1998, but the record does not support his contention. The Claimant did not ask Roadmaster Vanderpool to extend his leave of absence. Rather, he said he would not be reporting to work on October 26 and Roadmaster Vanderpool allegedly said "Okay." A reasonable person would not have concluded from this brief exchange that he had been given a leave of absence particularly since the Claimant's September 14, 1998 request to extend his leave of absence had been unequivocally denied by the Carrier.

The Claimant's failure to comply with the clear and unambiguous instructions given him by proper authority to return to his position on the Knoxville section gang by October 26, 1998 was not an insignificant violation of General Code of Operating Rule 1.13. He had not worked for the Carrier in almost six months and he gave no indication when he intended to resume his employment. Therefore, the discipline issued the Claimant on December 1, 1998 was justified notwithstanding his 20 years of service and a clear disciplinary record. The claim is denied as a result.

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 22nd day of July 2002.