

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37322
Docket No. MW-36851
04-3-01-3-435

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service beginning on May 18, 2000 and dismissal on June 12, 2000) imposed upon Mr. P. R. Peters for alleged violation of ‘. . . Maintenance of Way Operating Rules 1.1.3 Accidents, Injuries and Defects, 6.33 Escorting On-Track Equipment and 6.50 Movement of on-Track Equipment’ in connection with alleged failure to provide proper flagging for the switch grinder Pandrol Jackson 9 on May 16, 2000 while assigned as welding foreman was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File T-D-2083-W/11-00-0438 BNR).
- (2) The dismissal of Mr. P. R. Peters on June 16, 2000 for alleged violation of Maintenance of Way Operating Rule 1.13 Reporting and Complying with Instructions in connection with alleged failure to comply with instructions from proper authority on May 17, 2000 and alleged failure to protect assignment on May 18, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File T-D-2092-W/11-00-0445 D(MW)].

- (3) The dismissal of Mr. P. R. Peters on June 16, 2000 for alleged violation of Maintenance of Way Operating Rule 1.13 Reporting and Complying with Instructions in connection with alleged failure to comply with instructions from proper authority on May 17, 2000 and alleged failure to protect assignment on May 19, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File T-D-2093-W/11-00-0446 D(MW)].
- (4) As a consequence of the violation referred to in Part (1) above, Mr. P. R. Peters shall now be reinstated to service with seniority and all other rights unimpaired with his record cleared of any reference to the charges leveled against him and he shall be compensated for all lost time.
- (5) As a consequence of the violation referred to in Part (2) above, Mr. P. R. Peters shall now be reinstated to service with seniority and all other rights unimpaired, his record cleared of any reference to the charges leveled against him and he shall be compensated for all lost time.
- (6) As a consequence of the violation referred to in Part (3) above, Mr. P. R. Peters shall now be reinstated to service with seniority and all other rights unimpaired, his record cleared of any reference to the charges leveled against him and he shall be compensated for all lost time."

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, a Welding Foreman with about four years' seniority, was discharged for three separate alleged Rule violations. Each will be addressed below.

May 16, 2000 Alleged Violation: The first alleged violation took place on May 16, 2000, when the Claimant was serving as a Flagman for a contractor switch grinder that ran through a switch in Jamestown, North Dakota. After the switch grinder ran through the switch, the Claimant did not report the incident to management because he did not believe that the switch was damaged.

By letter dated May 18 to the Claimant, addressed to him in Hastings, Minnesota, the Carrier notified the Claimant that an Investigation would be held on May 25 to determine his responsibility, if any, with respect to his alleged failure to provide proper flagging to the switch grinder on May 16, and to report the incident. The May 18 letter also advised the Claimant that he would be withheld from service pending the Investigation.

Following the Investigation, the Carrier notified the Claimant in a letter dated June 12 that he was being dismissed from employment for violating Maintenance of Way Operating Rule 1.1.3, Accidents, Injuries and Defects and Rule 6.33, Escorting On-Track Equipment and Rule 6.50, Movement of On-Track Equipment. By letter dated June 22, the Organization filed a claim challenging the termination. Because the parties were unable to resolve the dispute, it was submitted to the Board for resolution.

At the Hearing, the Claimant acknowledged that, as the Flagman on the switch grinder, he was responsible for escorting the machine in a safe manner and for stopping the machine before it ran through a switch lined against him. Likewise, the Claimant acknowledged at the Hearing that, although he was required to report the incident, he failed to do so. Accordingly, the Claimant committed the safety and reporting violations as charged.

The Organization raises three procedural defenses. First, the Organization claims that the Carrier failed to timely provide it with pages 40 and 42 of the 42-page transcript. Even if this were true, the two pages in question merely contained the Claimant's testimony that he understood the Rules in question, his testimony that he was not afforded a fair Hearing, and the last portion of the closing argument submitted by the representative of the Organization. The omission of these two pages, if it occurred, did not deprive the Claimant of due process.

Second, the Organization contends that the dismissal should be overturned because the Hearing Officer was not the individual who issued the written decision to terminate the Claimant. The Agreement does not mandate that the Hearing Officer sign a dismissal letter. Moreover, because the Carrier representative signing the letter affirmed that the Hearing Officer actually made the decision to terminate the Claimant, the Organization's argument must be rejected.

Third, the Organization objects that the Carrier failed to produce as witnesses at the Hearing the contractor employees who operated the switch grinder and who were eyewitnesses to the incident. Because the Carrier could not subpoena them, however, and did not have control over them because they were not its employees, it could not be expected to produce them as witnesses. Furthermore, if the Organization had desired to use those persons as witnesses, it was incumbent on the Organization to arrange for their presence at the Hearing. Moreover, the Claimant's candid testimony about the incident made it unnecessary to call additional eyewitnesses.

On the merits, the Organization urges that, because the Claimant was engaged in productive work on the switch grinder at the time that it ran through the switch, he should be exonerated for failing to prevent the incident. As a Flagman the Claimant was responsible for ensuring that the machine did not run through a switch lined against him. The fact that he was preoccupied with productive work does not outweigh the fact that he was negligent. Likewise, the Organization's argument that the Claimant was not required to report the incident because the switch was not damaged must be rejected. The Claimant was required to report the incident, whether or not there was actual damage to the switch, because he knew of an "unusual condition that may affect the safe and efficient operation of the railroad." See Rule 1.1.3.

May 18 and 19, 2000 Alleged Violations: After the incident on May 16, the Claimant applied for a temporary position about 300 miles away in Minneapolis, Minnesota, to which he traveled that night. Early in the morning of May 17, the Claimant learned from Roadmaster W. Morris in Minneapolis, that the temporary position would not be available to him after all. At about 9:00 A.M. that morning, he telephoned his supervisor, D. A. Barth, told him that the temporary position had fallen through, and asked to take the next two days off so that he could drive back. Barth told the Claimant that he could not take the next two days off because he needed him back at work the following day, May 18. At about 3:00 P.M., with the assistance of his Organization representative, the Claimant obtained Morris's agreement to let him work a temporary job on the night shift in Minneapolis on May 17 and then perform day shift work on May 18 and 19 before he returned to Jamestown. At about 7:00 P.M., however, when the Claimant appeared for work, Morris, who apparently had spoken with Barth, told the Claimant that he could not work that night or the following two days in Minneapolis because he had to get back to Jamestown to work for Barth. Morris agreed, however, to pay him for the day (May 17). At about 7:10 P.M., the Claimant left the following voicemail message for Barth:

"Dan, This is Randy Peters, I reported to that job. Bump Central told me to report to that job at the Northtown area and when I got there, I talked to Roadmaster Wayne Morris and he sent me home with eight hours pay. The thing is that if I traveled up there I think that Bump Central messed up and that's what we talked about earlier today. I am going to be on the phone with them first thing in the morning. I will not be reporting to work up there. I talked to the Union about what they are doing. They didn't think it was right so I won't be there Thursday morning. I just wanted to let you know that. Talk to you later, bye."

According to the Claimant, he then went home in the Minneapolis area to get some sleep before he returned to Jamestown. At about midnight on Wednesday, May 17, when he awoke to drive back to Jamestown, the Claimant allegedly developed a bad headache, and he decided to remain in the Minneapolis area. On the morning of Thursday, May 18, he saw a physician who wrote a note stating that

the Claimant would be unable to work until Monday, May 22 because of the headache. The Claimant did not show up for work on May 18 or May 19.

Around 2:00 P.M. on Friday, May 19, the Claimant telephoned Manpower about the job he intended to fill on Monday, May 22. Manpower informed him that he had been withheld from service. Shortly thereafter, the Claimant telephoned Barth and told him that he had been unable to report to work on May 18 and 19 because he had felt sick around midnight on May 17 and had a doctor's excuse. Barth replied that he would discuss the matter with him at the Investigation scheduled for May 25.

By letter dated May 18, the Carrier notified the Claimant that an Investigation would take place on May 25 to determine his responsibility, if any, with respect to his alleged failure to comply with instructions from proper authority on May 17 and to protect his assignment on May 18. In a May 19 letter, the Carrier notified the Claimant that another Investigation would take place on May 25 to determine the extent of his responsibility for failing to comply with instructions from proper authority on May 17 and failing to protect his assignment on May 19.

Following the Investigations on May 25, the Carrier advised the Claimant in two separate June 16 letters that he was dismissed from employment for failing to comply with instructions from proper authority on May 17 and for failing to protect his assignment on May 18 and 19. On July 6, the Organization filed a claim, challenging the letters of termination. Because the parties were unable to resolve the matters on the property, the disputes were consolidated with each other and with the one involving the Claimant's termination for the incident on May 16 and submitted to the Board for final and binding resolution.

It cannot seriously be disputed that the Claimant failed to comply with instructions from proper authority on May 17. On the morning of May 17, his supervisor, D. Barth told the Claimant that he was to report to work in Jamestown on May 18. At about 7:00 P.M. on May 17, Roadmaster Morris also instructed the Claimant to report to work in Jamestown the following day. Notwithstanding the orders by Barth and Morris, the Claimant left a message for Barth at about 7:10 P.M. on May 17 that he would not be reporting to work in Jamestown on May 18 because he had been unfairly denied his temporary job in Minneapolis. Because the

Claimant was openly and blatantly insubordinate on May 17, the Carrier appropriately found that he had failed to comply with instructions from proper authority from management on May 17.

The Organization submits that, because the Carrier, in its May 18 letter to the Claimant, withheld him from service pending investigation of the May 16 incident, there was no reason for him to protect his assignment on May 18 or 19. That argument, however, misses the point. Barth and Morris had directed the Claimant to report to work on May 18 and 19 in Jamestown. Although the May 18 letter did state that the Claimant would be withheld from service pending investigation of the May 16 incident, it did not state the effective date of the withholding from service. Moreover, because it was mailed to the Claimant's address in Minnesota, the effective date could not have been prior to Monday, May 22. Indeed, the Claimant admitted that he did not learn that he had been withheld from service until he telephoned Manpower at about 2:00 on the afternoon of May 19 about the job he was to fill on May 22. Accordingly, the Claimant cannot absolve himself from culpability for absenting himself on May 18 and 19 simply because the Carrier effectively withheld him from service as of May 22.

Likewise, the Claimant cannot avoid responsibility for his failure to protect his assignment on May 18 or 19 on the ground that he had a doctor's note excusing him from working those days. Importantly, the Claimant did not advise Barth that he had a doctor's excuse until shortly after 2:00 P.M. on May 19, and only after he had learned from Manpower that he had been withheld from service. Moreover, it is not the role of the Board to overturn the Hearing Officer's credibility determination that the Claimant's headache was not bona fide. Indeed, the circumstances leading up to the alleged headache would suggest that it was a thinly veiled cover for his insubordinate refusal to report to work in Jamestown on May 18 and 19.

In summary, on the merits, there is substantial evidence to support the Carrier's conclusion that the Claimant failed to comply with management's instructions on May 17. Likewise, the Carrier submitted substantial evidence to support its finding that the Claimant failed to protect his assignment on May 18 and May 19.

With respect to the Carrier's decision to terminate the Claimant's employment, the Board notes that about one year before the incidents leading to the instant proceeding, the Claimant committed a serious Rule violation for which he received a 45-day suspension. Then, on May 16, the Claimant engaged in serious Rule violations by failing to ensure that the switch grinder for which he was flagging did not run through a switch lined against him, and by failing to report the incident to management. The following day, May 17, the Claimant blatantly refused to comply with management's directives to report to work on May 18 in Jamestown. Moreover, the Claimant failed to protect his assignment on May 18 and 19. Because the Claimant, who had only four years of service, engaged in so many serious violations within a one-year period, termination of his employment was neither harsh nor excessive.

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 21st day of December 2004.