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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37425
Docket No. SG-37809
05-3-03-3-173

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of D. W. Miller for reinstatement and payment of all time lost and benefits, and for all reference to this matter be removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, 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 20, 2002. Carrier’s File No. 35 02 0031. General Chairman’s File No. 02-031-BNSF-119-D. BRS File Case No. 12467-BNSF.”

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.

At approximately 12:30 P.M. on February 7, 2002, Signal Supervisor G. C. Lang contacted the Claimant at Dry Fork via two-way radio and instructed the Claimant to meet him at Wyoben, the Carrier's material storage facility at Gillette, Wyoming. The Claimant advised Lang that he was waiting to get track and time at Dry Fork. Lang instructed the Claimant to cancel the track and time and to meet him at Wyoben. Twenty minutes later, the Claimant called Lang's cell phone and informed him that he was at home and was not feeling well. Lang responded that the Claimant needed to meet with him at Wyoben. The Claimant replied that he had to go to the bathroom and that afterward, he would meet Lang at Wyoben. Fifteen minutes later, the Claimant again called Lang and reported that he was sick and would not be able to come to Wyoben. When Lang asked the Claimant his whereabouts, the Claimant indicated that he was going downtown to get some medicine. Lang again asked the Claimant to meet with him at Wyoben, at which time the Claimant stated that he was sick, and ended the call.

At approximately 6:40 A.M. on February 8, 2002, the Claimant left a message for Lang indicating that he was sick and would not be at work that day. Subsequently, it was determined that the Claimant and his spouse had left Gillette shortly after 2:00 P.M. on February 7 and had spent that evening and the following day out of town.

By letter dated February 11, 2002, the Claimant was directed to attend an Investigation to be held on February 20, 2002, "... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to protect your assignment and absenting yourself from duty without proper authority on Thursday, February 7, 2002 at or about 1300 hours until 1430 hours, and on Friday, February 8, 2002, while assigned as Signal Maintainer at Gillette, Wyoming. ..."

The Investigation was held on February 20, 2002 as scheduled. In a letter dated March 18, 2002, the Carrier notified the Claimant that as a result of the

Investigation, he was dismissed for violation of Maintenance of Way Operating Rule 1.15.

By letter received by the Carrier on April 1, 2002, the Organization appealed the discipline, alleging that it was unwarranted. The Organization asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. It contends that the Carrier imposed harsh and excessive discipline against the Claimant. According to the Organization, the Claimant was denied a fair and impartial Investigation in violation of Rule 54. The Organization further contends that dismissal constitutes an abuse of the Carrier's discretion and the Carrier should now be required to reinstate the Claimant to service, compensate him for all lost wages and benefits, and remove all reference to the discipline and Investigation from his personal record.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, the record contains substantial evidence to support the Claimant's culpability. The Carrier asserts that it met its burden of proof and that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325 and Third Division Award 16166.

The Board finds substantial evidence in the record to uphold the Carrier's decision. The Carrier proved that the Claimant violated the relevant Rule. The Claimant was in fact absent from his assignment without proper authority from Supervisor Lang on both February 7 and February 8, 2002. Based on the record, the Board concludes that dismissal is appropriate and we will not overturn it.

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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 March, 2005.