

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40529
Docket No. SG-40019
10-3-NRAB-00003-070198
(07-3-198)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of S. W. Hicks, for reinstatement to his former position with compensation for all time lost and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, 69 and 70, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on April 13, 2006. Carrier’s File No. 1445139 D. General Chairman’s File No. S-62(D), 69-766. BRS File Case No. 13698-UP.”

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 March 24, 2006, the Claimant was sent a Notice of Investigation specifying that he had voluntarily forfeited his employment. The notice stated that the Claimant violated Rule 62 D, because he had been absent on March 20, 21, 22, 23 and 24, 2006 without appropriate consent. The Rule states, in pertinent part, that:

“Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights and employment relationship.”

Following a Hearing into the matter on April 13, 2006, the Carrier found the Claimant had violated the Rule, forfeited his seniority and employment.

The Organization’s appeal is on both procedure and merits. The Board finds the procedural arguments unpersuasive. The Organization’s argument that the ‘reasons’ for the decision were not provided, in violation of Rule 69, are not on point. The Hearing Officer gave his reasons when he indicated that the transcript supported the fact that the Claimant violated the Rule, supra, and had “not provided or shown justifiable reason as the why proper authority” was not obtained.

On the merits, the Organization argues that the Claimant did attempt to establish contact with his Manager on March 22, 2006. The Claimant attempted several times to obtain the authority needed to be absent from his position. The Organization notes that he was unable to contact Manager Yetmar. Nevertheless, he did leave a voice mail indicating that he needed to take time off for personal problems.

The Organization also argues that the telephone request to be absent was the practice on this gang. If an employee needed to take time off, they would contact the Signal Gang Foreman and leave a voice mail on his cell phone. The Claimant had every reason to believe that his action was appropriate and would constitute approval. The Organization argues that to dismiss the Claimant over lack of communication, rather than counsel or coach the Claimant on requirements under the Rules is improper. The Organization states that the Claimant was disciplined for engaging in behavior on the Signal Gang that was common practice. The Organization argues that the Claimant should be returned to service with full backpay and his record cleared of this action.

The Carrier contends that the Rule is clear and the failure of the Claimant obvious. It further points to the Claimant's lack of authority and rejects any argument of a practice existing to support this behavior. The Claimant did not have proper authority, was clearly absent five consecutive days and was unable to support any reason whatsoever for his action. As for counseling, the Carrier indicated that the Claimant had been previously informed of his behavioral inappropriateness. The Carrier notes that the Claimant's former Manager D. Colvin discussed this specific issue of leaving a message on a cell phone as unacceptable. The Carrier argues that the Claimant violated the Rule and the discipline is self-executing.

The Board notes that the Claimant bid onto a Relief Maintainer's job in Kansas City from his former position in Houston, Texas. Manager Yetmar testified that he talked with the Claimant and arranged to permit him time before beginning his assignment. Yetmar testified that by agreement, the Claimant's first day on the job was to be Monday, March 20, 2006. He further testified that the Claimant failed to appear, did not contact him the week prior to his start date requesting the week off for vacation, did not contact him on Tuesday, and the first indication he had was a voice mail message on Wednesday, with a return telephone number from the Claimant requesting a weeks' vacation time. Yetmar testified:

“... I called that number back that he left on my phone on the 22nd stating that I wasn't going to allow vacation because he didn't report Monday and that he needed to protect his assignment on Thursday.”

The record is clear that the Claimant did not return the call or show up for his position until the following Monday, March 27, 2006.

The Board studied the Claimant's response and it supports the above time sequence. Further, Yetmar testified that he returned the call. The Claimant indicates that he left two phone numbers and received no call and never heard the voice mail return message to report to work. The Claimant further testified that he never received the call, never received a message, and did not call prior to his Monday start date, because:

"I could have called him Sunday, but I didn't want to bother him on a weekend and I didn't know if he was busy. I didn't really know the man; however, I did call him Wednesday, that's correct."

The Claimant admits that he had discussed arrangements to be at work on March 20, 2006. He admits that he knew prior to that day that he would not be there. He admits that he made no attempt to call prior to Wednesday, March 23, 2006.

There is contention between the Carrier and Organization over the practice on the property of just leaving a voice message and taking a day off. The Claimant testified that it was common practice. The Claimant further testified after wrecking his motorcycle and having a checkbook issue that he knew he would not report to work on Monday, but made no call whatsoever until Wednesday.

The Board notes that although Manager Colvin states that no such practice existed and that he counseled the Claimant over this very issue, this is disputed by the Organization and the Claimant. In a statement by three Signal employees working the prior Gang with the Claimant under K. Bailey, they state that they "also called Mr. Bailey and left messages on his cell phone that we were taking off work and we would be using a day of vacation or a personal day." The three Signal employees also state that they never witnessed Colvin discussing such calls with the Claimant.

Manager of Signal Construction Colvin submitted a statement that the Claimant was "habitually absent from work." Colvin further indicated that the Claimant "oftentimes" called a Foreman and simply left a message saying that he would not be at work, "10-15 such messages." What is important is that Manager Colvin explicitly states that there is no such practice and further, that the Claimant's behavior had become "so disruptive that I actually drove to Oklahoma to counsel Mr. Hicks on this precise issue personally."

It appears from this record that at some point and for some specific reasons, messages were accepted. However, this is not supportive of the Organization's argument that this is the first time a dismissal occurred for leaving a message about the need to be off work. The Board does not find this case on point with a day off necessitated by emergency or crisis that undoubtedly must occur. Nor is the statement by co-workers on point, because it refers to a day off or a vacation day used, not the failure to arrive for the first day of work and then missing an entire week on a new Gang.

The Board finds no support in this record to document that leaving a cell phone voice mail message indicated pre-approval to be absent, or that when the call was not returned, it provided authority to be off work. In this instance, the Board finds it unbelievable that the Claimant simply assumed he had approval to take a week off because he left a voice mail message with a new supervisor in the middle of the week, after failing to fulfill his arranged start date. It is equally difficult to accept that he did not call earlier, because he did not want to "bother" his Foreman. Simply leaving a message is not obtaining pre-approval or proper authority to be absent (Public Law Board No. 6089, Award 16).

The Board finds no mitigating factors or proof of understood practice to support the instant circumstances. The Claimant is a short term employee with a poor record. He had an obligation to protect his assignment. Rule 62 (D) is a self-executing Rule. The Claimant was absent for five consecutive days without "proper approval." Under these circumstances and given Colvin's statement of prior counseling, the Carrier's determination is neither harsh nor excessive. The claim is denied.

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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 15th day of June 2010.