

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32949
Docket No. MW-33715
98-3-97-3-174**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railroad Company (former
(Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [letter of censure and fifteen (15) day suspension] assessed Machine Operators F. Aguayo, G. Aguayo, R. J. Delorme, N. Longoria and S. Robles [letter of censure and thirty (30) day suspension] for their alleged insubordination on October 12, 1995 was without just and sufficient cause, based on unproven charges and in violation of the Agreement (System File C-96-S090-4/MWA 96-04-08AA BNR).**
- (2) Machine Operators F. Aguayo, G. Aguayo, R. J. Delorme, N. Longoria and S. Robles shall have their records cleared of this incident and they shall be compensated for all wage loss suffered during their respective suspensions."**

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.

Claimants have established and hold seniority as Machine Operators and at the time in question were assigned as such to Mini Tie Gang TP 24. On October 12, 1995 the gang was assigned to work in Sterling Yard at Sterling, Colorado, when, shortly after their 7:30 A.M. starting time, Foreman Rising instructed the crew that they were needed at the site of a derailment near Halsey, Nebraska, approximately 400 miles away. Rising instructed all of the Claimants except Claimant Delorme to remain at Sterling to load equipment while the remainder of the gang, including Claimant Delorme, was to proceed for the derailment site. Foreman Rising told all gang members that they were to report to the derailment site "... before the sun goes down. ..." and that they "... had to be there ... no ifs, ands, or buts, ... ready to work. ..." When the gang members asked if they could stop at their homes for money, clothes and other items, Foreman Rising agreed, but added "(y)ou need to be down there to go to work today."

Those gang members who left Sterling Yard at that point, with the exception of Claimant Delorme, arrived at the derailment site at various times between 2:30 and 5:00 P.M. Claimant Delorme on the other hand arrived at his home only to learn that his wife had been summoned from their home because of a medical emergency involving her father. Claimant Delorme remained at home until his school age children returned from school, at approximately 2:45 P.M., and then telephoned the designated gang lodging site at Thedford, Nebraska, leaving a message for Foreman Rising that he could not be at the derailment site until the next day because of the emergency. The Claimants who remained at the yard completed their loading work and left for their homes at approximately 11:30 A.M. They arrived at the gang's designated hotel in Thedford at approximately at 8:00 P.M. When they arrived they met other crew members who informed them that the work for the day had been completed.

The following day all of the Claimants reported for work and were withheld from service for "... fail(ing) to comply with instructions from proper authority when you allegedly failed to drive to Halsey, Nebraska to protect you assignments. ..." After Investigation all of the Claimants, but for Claimant Robles, were given letters of censure and 15 day suspensions. Claimant Robles was also give a letter of censure, but his suspension was for 30 days.

The Organization contends that the discipline assessed to the Claimants must be overturned because there is insufficient evidence that they willfully disobeyed orders. Rather, the Organization argues, that in four of the five cases the Claimants left Sterling, returned to their homes as permitted, and set out for and arrived as instructed, and that their failure to arrive as early as the rest of the gang was not improper in light of what the Organization sees as less than clear orders from Foreman Rising. More specifically, the Organization contends that Foreman Rising did not set a specified time for their arrival. With regard to Claimant Delorme, the Organization asserts that his failure to appear at the derailment site was justified by a personal emergency and that he attempted to contact Foreman Rising by telephoning the gang's designated lodging site. Finally, the Organization argues that the Carrier committed a procedural flaw by withholding all of the Claimants from service for the charges against them do not constitute serious infractions that would justify such action. The Carrier on the other hand asserts that Foreman Rising's instructions were sufficiently clear, that the Claimants failed to comply, that Claimant's Delorme conduct was not justified, and that the Claimants were therefore guilty of insubordination, a charge which justifies exclusion from service.

The threshold issue is of course to determine just what was expected of the Claimants when Foreman Rising gave his instructions at Sterling Yard. Although it is true that Foreman Rising did not set a specific time by which the gang had to arrive at the derailment site, the record is clear that his instructions were such that they were to arrive in time to begin work at the location in question. Indeed, even after the employees asked if they could stop at their homes first, Foreman Rising again repeated the importance of beginning work that night. Thus, we conclude that it was reasonable that all of the employees in the gang knew that time was of the essence.

With regard to all of the Claimants but Claimant Delorme, the Organization has expended much energy and effort arguing about the distances, routes, and the permissible speed limits that the Claimants faced once they set out for Halsey, Nebraska. However, these arguments fail to acknowledge that all of the gang but for these four Claimants were able to reach the site several hours before the Claimants and began work, exactly as Foreman Rising instructed. The record is devoid of any evidence that might sufficiently distinguish their situations from that of the four Claimants.

There remains then Claimant Delorme's circumstances. The record is unrebutted that he faced a family medical emergency and that he telephoned the gang's designated

lodging site to report his inability to report that night. However, the record is such that his claim is questionable for even the Organization admits that at the time the gang left Sterling its lodging site had not yet been ascertained. Moreover, and perhaps more importantly, the record establishes that once Claimant Delorme arrived at his home and discovered the situation that was at hand, he remained at home until his children returned from school, several hours later. There is no evidence that during the interim he made any effort to secure child care or other conditions that might have enabled him to comply with Foreman Rising's instructions.

The final issue is whether the Carrier acted improperly by withholding the Claimants from service in light of their misconduct. On this point the Organization argues that such action is justified only when there has been a serious infraction and, unlike the Carrier, it does not regard the Claimant's misconduct to rise to that level. We disagree. Rather, we believe that a failure to expeditiously leave and arrive at the site of a derailment when the foreman makes it clear that there is work to be done that day, is no minor matter.

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 23rd day of November 1998.

LABOR MEMBER'S
DISSENTING OPINION
TO
AWARD 32949, DOCKET MW-33715
(Referee Perkovich)

In this case, the five (5) Claimants were removed from service and charged with insubordination for their failure to arrive at a derailment site located four hundred (400) miles from the location that they were working. On the date in question, the gang foreman was informed that his crew was needed to perform work at a derailment site more than four hundred (400) miles away. The record of this case reveals that all of the gang members, except four (4) of the Claimants, left for the new work location at approximately 8:00 A.M. The four (4) Claimants were instructed to stay at the old work location and assist the loading of the gang's machinery. When the foreman informed the members of the gang about the move to work at the derailment site, he allowed all members of the gang the opportunity to go home to obtain clean clothes and additional funds as they may be required to work at the derailment site throughout the weekend. The gang members who left at approximately 8:00 A.M. arrived at the new work location between 2:30 and 5:00 P.M., except for Claimant Delorme. When Claimant Delorme arrived at home, he was informed that his wife had been called out of state to attend to her sick father, leaving their young children at home to fend for themselves. Claimant Delorme called the designated lodging site at Thedford, Nebraska from a pay telephone and left a message with the motel clerk to forward to his foreman informing him that he would not be able to report for duty due to personal problems at home.

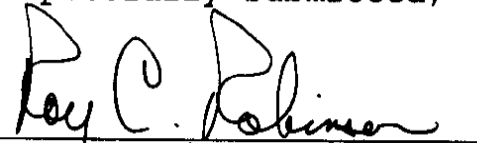
Four (4) of the Claimants that were instructed to stay at the old location to assist in the loading of the gang's machinery, which would be needed at the derailment site, finished loading the machinery at approximately 11:30 A.M. Thereafter, they began to travel to the new work location. The four (4) Claimants who were left at the old work location arrived at approximately 8:00 P.M. and were informed that the work had been completed for the day. The following day, the Claimants were removed from service for failure to follow instructions. An investigation was scheduled and held, whereupon the Claimants were found to be at fault. The Claimants received a letter of censure and a fifteen (15) day suspension, except for Claimant Robles who received a thirty (30) suspension. The crux of this case was, did the Claimants willfully disobey an order issued by their foreman? The record of this case simply does not support such a finding. Although the foreman told the Claimants that they had to be at the work site ready to work before the end of the day, the work required of them at the old location simply did not allow enough time for the Claimants to comply. In order to hold an employee accountable for failure to comply

Labor Member's Dissenting Opinion
Award 32949
Page Two

with instructions, the Carrier must establish that the instructions could be followed. Inasmuch as the Carrier failed to show that the Claimants could have followed the instructions, the award should have been sustained. Clearly, if the four (4) Claimants were not required to stay at the old location to perform work for more than three and one-half (3.5) hours after the rest of the gang left, they would have reported for work at the new location before the end of the workday. The fact was that the work they were required to perform before leaving the old location put them in an impossible position with regard to reporting at the new work location before the end of the day. Since the rest of the gang arrived at the new work location between 2:30 and 5:00 P.M. when the three and one-half (3.5) hours that the four (4) Claimants spent loading machinery is factored in, their arrival at the new location at 8:00 P.M. cannot be considered as excessive. Simply put, had the Claimants not been obligated to perform service at the former work location for three and one-half (3.5) hours, they would have arrived at the new work location within the time frame as the remainder of the gang.

As for Claimant Delorme, his personal situation at home should have qualified as a justifiable reason for missing work. Moreover, the Carrier's Division Superintendent during the handling of this dispute on the property offered to rescind his discipline and hold him blameless if he could produce a telephone bill showing that he had called the lodging site as he contended. As was pointed out by the General Chairman, Claimant Delorme made his telephone call from a pay phone and had no record to present as evidence. The Carrier's Superintendent was made aware of this fact prior to its offering to rescind the discipline. The Majority's comments relative to the Claimant not attempting to secure childcare was never raised by the Carrier during the handling of this dispute on the property and should never have been commented on within the Majority's findings. For all of the reasons cited above, this award is in palpable error and therefore, I dissent.

Respectfully submitted,

A handwritten signature in cursive script, reading "Roy C. Robinson". The signature is written in dark ink and is positioned above a horizontal line.

Roy C. Robinson
Labor Member