

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33220
Docket No. MW-33903
99-3-97-3-386**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The entry of censure and fifteen (15) day suspension assessed Grinder Operator S. Robles for his alleged improperly placing himself on a Group 2 machine at Crawford, Nebraska on February 26, 1996 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (System File C-96-S090-13/MWA 960702AA BNR).**
- (2) Grinder Operator S. Robles shall now have his record cleared of the incident and he shall be compensated for all wage loss suffered including overtime because of the fifteen (15) day suspension.”**

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.

Claimant was assigned as a Grinder Operator on a welding crew in the Alliance, Nebraska Seniority District when this dispute arose. Although the facts in this matter are in some dispute, Carrier maintains that on the morning of February 26, 1996, Claimant telephoned Call Clerk Matt Place at the Denver Call Desk to request a temporary position as a Motor Grader Operator under Rule 19 A at Crawford, Nebraska, the following day.¹ Place advised him he could make the move provided it was approved by his Roadmaster, Dave Ferryman. Claimant represented to Place that Ferryman had already given him authorization for the move, and Place then proceeded to assign him to the Group 2 machine position at Crawford as requested.

After learning that Claimant had placed himself on this position without permission, Ferryman called Place and reminded him that he must always advise employees that approval from their Roadmasters is required before such moves can be made. Place informed Ferryman that he had in fact complied with those procedures, and that Claimant had told him that Ferryman had approved the move. Claimant attended an Investigation and Hearing on March 11, 1996, and on March 18, 1996 was assessed the 15 day suspension now before this Board for consideration for violation of Maintenance of Way Operating Rules 1.13 and 1.15. Those Rules provide as follows:

"1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

* * *

1.15 Duty - Reporting or Absence

¹Rule 19 A. TEMPORARY VACANCIES AND VACATION RELIEF NOT BULLETINED, permits new positions or vacancies of 30 days or less duration to be filled without bulletining.

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority."

The Organization argues that Carrier has failed cite with adequate specificity the Rule violations with which he was being charged; that Rule 19 A does not expressly require the employee attempting to fill a temporary vacancy to secure permission from his Roadmaster as evidenced by the fact that Claimant was subordinate to the Welder on his crew at Alliance, and the previous week had filled a Truck Driver assignment at Scottsbluff through February 23 with approval from the Welder, acting as Foreman. On February 26, the Organization contends, the Claimant did not place himself on another position - he merely phoned the call desk and was assigned effective the next day. Further, in this instance Roadmaster Ferryman knew at 6:00 P.M. on February 26 that Claimant had turned in a request for the grader position for the following day and at no time instructed him not to do so. Additionally, the Organization maintains that Claimant's prior work record containing discipline that postdates this incident is improperly before the Board since not produced in claims handling on the property.²

In the absence of exceptional circumstances, this Board has no authority to disturb the credibility findings of the Carrier's Hearing Officer. With that as a given, the Board's analysis begins with this keystone in place: the Claimant was dishonest in stating to the Carrier's Call Clerk that he had permission from his Roadmaster to move to a temporary position. That determination effectively sweeps out each of the Organization's defenses with three exceptions: 1. That Claimant was not given adequate notice of the particular conduct that was being investigated; 2. That no express Rule was violated by Claimant's falsification; 3. That Roadmaster Ferryman is estopped from complaining about this incident since he knew in advance of the Claimant's intentions and took no action to interfere with them.

²There is some skirmishing between the recitations of the parties with respect to the timing of the incidents leading to the charges revolving around whether the improper placement occurred when the call to Place was made or the day on which Claimant reported to the Crawford assignment. The Board does not view the outcome of that debate as dispositive on the issues.

As an initial matter, we cannot agree that the charges here are insufficiently precise to put Claimant on notice of the allegations against him. In context, the charges are quite specific, and the Hearing record itself reveals no evidence that Claimant was prejudiced or compromised in any way as a result of vagueness in the Notice of Investigation.

The Organization next asserts that Rule 19 A does not expressly require a Roadmaster's permission for an employee to place himself on another position. Plainly enough, that is a correct reading of the Rule. But the argument deadends because it wrongly assumes that the Carrier may not conduct its operations in accordance with policies procedures of its own making. Here, it has implemented a commonsensible requirement intended to make optimal use of manpower and avoid surprises of the type encountered by Ferryman when he found himself suddenly short one man. Nor can it be seriously argued that the Claimant was unmindful of his obligations - he openly admitted that on prior occasions he had always complied with the Rule: "Every time I went to a 19 A. I got permission from a Roadmaster before I go anywhere." The Board must conclude that there is substantial record evidence to establish that the Claimant violated Rule 1.13 by failing to comply with instructions applicable to his duties, and violated Rule 1.15 by leaving his assignment with proper authority.

Lastly, neither the testimony of Welder Curt Garner nor that of the Claimant supports the argument that Roadmaster Ferryman waived his rights in any way by failing to challenge the Claimant's move on the afternoon of February 26. Garner says he merely advised Ferryman sometime around 4:00 or 4:30 P.M. on February 2 that Claimant had turned in a 19 A for a Grader position at Crawford for the following day. Ferryman testified that he was upset upon receiving this news, wrongly concluding that since the move had apparently been already approved, the fault lay with the Call Clerk, and not with his employee:

"Q. So you did not take any action then or the next day on finding out that Mr. Robles had 19 A.'ed to a Group Two machine?

A. No, I did not. I didn't verify that until . . . I took it for granted that he had done that and in my mind I was upset at that time with the Denver Call Desk because I figured they had went ahead and let him do that without my permission. And like I previously stated I kept that in the back of my mind and the next time I called them on

that Friday, to talk about something else, I pointed that out to make sure you are asking the employees if they have roadmaster permission and that is when Matt told me that he did ask Sergio that. And Sergio told him he did, so that was my first knowledge . . . that Sergio had 19 A'ed the job telling Matt Place that I had given him permission when I had never talked to him."

Absent any violation of contractual time limits in taking disciplinary action, the Board is not convinced that by momentarily choosing to credit the honesty of the Claimant, the Roadmaster thereby waived any rights to later act when the facts proved that assumption to be unjustified.

The Board concludes that a 15 day suspension was a reasonable penalty for the misconduct demonstrated by this record. No consideration to the Claimant's past record has been given in our consideration of this 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 21st day of April 1999.