

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34978
Docket No. MW-33450
00-3-96-3-972**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of A. E. Montelongo for alleged ‘ . . . violation of Rules 1.13 of the General Responsibility, Maintenance of Way Rules ***’, was arbitrary, capricious and in violation of the Agreement (System File S-P-532-O/MWB 95-01-30AA BNR).**
- (2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.”**

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.

Prior to his dismissal from the Carrier, the Claimant, with 13 years of service, had established and held seniority as a Laborer on the Lakeside Subdivision, Spokane, Washington Division.

It is important to refer to the events of August 1994, in order to understand the Carrier's dismissal of the Claimant in November 1994. In August 1994 the Claimant received a disciplinary suspension for failure to report for duty. This was not the first time that the Claimant had been disciplined. During his tenure with the Carrier, the Claimant had an unsatisfactory record. He had been disciplined for either failing to report to work or failing to protect his assignment on ten different occasions.

As a result of the Claimant's poor work history on August 20, 1994 Roadmaster J. Espinosa gave the Claimant written instructions which he was required to follow upon his return to service after the period of his disciplinary suspension had ended. The instructions were as follows:

"Upon your return to service after your suspension for failure to protect your job assignment the following rules will be in effect:

- 1. Only Roadmaster F. J. Breen or J. Espinosa will have any authority to allow you to miss work.**
- 2. Personal contact must be made. Voice mail or recording will not be acceptable.**
- 3. If you miss work due to being sick or your vehicle will not work, you will be required to bring a doctor slip stating the illness or a mechanic repair bill for vehicular repair.**
- 4. Reporting to work late will require an investigation and disciplinary action."**

Thus, among the Rules in effect was the requirement to make personal contact with either Roadmasters F. J. Breen or J. Espinosa. On November 7 and 10, 1994, when he was absent from work, the Claimant admitted that he failed to comply with Espinosa's instructions because he failed to personally contact either Breen or Espinosa.

As a result of the Claimant's failure to comply with Espinosa's instructions, the Claimant received a notice of Investigation. An Investigation was held on November 18, 1994 and the Conducting Officer concluded that the Claimant had violated Maintenance of Way Operating Rule 1.13 on November 7 and 10, 1994. On December 12, 1995, the Claimant was notified that he was dismissed from the service of the Carrier for his failure to comply with instructions from proper authority.

Rule 1.13 provides as follows:

"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."

At the November 18, 1994 Investigation the Claimant admitted that he did not comply with Espinosa's written instructions which required him to personally contact either Breen or Espinosa if he was going to be absent from work. The Claimant said that he left a voice mail with Breen that he would be absent. However, Espinosa's written instructions required that he reach Breen or himself in person, and not by voice mail. The Claimant acknowledged that he "complied by the Rules except those two days [he] was hurting bad." Clearly, the Claimant did not comply with Espinosa's written instructions.

The failure to follow Espinosa's written instructions cannot be excused because the Claimant was under a doctor's care. The doctor's note, dated November 14, 1994 indicates that the Claimant has "a possible herniated disc" but "no abnormalities were detected." There is nothing in the doctor's note to establish that the Claimant was prevented from making personal contact by telephone with Espinosa or Breen. Furthermore, there is nothing to indicate that the Claimant was under the influence of medication which prevented him from personally contacting either of the two supervisors.

There is no question but that the Claimant was singled out and thus was required to comply with Espinosa's written instructions. He had been disciplined for

violating Carrier Rules on ten previous occasions. As a result there was a reasonable basis for the specific application of Espinosa's Rules to the Claimant.

Whether the Claimant received a fair and impartial Hearing at the Investigation, has also been considered by the Board. The Board places great weight on the Claimant's statement that the Investigation had been conducted by the Carrier in a fair and impartial manner.

The Carrier properly took into account the Claimant's disciplinary record with respect to its penalty of dismissal. The Claimant's record and his infraction of the specific Rules which he failed to follow on November 7 and 10 leads the Board to conclude that the penalty of dismissal should not be disturbed. The penalty is not arbitrary, excessive or unreasonable. Accordingly, the claim is denied.

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 20th day of September, 2000.