

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35920
Docket No. MW-35765
02-3-99-3-746**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Level 4 discipline assessed Assistant Foreman J.T. Gonzalez for alleged violation of Union Pacific Rules 1.15 and 1.13 while working on Gang 8566 on June 29, 1998 was without just and sufficient cause, arbitrary, capricious and in violation of the Agreement (System File W-9848-158/1154845).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J.T. Gonzalez’ record shall now be cleared of said discipline and he shall be paid for all time lost.”**

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 J. T. Gonzalez holds seniority as an Assistant Foreman, and was regularly assigned as such to Tie Gang 8566, under the direct supervision of Foreman R. Olaiz and Engineering Tech 2 L. Brown when this dispute arose.

On July 6, 1998, the Carrier notified the Claimant of the following:

“Please report to Union Pacific Railroad Company on July 14 at 1:30 p.m., for investigation and hearing on charges to develop the facts and place responsibility, if any, that while working as a System Asst. Foreman on Gang 8566, June 29, 1998, in the vicinity of Lake Point, Utah, you allegedly failed to comply with instructions and also absented yourself from your duties without proper authority. This is in possible violation of Union Pacific Rules 1.13 and 1.15, effective April 10, 1994.”

Specifically, the Carrier asserted that the Claimant failed to comply with an instruction from Supervisor Brown to provide a report regarding the status of an inoperable rail lifter machine. The Carrier further asserts that, on that same day, the Claimant absented himself from the job site without proper authority.

As a result of the Investigation, Engineering Supervisor Martinez apprised the Claimant that:

“I have carefully reviewed and have considered all the testimony contained in the hearing transcript. I have found more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you for your violation of Union Pacific Rules 1.15 and 1.13. This is a Level Two violation.

According to the UPGRADE Discipline table found on page eight of the UPGRADE Policy, your past Discipline assessment of Level 3, plus the current discipline assessment of a Level 2, now requires the assessment of a Level 4. Therefore, this is to advise you that your personal record will now be assessed with a Level 4.

Level 4 requires thirty (30) days off work without pay and you must pass necessary annual rules in order to return to work. A Corrective Action Plan must be developed upon return to work.”

On August 24, 1998, the Organization submitted a claim noting that the Claimant was "new" to the gang and therefore, unfamiliar with established reporting procedures. With respect to Rule 1.15, the Organization asserted that the Claimant did not absent himself without authority, but rather "assumed" he had completed his assignment. Finally, the General Chairman noted that even if the Claimant had wanted to contact his Supervisor, he could not have done so because his radio was inoperable.

For its part, the Carrier noted that although the Claimant was "specifically instructed" to keep Supervisor Brown informed of "any and all" mechanical problems, he did not do so. Nor did the Claimant provide his immediate Supervisor, Mr. Olaiz, with a mechanical update prior to departing the property. The Carrier further asserted that the Claimant violated Rule 1.15 of the Agreement when he left the job site without being released from duty. In that connection, the Carrier asserts that the Claimant used the dead radio battery as an "excuse," and could have contacted the Carrier, via the bus radio, as he was escorting the Laborers to the tie up location.

The Rules for which the Claimant was cited provide that:

"RULE 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.

RULE 1.15 - DUTY - REPORTING OR ABSENCE:

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."

Although the Organization asserts that the Claimant was "off of the Southern Pacific" and did not know the Carrier's "practices," there is no dispute that on June 29, 1998 the Claimant was given a direct and explicit instruction to keep his Supervisor(s)

apprised of “any and all” mechanical problems throughout the duration of his shift. According to Supervisor Brown’s undisputed testimony, the following exchange occurred on the morning of June 29, 1998:

“Q. You mention that Claimant failed to follow instructions. What were those instructions?”

A. I instructed Mr. Gonzalez to provide me with the equipment number, how long it was down, what was wrong with it. And the other equipment that went down that day, so we could put it down on our production report, to show our train delays, or mechanic problems that we are having out with the gang. And he failed to do that.

Q. So, you personally instructed Mr. Gonzalez to turn in a report to you?

A. I personally talked to him, instructed him to do that, why it was important. And watched him pull out his job briefing book and write down some information.”

In that connection, the Hearing Officer questioned the Claimant’s immediate Supervisor, Foreman Olaiz as follows:

“Q. Was Mr. Gonzalez instructed to turn in his reports?”

A. Yes, he was.

Q. You stated earlier that you couldn’t recall if you personally told him, basically, the gang’s working procedure. With reference to reporting downed equipment, or anything associated with the production reports?

A. No, I didn’t bring it up in the job briefing. But during the day, you know, every time a machine goes down, I always remind my assistants to make sure they write it down, so they can report it to me at the end of the day.”

For his part, the Claimant admitted the following:

“Q. Did you get instructions from anybody not to turn in your reports?

A. No.

Q. Did Mr. Brown give you instructions to turn in your report to him?

A. He told me to make sure to tell your foreman what happened to the machine.

Q. If one of your supervisors tells you to do something, are you required to do what he tells you?

A. Yeah.”

These unrefuted statements prove that the Claimant was clearly instructed to report certain information to both Supervisor Brown and Foreman Olaiz. Further, the Claimant wrote down the information as it was being conveyed to him, implying that he understood the direct and absolute instructions. There is no question then, that the Claimant’s refusal or failure to do as he had been directed clearly violated Rule 1.13, for which he was cited.

With regard to Rule 1.15, the Carrier asserts that the Claimant was not relieved of duty prior to leaving the property. The Organization maintains that the Claimant’s radio battery was dead, and he could not check in with his Supervisor for permission to leave. However, according to Foreman Olaiz’ undisputed testimony, there was a “big” radio with capability to talk “for miles and miles” on the bus the Claimant rode with the Laborers, yet the Claimant did not make use of same to request permission to leave for the day. In that connection, the Claimant admitted that he was “unsure” if he was to be released after he left the work site. Specifically, the Claimant admitted that:

“Q. Did you make any attempt to call the foreman on the radio?

A. No.

**Q. Did anybody say, you're done for the day, you can go home now?
Did anybody tell you that?**

A. No."

In discipline cases such as this, the Carrier bears the burden of proving the misconduct for which the employee was disciplined. The quantum of proof necessary to prove the charge is "substantial evidence." The Claimant was clearly instructed to provide required reports. He did not do so. Nor did he garner permission from his supervisor or other proper authority to leave the work area prior to the end of normal work hours. In the circumstances, the discipline assessed was reasonable and warranted. Therefore, this claim must be 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 22nd day of January, 2002.