

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36112
Docket No. MW-36239
02-3-00-3-452**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(The Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [sixty (60) day suspension] imposed upon Mr. S. M. Malay, from March 2 through and including April 30, 1999, for his alleged violation of Rules 1.15 and 1.13, was arbitrary, capricious and in violation of the Agreement [System File C-90-S090-12/MWA 10-99-0256 (MW) BNR].**
- (2) As a consequence of the violation referred to in part (1) above, Claimant S. M. Malay's record shall be cleared of the charges leveled against him and he shall be compensated for all time lost as a result of the wrongful discipline."**

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.

During the first week of May 1998 the Claimant was given a leave of absence from his Laborer's position on the Knoxville, Iowa, section crew to care for his 18-month old son. The child's mother was suffering from depression. On or about September 15, 1998 the Claimant requested an extension of his leave of absence. On October 19, 1998 the Carrier denied the Claimant's request and instructed him to return to his position on the Knoxville section crew by October 26, 1998. He did not return to the section crew as instructed and an Investigation was held on November 17, 1998, as a result.

At the end of the Investigation on November 17, 1998, the Claimant told Illinois Division Engineer Scott Linn that he had a doctor's appointment for possible depression and stress. The Claimant was still out of work and had not performed any service for the Carrier since May 1998.

On November 23, 1998, the Claimant telephoned Division Engineer Linn to inquire about obtaining a leave of absence through the Carrier's Employee Assistance Program (EAP). Linn contacted the EAP Professional for the Illinois Division who advised that the Claimant would not be given a leave of absence through the EAP.

On November 25, 1998, Division Engineer Linn telephoned the Claimant and informed him that the EAP would not give him a leave of absence. Linn reminded the Claimant that he was still absent without authority. Linn told him that he would have to report back to work by December 1, 1998, or provide medical documentation from his doctor explaining why he was unable to return to work.

Division Engineer Linn received a facsimile from the nurse at the Claimant's physician's office the afternoon of November 25, 1998. The facsimile from Integra Health read:

**"Faxing this at pt's [patient's] request: He was seen in our office on 11-17-98.
Please contact our office on 11-27-98 if you have questions.**

**Glenda
Dr. Henderson's nurse"**

Linn considered this information insufficient because it did not say the Claimant was unable to work because of a medical condition, nor did it say that it would be unsafe for him to work because of medications he was taking. Consequently, on December 1, 1998 the Claimant was notified by overnight mail to provide information from a medical doctor

stating that he should not return to work account of medical treatment and how long his treatment would last. The Claimant was directed to fax Division Engineer Linn this information by December 3, 1998.

Linn had a telephone conversation with the Claimant on December 1, 1998, during which Linn tried to tell the Claimant that he had not complied with his instructions to submit medical documentation from a doctor. The Claimant said that he was taking medication that caused him to be very tired. He also said that he had an appointment with Dr. Henderson, his physician, on December 14, but was trying to move it up. The Claimant ended the conversation by telling Division Engineer Linn that he was empowering himself not to work because he still had to care for his 20-month old son and that he would try to get the information he requested from his doctor.

On December 3, 1998 the Claimant left two messages on Linn's voice mail. In the first message he said that his doctor had changed his medication and did not see any reason to see him before his scheduled appointment on December 14, 1998. In the second message, the Claimant said that the information that he [Division Engineer Linn] demanded was unobtainable because his doctor was not going to see him at this time.

On December 7, 1998 the Claimant was notified to attend an Investigation on December 16 to ascertain the facts and determine his responsibility, if any, for his failure to report for duty on December 1, 1998 and his failure to provide medical information by December 3, 1998. The Investigation was postponed several times and eventually held on March 2, 1999. At his Investigation, the Claimant insisted that he did all he possibly could have done to comply with Division Engineer Linn's request.

On March 25, 1999 the Claimant was suspended for 60-days for his reputed violation of General Code of Operating Rule 1.15 and Maintenance of Way Operating Rule 1.13.

The Claimant insists that he did everything possible to comply with Division Engineer Linn's instructions, but the Board respectfully disagrees. Linn made it clear to the Claimant in his December 1, 1998 letter and during their December 3, 1998 conversation that Linn wanted medical documentation from the Claimant's doctor explaining why he was unable to return to work. Because the Claimant had not performed any service for seven months the Carrier was certainly entitled to know his status.

The Claimant contends that it was the Carrier's responsibility to obtain this information because Dr. Henderson's nurse said to contact his office if there were any

questions. However, the Claimant never gave the Carrier a release to obtain his medical records. Therefore, it would have been pointless for the Carrier to contact Dr. Henderson's office.

The Claimant had an appointment with Dr. Henderson on December 14, 1998. He easily could have obtained written documentation from Dr. Henderson at that appointment to explain his treatment. It is noteworthy that the Claimant's disciplinary Investigation was pending at that time. Yet he did not obtain anything from his doctor to explain his purported inability to protect his position on the Knoxville section crew. In fact, he still had not furnished the Carrier any medial information from his doctor by March 2, 1999, when his Investigation was held.

For all the foregoing reasons, the Board finds that the Claimant did not comply with the clear and unambiguous instructions given him by Division Engineer Linn on December 1 and December 3, 1998. There was no justification for his failure to comply with these instructions. Accordingly, the discipline assessed the Claimant on March 25, 1999 was warranted and his claim is denied as a result.

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 July 2002.