

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39871
Docket No. SG-39579
09-3-NRAB-00003-060373
(06-3-373)

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of J. W. Storbeck, for the discipline issued to be rescinded and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the excessive and unwarranted discipline of a 30-day overhead suspension with a one-year probationary period without meeting its burden of proving the charges in connection with an investigation held on March 24, 2005. Carrier’s File No. 35—5-0061. General Chairman’s File No. 05041-BNSF-172A. BRS File Case No. 13574-BNSF.”

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.

The Claimant was assigned as a Signal Maintainer at Kingman, Arizona. By notice dated March 14, 2005, he was directed to attend a formal Investigation in connection with the alleged violation of Rules 1.6, 1.13 and 1.15 for failing to comply with supervisory instructions and absenting himself from his assigned work area on February 7 and 18, 2005.

At the Investigation held on March 24, 2005, Signal Supervisor P. Sharp testified that the Claimant had been instructed in March 2004 to work on his territory during assigned work hours. The Claimant was further instructed to contact supervision for permission if he needed to be away from work for personal business.

In January and February 2005, Supervisor Sharp received reports from signal gangs in the area indicating that the Claimant was not on his assigned territory. The Claimant's assigned vehicle was also seen at locations outside of his assigned territory during work hours. Accordingly, Supervisor Sharp contacted Special Officer C. Field on February 2, 2004 to request surveillance.

Special Officer Field observed the Claimant on February 7 and 18, 2005. On both dates, he noted that the Claimant left his work site in a company truck and drove to a subdivision where he was building a new home. On February 7, 2005, the Claimant was seen working on some electrical outlets at his new home. He did not return to work for two hours. On February 18, the Claimant was observed working at his new house for approximately one hour.

Special Officer Field compiled a report and submitted it to Supervisor Sharp on March 7, 2005. The record shows that the Investigation was scheduled for March 21, 2005, but was postponed for three days at the request of the Organization.

The Claimant acknowledged at the Investigation that he was conducting personal business on the dates he was observed by Special Officer Field. He stated that he was waiting for a subcontractor who was late arriving to work on the construction of his new home. When asked if he had permission from his supervisor to absent himself from his assigned territory, the Claimant testified that he used his lunch period and "didn't think stopping by occasionally would be a problem." He insisted that the

Carrier had been flexible in allowing employees to conduct personal business during assigned hours so long as they made up the time.

The Claimant was subsequently notified that the charges against him had been substantiated at the Investigation. He was assessed a Level S record suspension of 30 days and assigned a probation period of one year.

The Organization protested the discipline. It contended that the Investigation was procedurally flawed because it was not conducted within the contractual time limits. Rule 54 states that Investigations are to be held “not later than fifteen (15) calendar days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) calendar day limit from the date information is obtained by an officer of the Carrier. . . .” The Organization argues that the Claimant’s alleged misconduct occurred on February 7 and 18, 2005, more than 15 days prior to the Notice of Investigation dated March 14, 2005 and, therefore, the Carrier forfeited its right to issue discipline in this matter.

The Organization’s position is without merit. Prior arbitral Awards have recognized that notice to the Carrier is not triggered until the agent or officer has concluded his preliminary Investigation and reported the results to the Carrier. At that point, the Carrier is deemed to have the necessary information to trigger the time limits. See, Third Division Award 36337. In the instant case, the evidence shows that Supervisor Sharp received Special Officer Field’s report on March 7, 2005. The Investigation was originally scheduled to be held on March 21, 2005. The Board finds that the Investigation was held in accordance with the 15-day time limit set forth in Rule 54.

On the merits, we conclude that the charges were proven and the discipline was fully warranted. There is substantial evidence on the record, including the Claimant’s admission, to establish that he was indeed guilty of the misconduct with which he was charged. The Claimant admittedly conducted personal business during work hours without supervisory authorization. There were multiple events observed which occurred while the Claimant claimed to be present at his assigned work location and received compensation for service to the Carrier. He violated the Rules as charged.

The Claimant’s attempts to justify his conduct were not persuasive. The record showed that he received a 30-minute lunch break. The Claimant far exceeded that

length of time on February 7 and 18, 2005, when he was observed away from his assigned territory conducting personal business. Moreover, his assertion that the Carrier had been lax or permissive in allowing employees to take personal time was not substantiated by any probative evidence. Equally important, the Claimant's assertion was belied by the fact that he had been specifically instructed to stay on his territory during his assigned work hours. The Claimant knew or reasonably should have known that absenting himself without permission to conduct personal business was prohibited.

The Board will not interfere with the assessment of discipline in the absence of a finding that the Carrier's determination was arbitrary, capricious or unreasonable. On this record, no such finding has been shown. The discipline was commensurate with the seriousness of the proven offense. Accordingly, the claim must be denied in its entirety.

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 31st day of July 2009.