

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41226
Docket No. SG-41054
12-3-NRAB-00003-090212

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 BNSF Railway Company:

Claim on behalf of T. S. Humble, for his personal record to be cleared of any mention of this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a 20-day record suspension against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on August 24, 2007. Carrier’s File No. 35-08-0009, General Chairman’s File No. 07-028-BNSF-161-NM. BRS File Case No. 14096-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 assessed a 20-day record suspension for violating Rules 1.6, 1.13 and 1.15 of the Maintenance of Way Operating Rules when he released the members of his Signal Gang before the end of the scheduled workday “without proper authorization from Supervisor Valerie Duque.” On July 12, 2007, the Claimant, a Signal Construction Foreman, gave his Signal Gang permission to leave work before the normal quitting time of 5:00P.M. The crew was working in Mountainair, New Mexico, and had lodged nearby in Kayser, New Mexico. July 12 was the last day of the crew’s existence. The gang was done with the work it had been assigned and the employees were hauling equipment from the work site back to Kayser and then taking it to Belen, New Mexico, where they would report for duty the following week. According to the Claimant, the crew had worked some overtime and had had short lunch breaks all week (which he recorded in his planner calendar, which is part of the record). His calculations indicated that “comp time” entitled the gang to leave work at 3:10 P.M. Between 2:00 and 2:30 P.M., he instructed the crew to drive from Mountainair to Kayser, wrap things up there, and then travel to Belen. The fourth crew member, who lived in Mountainair and had stayed at home instead of bunking with the rest of the crew in Kayser, had reported on duty one-half hour early all week (four days) to prepare the work site for the other crew members, who drove over from their lodging in Kayser. The Claimant permitted him to report off at 2:30 P.M. and to go straight home, rather than requiring him to travel to Kayser or Belen to report off. The crew members who went to Kayser, then Belen reported off shortly after 4:00 P.M.

The Claimant and his Signal Construction Supervisor had not talked for two weeks—she had been on vacation the week before, then traveling to other locations earlier the week of the incident. On July 12, she arrived at Mountainair at about 2:30 P.M. and saw the Claimant at the Depot in his personal vehicle. She asked him where he was going. According to her testimony, he told her he was going to meet up with the rest of the gang in Kayser, and she told him that she would meet him there. She drove to Kayser and ran into the remaining three crew members, who were leaving. It was approximately 2:30 P.M. When she asked what they were doing, they reported that they were taking equipment for the next week’s work to Belen, where they would end their workday early. The Signal Construction Supervisor did not say anything to them about why they were leaving early, nor did she direct them to stay at work until 5:00 P.M. According to the Supervisor, no one ever mentioned “comp time” to her. The crew departed and the Signal Construction Supervisor waited for the Claimant,

who never appeared. She telephoned him on his cell and left a message asking him to return her call. He did not call. The Signal Construction Supervisor stated that she did not try again to contact the Claimant because she was waiting for him to return her call. Close to 5:00 P.M., she left Kayser and drove to Belen, which was about 40 minutes away. According to the Signal Construction Supervisor, crew members may not leave a location without proper authorization, which is permission from her in person or via telephone. Any overtime or "comp time" must be pre-authorized by a Supervisor in advance and Supervisors need to be kept informed by Foremen where the gangs are and if they need to work overtime.

The Claimant testified that when they talked in Mountainair, he told the Signal Construction Supervisor about the overtime the crew had worked and that he had used "comp time" to release them early. The Signal Construction Supervisor said nothing; nor did she indicate that she wanted to talk to him in Kayser. He had intended to travel to Kayser but ran into another employee that he needed to talk to. By the time they finished, it was after 3:30 P.M., and he could legitimately leave work himself. The crew members had not reported any problems in Kayser and he concluded that he did not need to go there. He stated that he did not get a call on his cell phone from the Signal Construction Supervisor that afternoon, but noticed when he reported back to work the following Monday that there was a "missed call" from her. Two witnesses testified that cell phone coverage in the area is very unreliable, and the Claimant noted that dropped calls can take several days to show up on his phone. In addition, he uses one phone for work and another one for personal use, and he did not check his work phone over the weekend. The Claimant also testified that there was no consistent policy on overtime and "comp time" among Supervisors, and nothing in writing. His Supervisor, and others, allowed "comp time" and he had used it before to release gang members early at the end of the week. He acknowledged that he had not reported the small amounts of overtime the gang worked during the week because they were minimal.

The Carrier conducted an Investigation of the matter. By letter dated September 20, 2007, it notified the Claimant of its conclusion that he had violated its Operating Rules by permitting the gang members to depart early without proper authorization. The discipline issued was a 20-day record suspension for violation of Rules 1.6, 1.13 and 1.15. Rule 1.6 (Conduct) states: "any . . . misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal. . . ." According to the Carrier, the Claimant failed to follow instructions and procedures set forth by his direct Supervisor for reporting overtime and by giving

his gang comp time without her authorization. His conduct also violated Rule 1.13 (Reporting and Complying with Instructions), which states “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction.” Finally, the Claimant also violated Rule 1.15 (Duty – Reporting or Absence): “Employees must not leave their assignment . . . without proper authority. . . .” The Claimant failed to obtain proper authority from his Supervisor for him or anyone on the Signal Gang under his direction to leave their assignment early. The Carrier contends that the Claimant’s testimony is self-serving and not credible, and that it has established substantial evidence in support of its conclusions. The Claimant violated the Rules with which he was charged, and the level of discipline was appropriate. Accordingly, the claim should be denied. The Organization contends that the Carrier failed to meet its burden of proof. The Investigation proved that the Claimant complied with the ongoing procedures practiced by his Supervisor and was not dishonest in any way. She had the authority to stop the Claimant and his Signal Gang from leaving early but did not, effectively giving her permission.

The Rules the Claimant is charged with violating all have one thing in common—they require a certain mental state on the part of the employee, specifically an intent to engage in misconduct. Rule 1.6 refers to “misconduct or willful disregard . . . affecting the interest of the company. . . .” (Emphasis added) The employee must willfully engage in misconduct before he can be found guilty. Rules 1.13 and 1.15 similarly require intent on the part of the employee. An employee cannot be guilty of violating Rule 1.13 if he believes that his actions comply with his Supervisor’s instructions and directions, nor can he be in violation of 1.15 if he leaves his assignment believing that he has “proper authority” to do so.

It is in this regard that the Carrier failed to meet its burden of proof in this case. There is absolutely no evidence that the Claimant acted in anything other than good faith in calculating the “comp time” that he believed his crew was due and giving it to them before the gang was abolished and broken up. The Rules he is accused of violating are essentially charges of dishonesty and insubordination, but there is no evidence of any intent on the Claimant’s part to engage in subterfuge, to deceive the Carrier or to defy any instruction or direction that he had been given by his Supervisor. In the absence of such intent, he cannot be found guilty of misconduct.

Moreover, the Claimant’s Supervisor was aware on July 12 before all but one of the gang members had left of the Claimant’s intent to release the crew early, yet she

said and did nothing to keep them at work.¹ She had the authority to contravene the Claimant's directions. If she believed that permitting the Signal Gang to leave early was the gross violation of Company Rules that the Carrier subsequently alleged it was, she had an obligation to direct the gang members to remain at work until the end of their scheduled shift. She did not, and by failing to act, she gave her tacit permission to the Claimant's use of "comp time" to permit the Signal Gang to leave work early on July 12, 2007. Under the circumstances, the Carrier failed to establish that the Claimant violated the Rules with which he was charged, and the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2012.

¹ And the one gang member who had left lived nearby and could easily have been recalled to work.