

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41383
Docket No. SG-40920
12-3-NRAB-00003-090103**

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 R. S. Pippin, 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 imposed the excessive discipline of a formal Letter of Reprimand without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on October 18, 2006 [2007]. Carrier’s File No. 35 08 0010. General Chairman’s File No. 07-036-BNSF-129-S. BRS File Case No. 14127-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, who has worked for the Carrier since 1993, was a Shop Signalman in Springfield, Missouri, at the time of the events giving rise to this claim. The Springfield Signal Shops Absenteeism Policy follows Engineering Instruction 22.6.1, BNSF Absenteeism and Layoff Policy. The Springfield Policy reads, in part, as follows:

“EI 22.6.1 states ‘If for some reason you need to be absent, it will be necessary that you personally contact your Assistant Roadmaster or foreman to discuss the matter with that person. Leaving a voice mail message for the Roadmaster will not be considered contacting the proper authority.’

‘EI 22.6.1 also states ‘The policy for handling unexcused absences or tardiness is as follows:

1. First violation will result in your Roadmaster or Foreman counseling you concerning the rules involved.
2. Second violation will result in a Formal Letter of Reprimand noting the rule violation placed in your personal file.
3. Any subsequent violations of these rules will result in scheduling a Formal Investigation with more severe disciplinary action being taken.’

The Signal Shops will be holding employees accountable to this rule substituting Assistant Roadmaster and Roadmaster for Signal Shop Manager.”

The Springfield Policy became effective March 15, 2007, and T. Barlow, the Signal Shop Manager, conducted a briefing for employees that day. The Claimant was absent, and Barlow testified that she met with him for a private briefing when he returned to work the next day.

On March 22, 2007, the Claimant failed to obtain the proper authority for being absent and received a verbal counseling for a First Violation of the Policy. The Claimant testified that he was aware of the Springfield Policy, but he did not recall either the briefing or his first violation.

On September 7, 2007, the Claimant left a voice mail message for Barlow stating that he was having trouble with his back and would be absent. On September 10, the Claimant again left a voice mail message for Barlow stating that he was having back problems and would not be in to work that day. Barlow and the Claimant had had a discussion the preceding week about his back injury, and there is no dispute that she did receive the messages that he left. Barlow testified that she attempted, without success, to reach the Claimant by telephone at four different numbers she had for him, and he did not respond to messages that she left. He testified that he did not have his cell phone with him while he was lying down. She sent him a certified letter dated September 7, 2007, but does not know if he ever received it, because she did not get a receipt for its delivery. He stated that he never received the letter. The Claimant returned to work on September 11, 2007.

The Carrier treated the two incidents as Second and Third Violations of the Absenteeism Policy and scheduled a Formal Investigation, which took place on October 18, 2007. As a result of the Formal Investigation, the Carrier found the Claimant guilty of violating the Springfield Shop's Absenteeism Policy and Engineering Instruction 22.6.1 by failing to speak to Shop Manager Barlow when requesting to be absent both days in September. It issued a Letter of Formal Reprimand, to remain in his file for a period of three years. The Organization filed this claim, alleging that the Claimant was innocent because he left voice mail messages for the Signal Shop Manager, that the policy requiring an employee to speak directly to someone when laying off is unreasonable, and that the Claimant was not properly instructed on the change in the policy.

The Carrier contends that the Claimant was properly disciplined. There is no evidence that the Signal Shop Manager's multiple roles in the investigatory process prejudiced the Claimant's right to a fair and impartial Formal Investigation. As for the substance of the claim, the record establishes that the Claimant was fully aware of the policies concerning the proper procedures to follow when laying off from work and chose to violate them by leaving a voice mail message instead of making actual contact with Barlow. The policy is not unreasonable. The Springfield Policy is based on Engineering Instruction 22.6.1, which has been in place for many years. The Engineering Instruction is, in turn, based on Maintenance of Way Operating Rule 1.15, Duty – Reporting or Absence, that had been in effect since at least October 31, 2004. The requirement that an employee speak directly to a Carrier Officer is neither new nor limited to Signal Shop employees in Springfield. It applies to all Signal and Maintenance of Way forces. Prior Awards have found similar reporting off requirements not to be either unreasonable or unduly burdensome. The Carrier acted appropriately under the Policy, and it is not the

function of the Board to substitute its judgment for that of the Carrier over the quantum of discipline assessed.

The Organization alleges that the Carrier violated the Agreement by failing to provide a fair and impartial Formal Investigation and when it failed to meet its burden of proof. Procedurally, it was improper for the same Manager to perform multiple roles in this disciplinary action: she both made the charge and assessed the penalty. This is such a fundamental breach of the standards of fairness that the Board should uphold the claim. Moreover, the policy requiring employees to speak with a Supervisor directly is unreasonable and unduly burdensome. Barlow received the messages and knew that the Claimant would be absent and why. Employees should not be required to call off every day if they are going to be off for the same reason. Who should they contact if the Signal Shop Manager is absent herself? What other options are available? The Carrier was wrong to ignore the reason for the Claimant's absence and failing to take into account the fact that Barlow was not available to answer the call. When the Carrier considers issuing discipline of any form, it should consider mitigating factors, which it did not do here. The Claimant attempted to call the Signal Shop Manager, but she was not available. It is unduly burdensome for employees to have to spend their time trying to run down one person when they are suffering from an injury or illness. In the absence of any alternate policy, it is unfair for the Carrier to have issued a Letter of Formal Reprimand to the Claimant, and the claim should be sustained.

The Board will first address the procedural objection lodged by the Organization, relating to the fact that the letter of charge and the notice of discipline were signed by the same individual, the Manager of Signals in Springfield. The signature of the Department Manager does not alone mean that the process was unfair or biased. To some extent, Department Managers necessarily play several roles in managing the employees under their supervision. It is not clear on the record that the Department Manager initiated the Formal Investigation; it appears more likely that it was the Signal Shop Manager who set things in motion. Moreover, someone within the Carrier's management structure has to make decisions about what is an appropriate level of discipline, and that person is frequently the Department Manager. The actual Formal Investigation was conducted by a third party, and the Claimant and his representative acknowledged that they had had a fair opportunity to prepare and participate. All in all, the Organization's position on the procedural conduct of the Formal Investigation is unpersuasive.

Turning next to the substance of the claim, the Board finds that the Claimant had notice of the Springfield Policy; he admitted as much himself in his testimony at the

Formal Investigation. The Board further finds that the Policy is not unduly burdensome as implemented. The Organization raises legitimate questions about what alternatives are available to employees if they are unable to reach the contact person directly, and the Carrier may want to consider adding a back-up contact plan to the Policy. In this case, however, the Claimant failed to follow up his voice mail message with further telephone contact. It is not at all clear that had he done so, he would have been disciplined. In his September 7 voice message to Barlow, the Claimant said, “. . . If I get another [shot today] I will try to come in after that. Otherwise, will have to figure out what, I will have a note from doctor or whatever but there is just no way this morning. So I will talk to you later. . . .” [Emphasis added.] The Claimant clearly understood that he needed to talk to his Supervisor, but he never followed up, leaving her clueless as to what the state of his health was and when or if he would report for work that day. She attempted to reach him and left messages that he did not return. His testimony that he did not have his cell phone with him when he was resting does not explain why he never returned Barlow’s calls. Similarly, the Claimant’s September 10 message said, “. . . I’m suffering from back I’m going to doctors and see about an appointment today. I will holler at you later. . . .” [Emphasis added.] Again, the Claimant acknowledged in his telephone message the need to make direct contact with his Manager, then failed to do so. Direct contact is important so that the Manager and the employee can discuss the employee’s situation and how best to proceed. Had the Claimant spoken to Barlow on September 7, the two of them might have agreed that he did not need to call her again on September 10 if he were still suffering. Instead, he neither called back nor returned her phone calls to him. As a result, she was left wondering what his health status was and even if he were legitimately ill. The Organization makes much of the fact that the policy requires employees to contact only one person who may or may not be available to answer the telephone when they call in. The Policy, however, is silent on exactly when direct contact must be made. It is difficult to imagine that if an employee were in an accident and unable to telephone immediately, but made contact as soon as possible, the Carrier would charge him or her with a violation of the Policy. Similarly, by leaving a voice message on the telephone, an employee demonstrates that he or she has attempted to comply with the policy. However, the burden remains on the employee to follow up the message with a later attempt to make direct contact. Requiring the employee to complete the direct contact at a later time if his or her Manager is not immediately available is not unduly burdensome; it requires only a simple telephone call. From the content of his messages to Barlow, the Claimant realized that he needed to speak to her. But he failed to follow through, or to return her calls to him. The Board concludes that the Claimant knew what the Policy required and failed to comply. He had previously been counseled for a First Violation of the Policy.

Form 1
Page 6

Award No. 41383
Docket No. SG-40920
12-3-NRAB-00003-090103

The Carrier was within its rights to treat the September 7 and September 10 violations as a Second Violation and to issue him a Letter of Formal Reprimand.

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 25th day of July 2012.