

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42151  
Docket No. SG-42372  
15-3-NRAB-00003-130389**

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 B. Hada, for reinstatement to service with compensation for all time lost, including skill pay, with all rights and benefits unimpaired and with 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 harsh and excessive discipline of dismissal to the Claimant without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on April 12, 2012. Carrier's File No. 35-12-0041. General Chairman's File No. 12-030-BNSF-33-K. BRS File Case No. 14895-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.

On November 17, 2011, the Claimant was dismissed for failing to comply with instructions and falsely reporting his hours of service. Following a meeting of the PEPA Committee on March 2, 2012, the Committee which reviews discipline cases that result in termination, decided to give the Claimant another chance.

On March 13, 2012, a letter informing the Claimant of the opportunity to return to work on a leniency basis was sent by certified mail and hand-delivered by Signal Manager Gary Lang. The letter outlined certain steps that the Claimant needed to complete in order to return to active service, steps that are routine in such cases such as completing a medical packet. In addition, the letter stated that the Claimant would receive “no pay for time lost” and that the reinstatement was not to be a mitigation of the circumstances surrounding the Claimant’s dismissal.<sup>1</sup> Initially, the Claimant refused to sign an acknowledgement of receipt of the letter. He told Signal Manager Lang that he wanted to think overnight about whether he wanted to return.

The next day, March 14, 2012, the Claimant telephoned Lang and told him that he would only return to work if his record was expunged and he received full back pay for the time that he had been off work. The conditions set forth in the letter were determined by the PEPA Committee; Lang had no control over the terms of the Claimant’s return to work. On March 15, 2012, the Claimant participated in a conference call with Lang and a Specialist in the Carrier’s Medical Department. The Claimant confirmed that he had received the medical packet, which consisted of a Medical Questionnaire to determine the physical shape of an employee returning to work. The Claimant again stated that he would not return to work unless he was paid for all time that he had been off work. Following that conversation, Lang sent the Claimant a certified mail letter dated March 15, 2012, informing him:

“... [y]ou are advised that the infraction that led to your dismissal will remain on your personnel record, and you will not be paid any back pay.

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<sup>1</sup> Specifically, the letter stated: “Mr. Hada will be reinstated to service on a leniency basis, with seniority unrestricted, with no pay for time lost. Furthermore, it should be understood that this reinstatement shall in no way be used in any effort to mitigate the circumstances of the Claimer’s dismissal.” The letter went on to set out six steps that the Claimant needed to take (primarily related to certifying his medical fitness and qualifications) before returning to work.

**You are hereby advised that if you fail to comply with all instructions and timelines prescribed in that reinstatement letter dated March 13, 2012 and return to service, that would make you subject to further discipline, up to — and including — dismissal.”**

The Claimant did not follow the instructions set forth in the reinstatement letter. On March 29, 2012, the Carrier considered him absent without permission. The Organization asked for a 24-hour grace period, which the Carrier granted, and then another one, which the Carrier also granted. The Carrier scheduled an Investigation for April 12, 2012. The Claimant’s union representative attended, but he did not. The Claimant was found to be in violation of Maintenance of Way Rules 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty - Reporting or Absence), and on April 27, 2012, he was again dismissed from service. The Organization filed a timely claim; the Parties having been unable to resolve the matter on the property, it was submitted to the Board for adjudication.

Initially, the Claimant was terminated on November 17, 2011. The Organization filed a claim on his behalf challenging the dismissal, which was still pending at the time this matter was heard by the Board. On March 13, 2012, the Carrier offered the Claimant the opportunity to return to work without back pay and without expunging the earlier offense from his record. When the Claimant failed to return to work pursuant to the terms of the letter, the Carrier considered him AWOL and terminated him a second time, on April 27, 2012.

The claim before the Board is for the Claimant’s termination on April 27, 2012 - it is not for the original termination in November 2011, which is the subject of a separate claim. The letter offering him the opportunity to return to work did not require the Claimant to drop his original grievance, but it did require that he sign if he was agreeable to the terms it contained. The Organization argued that the crux of the instant dispute is whether the Carrier can discipline the Claimant for failing to agree to the terms of a leniency reinstatement letter that specifically included language requiring his agreement. The Organization maintained that the items contained in the letter were not instructions; they were the terms that the Claimant would have to follow if he agreed and decided to accept the leniency reinstatement.

Under the unique facts and circumstances of this case, the Claimant will be allowed to return to work if the claim in the underlying original dismissal is sustained in arbitration (or otherwise pursuant to the Parties’ dispute resolution procedures).

That is to say, this Award is not a return-to-work order for the Claimant; whether he returns to work depends on the disposition of his original claim. However, by his actions, the Claimant has limited his entitlement to backpay in the event his original termination is reversed. The Claimant had an opportunity to return to work and earning status in March 2012, which he refused. It is a standard principle of industrial relations, and contract law in general, that individuals must mitigate damages when they have an opportunity to do so, or forfeit their right to backpay. This is to discourage employees from merely sitting on their rights while their appeals are processed, in hopes of a windfall in backpay. By refusing to return to work when he had the chance, the Claimant waived his right to any backpay compensation for the period following the Carrier's offer to reinstate him.

**AWARD**

Claim sustained in accordance with the Findings.

**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 26th day of August 2015.