

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42467
Docket No. SG-42955
16-3-NRAB-00003-150149**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 P. L. Lopez, 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 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 2, 2013. Carrier’s File No. 35-14-0005. General Chairman’s File No. 13-037-BNSF-172-A. BRS File Case No. 15069-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 April 17, 2013, Claimant accepted a Standard Formal Reprimand and agreed to waive his right to investigation and to comply with the Employee Assistance Program (EAP) Manager's recommendations. The Carrier subsequently learned he was scheduling EAP counseling sessions during his regular working hours and paying himself for the time even though he was not at work. His Supervisor asserts that he met with Claimant, instructed him not to pay himself for time not worked, and advised that he must inform his Supervisor when he is going to be absent from his assignment. The Supervisor contends he told Claimant that time spent during his regular assigned shift attending counseling sessions would not be paid. The following day Claimant was absent again without notifying his Supervisor, and submitted for a full eight-hour shift.

The Carrier held a formal Investigation for the purpose of gathering evidence. Based on the evidence adduced at the Investigation, Claimant was found to have violated MOWOR 1.6, 1.13 Reporting and Complying With Instructions and MOWOR 1.15 Duty Reporting or Absence. The Carrier deemed his offense to be very serious and dismissed him from service. The Organization protested the dismissal, which the Carrier rejected on appeal. The claim was duly processed without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

In the Carrier's view, this case is relatively simple. Claimant was specifically instructed not to charge for his counselling sessions and did it anyway. It argues he also paid himself a meal allowance when he was gone all day; employees are required to work at least four hours before qualifying for a meal allowance. As the Carrier sees it, even if the Supervisor said he would "look into it," this does not constitute authorization for Claimant to pay himself for time not worked. The Carrier insists that Claimant admitted that his Supervisor instructed him not to pay himself for the sessions going forward.

The Organization finds fault with several procedural aspects of the case, including the sufficiency of the Notice of Investigation, the conduct of the Hearing Officer and the authorship of the letter of dismissal. On the merits, it argues that the decision to pay was not made until after Claimant and his Supervisor spoke on the July 18. It argues Claimant did not have a definitive answer to the question of payment on July 18, and lacking clear instruction, he cannot be faulted. In its view, Claimant was taken out of service without prior warning.

The Organization asserts Claimant was confused about what his Supervisor meant when they spoke. The Organization maintains that when he discussed the matter with Claimant, his Supervisor said he would "look into it," meaning the question was left open.

The Board has reviewed the transcript and found the following testimony from Claimant regarding his Supervisor's instructions:

"DANIEL CHAPARRO: Okay. And uh, Mr. uh, Mr. Anderson approached you on it prior to the 17th and he did, I did remember his testimony, he said, going forward, that he would not allow this to be charged anymore. Is that what he said to you?"

PAUL S LOPEZ: Something to that effect, but I don't recall exactly his words, but I don't really know what going forward means."

However, after making this statement, Claimant attempted to backpedal:

"DANIEL CHAPARRO: Well, did he say you can't charge for it or that he-

PAUL S LOPEZ: No-

DANIEL CHAPARRO: Was reviewing-

PAUL S LOPEZ: No-

DANIEL CHAPARRO: It?

PAUL S LOPEZ: He said, going forward, he would look into it, but he never actually said, 'Don't charge your time.'

DANIEL CHAPARRO: He never told you not to charge for it?

PAUL S LOPEZ: Right. He never said that."

It is simply not credible that Claimant does not know what "going forward" means. Further, his testimony was plainly inconsistent. Claimant initially admits that Anderson said 'something to the effect' of the charge not being allowed. "Something to the effect" must be interpreted as an expression consistent with disallowance of the charge. Claimant's attempt to backtrack is all too transparent: he changed his testimony and claimed his Supervisor promised to look into it and did not prohibit the charge. Claimant cannot have it both ways.

By contrast, Supervisor Anderson's testimony was definitive:

“The day prior to the situation, I had a uh, one-on-one conversation with Mr. Lopez, stating, going forward, that we will, via communication, if there is any a time that he is not going to be at work and going forward if he has EAP uh, meetings that he has to attend, he will not be able to pay himself for those, that time away from the Railroad.”

Upon review of the record evidence, the Board is not persuaded that there was procedural error in this case. Further, the Board finds substantial evidence of wrongdoing by Claimant. He was absent without informing his Supervisor that he would be gone or where he would be. Even if the absences were authorized, management would have to know when he would be gone in order to schedule manpower.

The Carrier has discredited Claimant’s testimony. Upon analysis, the Board finds the Carrier had good reason to deem Supervisor Anderson’s testimony more consistent and persuasive than Claimant’s, and did not abuse its discretion in this regard. The record evidence supports the conclusion that Claimant was specifically advised to inform his Supervisor of future absences and not to charge for them, yet he persisted in claiming pay for time not worked.

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 28th day of November 2016.