

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43051
Docket No. SG-43407
18-3-NRAB-00003-160047**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific (formerly Soo Line)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific (formerly Soo Line):

Claim on behalf of T. L. Ferguson, for reinstatement to service with any mention of this matter removed from his personal record, compensation for all time lost, including overtime, and payment for any loss of benefits he has suffered as a result of his dismissal, account Carrier violated the current Signalmen’s Agreement, particularly Rule 28, 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 August 13, 2014. Carrier’s File No. 9-00145. General Chairman’s File No. 9-26-14 Ferguson dismissal. BRS File Case No. 15209-SOO.”

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.

Prior to his dismissal from service, T. L. Ferguson, hereinafter the Claimant, was employed as a Signal Maintainer, Madison. At the time of the events which led to his dismissal, the Claimant had been employed by Carrier for a period of five (5) years with a work record free of any prior discipline.

On the claim date in question, August 11, 2014, a Monday, the Claimant was testing Commercial Avenue a grade crossing on the M&P Subdivision at mile post 32.1. The Claimant began his shift that day at 6:30 am. At approximately 9:30 am, the Claimant stopped at his truck parked outside a bungalow for a snack and then took some Aleve medication to ease back pain and soreness he was experiencing as a result of a home project he worked on over the preceding weekend. Unbeknownst to the Claimant, his direct supervisor, Signal and Communications Maintenance Manager, Gregory Stahl had come to the location where the Claimant was working to observe / audit the Claimant's work. Upon his arrival, Stahl observed the Claimant enter the bungalow. According to the Claimant, he went inside the bungalow to rest his back by laying down on his side to allow the Aleve pain medication to take effect. At this time the Claimant also decided he considered the time away from work while inside the bungalow to be his contractual thirty (30) minute lunch break. While laying on the floor, the Claimant accessed his personal cell phone and began playing a game called "Spider Solitaire".

Supervisor Stahl remained outside the bungalow and after about fifteen (15) to twenty (20) minutes when the Claimant had not yet exited the bungalow, Stahl decided to go inside to ascertain what the Claimant was doing. According to Stahl, after entering the bungalow at approximately 9:50 am, he observed the Claimant laying on the floor in what looked to be a fetal like position, that is, curled up with his cell phone in hand and appeared to be asleep. When the Claimant became aware of his presence, Stahl related the Claimant said to him, "Greg, we can talk about this I need this job I have a daughter". Stahl also maintained that during their verbal interchange, the Claimant also stated, "Greg, you got me on that one". Stahl then took the Claimant out of service and ordered him to report back to the Portage, Wisconsin office whereupon his arrival he was asked to write a statement pertaining to the events of the surrounding circumstances of his entering the bungalow and remaining there for the period of thirty (30) minutes. Stahl also required of the Claimant to submit to a blood and alcohol testing and the Claimant complied. The Claimant's written statement reads in whole as follows:

“My statement, I was at commercial doing a crossing test and painting terminations. I had all my paperwork filled out. My back was really bothering me from a project I undertook over the weekend. I took some Aleve to help with the pain I was experiencing and went to continue my testing. I sat down in the relay house to try and help my back some and to make battery cards for the new installation that has occurred. I figured I would just count this down time as my lunch until the Aleve kicked in so I could continue about my day. I have to lay down on my side because it was the only comfortable position for my back. I assumed some I was counting this as my lunch it therefore counted as a designated break and subsequently was on my phone playing spider solitaire to pass the time a little bit. Greg approached me about 10-15 minutes into the break I was in. I know that we aren’t allowed to take our lunches out of a certain time period but I was just trying to be able to produce the best I could for the day. I had forgotten about my ITD [Individual Train Detection] that I had filled out in the truck at the time Greg was in my face because my mind was on getting through the pain. I have presented both my ITD and job briefing to Greg though.”

The Claimant was cited for formal Investigation that was held on August 13, 2014 at the Carrier’s Bensenville Yard Office, Franklin Park, IL. The Claimant was informed the purpose of the formal Investigation was to develop all facts and circumstances and placing responsibility, if any, in connection with: your alleged unauthorized use of a personal electronic device, sleeping while on duty, and not having proper On-Track protection at Commercial Avenue, MP 32.1, M&P Subdivision. On August 19, 2014 Carrier apprised the Claimant that upon its review of the testimony and evidence comprising the formal Investigation record, it determined the Claimant to be guilty of the violations of its rules, regulations and policies to warrant the discipline of removal from service. Thereafter, the Organization filed the subject claim and reaching no resolution of the matter, the claim is now properly before the Board for review and final resolution.

While Carrier argues the Claimant was found sleeping by Supervisor Stahl, the Claimant denies he was sleeping. We find the charge plausible but we are not persuaded Carrier proved this charge by the required threshold standard of substantial evidence. We find the charge of the Claimant’s not having proper On-Track protection to also be plausible but we are not persuaded Carrier proved this charge by the required threshold standard of substantial evidence. What we do know

from the record evidence is the Claimant's admission to committing two (2) violations, to wit: 1) taking a thirty (30) minute lunch period outside the 4th and 7th hours of being on duty and not seeking approval to do so by any managerial authority and 2) use of personal cell phone while on duty, both of which are deemed to be serious infractions by the Carrier and warrant the assessment of severe discipline. However, in light of the fact that at the time the Claimant committed these two (2) work violations he had a pristine work record free of any previous discipline, we concur with the Organization's position that dismissal was a more severe discipline than what was required or needed under all the prevailing circumstances. We are persuaded that the redress of this claim requires assessment of a quantum of discipline commensurate with the infractions committed but noting at the same time both are deemed by Carrier to warrant serious measures. Therefore, the Claimant is to be reinstated with seniority unimpaired, and without backpay. It is the Board's hope that the Claimant has learned from his mistakes and that going forward he will comport himself well. To do otherwise would place his further employment in serious jeopardy.

Claim sustained per Findings.

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 2nd day of May 2018.