

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44809
Docket No. SG-46680
23-3-NRAB-00003-210157**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of W. Zwit, for reinstatement to service with compensation for all time lost, including overtime 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 October 8, 2019. Carrier’s File No. 35-19-0045. General Chairman’s File No. 19-082-BNSF-20-C. BRS File Case No. 16285-BNSF. NMB Code No. 106.”

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 began in the Carrier's service on August 13, 2009. At the time of the incident herein, the Claimant worked as a Signal Electronic Technician in the Galesburg, Illinois Classification Yard, with a normal work schedule of Tuesday through Saturday, with Sunday and Monday as rest days.

On Saturday, July 27, 2019, the Claimant was assigned to work his normal shift from 1500 to 2300 at the Galesburg yard. Before the start of the Claimant's shift, there was a home flood emergency in his house causing him to be unable to report for duty on that day. The Claimant contacted the Signal Electronic Technician on the first shift (0700-1500), informing him of the emergency and that he would be unable to report for duty. There is no dispute that the Claimant did not inform his Supervisor. The Claimant then logged into the employee tracking system, marked himself as "off-call," and changed his workday pay code to a vacation day, with less than 24 hours' notice.

On August 05, 2019, the Claimant was given notice of an investigation in connection with the following charge:

An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to notify supervision before your missed shift on Saturday, 7/27/2019, at approximately 1500 while working as a Signal Electronic Technician in the Galesburg Yard. The date BNSF received first knowledge of this alleged violation is July 29, 2019.

After a formal investigation on October 8, 2019, the Claimant was found in violation of MWOR 1.6 Conduct, MWOR 1.15 Duty-Reporting or Absence, and MWOR 1.13 Reporting and Complying with Instructions, and was dismissed from the Carrier's service.

In a letter dated December 27, 2019, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated February 25, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that there is no question that it presented substantial evidence that the Claimant violated the Carrier's rules when he failed to follow proper instructions. The Claimant admitted to not following the rules as charged, despite previously received instructions from his Supervisor regarding how to request off.

The Carrier contends that the Claimant was provided with a fair and impartial hearing. The Carrier contends that it introduced evidence only to show that the Claimant had been properly informed of the attendance procedures. The Carrier contends that the absence of the first shift Signal Electronic Technician as a witness was not a denial of due process, because the Claimant's coworker was not his "accuser."

The Carrier contends that the penalty assessed was consistent with its Policy for Employee Performance Accountability ("PEPA"), which classifies this type of violation as Serious. The penalty of dismissal was consistent with the nature of the offense, the Claimant's disciplinary record, and the PEPA policy.

The Organization contends that the Carrier's Notice of Investigation was flawed because it did not identify the Rule that was allegedly violated. The Organization contends that the Carrier waited until the day of the Investigation to identify the charged Rules.

In addition, the Organization contends that the Claimant was denied a fair and impartial hearing when the Carrier entered his coworker's statement into evidence without calling him as a witness. The Organization contends that the coworker's testimony could have proven the Claimant did not violate the charged Rules.

The Organization contends that the Carrier has failed to present substantial evidence that the Claimant violated the charged Rules. The Organization contends that the record shows simply that the Claimant used a vacation day to attend to an emergency flood at his home. The Organization contends that while the Claimant did not seek prior approval to use a vacation day, he did ensure that a co-worker would cover his shift while he attended to a home emergency. The Organization contends that this is nothing more than an attendance issue and should have been treated as such.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

While there is no question that the Claimant failed to protect his assignment on July 17, 2019, in that he did not report for his scheduled shift and did not notify his supervisor, we find that the Carrier has failed to prove that the Claimant was indifferent

to his duty. In a stressful emergency situation, the Claimant realized he could not report for duty and then took steps to minimize the impact to the Carrier. It is clear that he did not take the proper steps, and thus, some discipline is appropriate, but dismissal is excessive. Based upon the unique circumstances of this case and without precedent for any future similar claims, the Claimant is returned to duty without back payment, but with all other rights and privileges intact.

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 28th day of October 2022.