

Joseph Lazar, Referee.

CASE NO. 16

STATEMENT
OF CLAIM:

NOV 16 1989

Rule 532(B) reads as follows:

"Instructions: Employees must comply with instructions from the proper authority."

On March 25, 1988, the Carrier issued to Claimant a letter of suspension stating:

"Suspended from service March 23, 1988 until March 31, 1988 (seven eight hour working shifts), for violation of Rules 532 and 532(B) of the Burlington Northern Railroad Rules of the Maintenance of Way dated April 27, 1986, as the result of your failure on March 21 and 22, 1988 to protect the trackman's vacancy you were working on Track Gang 131 headquartered at Seymour, MO as you were instructed.

Since Friday, April 1, 1988 is a holiday, you are specifically instructed to protect this trackman's vacancy at Seymore, MO on Monday, April 4, 1988."

The transcript of investigation shows the following testimony of Roadmaster:

" I sent Mr. D. R. Freeman a certified letter March 4, 1988, recalling him for work from Gang 131 at Seymour, Missouri. He was to take a re-entry physical and report to work within ten days. Mr. Freeman passed his physical March 11, 1988. He came to my office on this date to discuss with me about letting him return to work one day a month for the next six months in order to become vested for ten years' railroad retirement. He said he would also drop all time claims against the company. I refused this deal, but suggested he talk to my immediate supervisor...

Mr. Freeman reported to work March 14, 1988, as instructed. Friday morning, March 18, I ask him if he would be reporting to work the following Monday. He stated he could not as he was protecting another job working for the Missouri State Highway Department. I informed him at that time that this a rule violation and that he report to work to protect his job with the railroad.

Mr. Freeman failed to report to work Monday, March 21 and Tuesday, March 22, 1988. On March 23 I called him at home and asked if he would be returning to work. He said he would be back for one day the next month.

On March 25, by certified letter, I suspended him from work for seven working days for violation of Rules 532 and 532(B). He was told to report for work April 4, 1988.

Records will show that Mr. Freeman was suspended five days for the same rules violation November 21, 1986.

April 4 and 5, 1988, Mr. Freeman did not report for work as instructed. On April 6, 1988, I attempted to contact him at home and at his place of employment with the highway department. I was unable to reach him.

More investigation revealed that Mr. Freeman was working for the State Highway Department during the week of April 4, 1988." (Tr., pp. 4-5).

The transcript of investigation, Exhibit No. 22, is a letter from the Missouri Highway and Transportation Commission, dated May 12, 1988, stating:

"This is to advise that employee Dennis Freeman worked April 4, 5, 6, 7 ($\frac{1}{2}$ day), and 8th. He took $\frac{1}{2}$ day of sick leave on April 7, 1988."

The transcript of investigation shows the following testimony of Claimant:

- "Q. Exhibit 22 that you examined earlier, I believe you said there was an error on this exhibit. Would you tell us that error again?
A. Yes. On April 6 and 7 those days I went to see the company doctor, Dr. Lowe.
Q. Are the rest of the days correct?
A. I suppose so I--that's the only two that I remember going to the doctor.
Q. Other than those errors then the rest of this document is correct?
A. Yes.....". (Tr., p. 21).

- "Q. And did the foreman always grant your request to be off to protect another job?
A. I never asked to be off to protect another job in the past.
Q. But this time you did?
A. I never gave no reason, I said it was personal--need to take off personal.
Q. But that was the reason to protect another job?
A. I have to make a living, yes." (Tr., pp. 21-22).

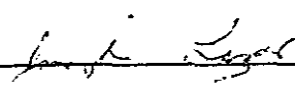
The evidence of record shows that Claimant was specifically instructed to report for work on April 4, 1988. Claimant did not report as instructed. Instead, he worked that day and on the 5th, 6th, 7th, and 8th for the Missouri State Highway Department. Claimant had previously requested that he be allowed to work one day a month for the Carrier so that he might become qualified for railroad retirement benefits, but this request was denied by the Roadmaster.

The record shows substantial probative evidence in support of the Carrier's determination that Claimant violated Rules 532 and 532(B) of the Burlington Northern Railroad Rules of the Maintenance of Way dated April 27, 1986.

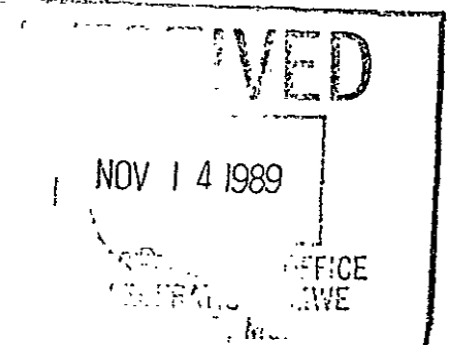
The Board notes that Claimant obtained from Company doctor on April 6, 1988, a determination that the Claimant's off-duty injury of his knee, suffered on January 29, 1988, rendered him not medically satisfactory for employment. This determination was made on April 6; Claimant's non-compliance with instructions to report occurred on April 4. The testimony of Claimant is that he did not try to contact his foreman or his Roadmaster to attempt to lay off on April 4. (Tr., p. 19). In the circumstances of this case, taking into account the fact that Claimant worked for the State Highway Department the week of April 4, and taking into account Claimant's past record, the discipline was not excessive.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim is denied.


JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

DATED: November 8, 1989



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