

**PUBLIC LAW BOARD NO. 5939**

**Case No. 44  
Award No. 44**

**PARTIES TO DISPUTE: BROTHERHOOD OF LOCOMOTIVE ENGINEERS**

**-and-**

**BURLINGTON NORTHERN AND SANTA FE  
RAILWAY COMPANY**

**STATEMENT OF CLAIM:**

Claim on behalf of Engineer D. J. Milbrandt for reinstatement to service with his seniority unimpaired; removal of discipline from his personal record; and that he be made whole for all lost time and benefits.

**FINDINGS:**

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1932;

That this Board has jurisdiction over the dispute involved herein.

In 1979, the Claimant was hired as a Brakeman at Beardstown, Illinois. In 1975, he was promoted to a Locomotive Engineer. Since April 2003, Dilworth, Minnesota has been the Claimant's home terminal.

At Dilworth, the Claimant was assigned to the Engineer's Extra Board. On or about January 1, 2004, the Claimant was forced to the Conductor's Extra Board. He remained on the Conductor's Extra Board until January 10, 2004, when he was forced to the Switchman's Extra Board at Dilworth. On January 15, 2004, the Claimant was returned to the Brakeman's Board. He remained on the Brakeman's Extra Board until January 27, 2004, when he was assigned back to the Engineer's Extra Board.

Between January 1 and February 3, 2004, the Claimant performed service on one day, January 8, 2004. The Carrier's crew office telephoned him approximately 159 times during this 34-day period either for service or to notify him of changes in his job status. About 150 of these calls were not answered. All the calls were made to the Claimant's residence. This was his only telephone number on file with the crew office.

On January 20, 2004, the Claimant requested a personal day, which was denied. Two minutes later, he laid off claiming fatigue. Approximately 24 hours later, the Claimant was called for service off the Brakeman's Extra Board and he laid off on call. On January 15, 2004, the Claimant was furloughed by mistake due to computer error. He was notified of this error three days later and was marked up on the Brakeman's Extra Board. On February 4, 2004, the Claimant requested to layoff, which request was denied. He therefore laid off claiming fatigue.

The Claimant was notified to attend an investigation to ascertain the facts and determine his responsibility, if any, for abandoning his duties as a BNSF employee when he was unavailable for over 150 calls for service and notifications of changes in his job status between January 1 and February 3, 2004. The investigation was held on February 12, 2004. The Claimant insisted that he was at his usual calling place between January 1 and February 3, 2004. On February 25, 2004, the Claimant's employment was terminated for his reputed violation of Rules 1.6, 1.16, 1.15 and 1.13 of the BNSF General Code of Operating Rules.

It is obvious to this Board from the evidence presented at the February 12, 2004, investigation that the Claimant had a cavalier attitude toward his employment obligations between January 1 and February 3, 2004. During this 34-day period, he was available for service on only 11 days and actually worked on only one day. Despite having worked only one day in a span of 34 days, the Claimant laid off due to fatigue on two days. He also laid off on call one day. Furthermore, he received guaranteed extra board pay on at least two days (January 23 and 24, 2004).

The Claimant was either absent from his usual calling place without notifying the crew office in violation of Rule 1.16 or he was intentionally malingering between January 1 and February 3, 2004. In either case, he failed to fulfill the obligation he owed the Carrier as a BNSF employee.

The Claimant's unavailability for service during the month of January 2003 was not an isolated act of irresponsibility on his part. Since late 1999, he has been disciplined six times for missing calls or for failing to be available when called for service. Nevertheless, due to somewhat unusual circumstances in this case, this Board finds that the Claimant's termination on February 25, 2004, was excessive and unreasonable.

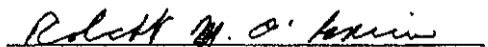
The Claimant's unavailability for service between January 1 and February 3, 2004, was not entirely his fault. During this 34-day period, the Claimant was assigned to four separate extra boards. He was also bumped twice and furloughed for three days,

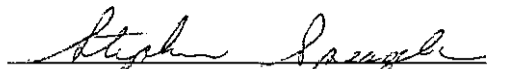
albeit erroneously. In the light of this atypical movement history, the Claimant's unavailability for service was not totally his responsibility.

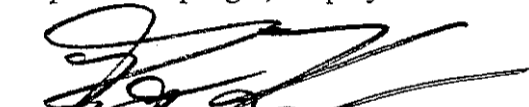
We find that the Claimant's termination was excessive and unreasonable in the light of this obfuscation in his employment status between January 1 and February 3, 2004. Accordingly, he shall be reinstated with his seniority unimpaired but without any back pay because of his unavailability for service in January 2004, and his prior disciplinary record. Upon the Claimant's return to service, we direct that he be placed on Level S discipline and be given a one-year probation commencing with his return to service. This Board will return jurisdiction over this claim for the one-year probationary period.

**AWARD:** Claim disposed of in accordance with the Findings.

The Carrier is ordered to make the within Award effective on or before thirty (30) days from the date hereof.

  
Robert M. O'Brien, Neutral Member

  
Stephen D. Speagle, Employee Member

  
Robert S. Karov, Carrier Member

Dated: 28 Mar '05