

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

Award No. 13749

Docket No. 13647

03-2-02-2-7

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

(International Brotherhood of Electrical Workers  
**PARTIES TO DISPUTE:** (  
(Burlington Northern Santa Fe Railway Company

**STATEMENT OF CLAIM:**

- “1. That in violation of the current April 1, 1983 Agreement, Rule 30 in particular but not limited to, Towerman J. D. Good was unjustly dismissed from the service of the Burlington Northern/Santa Fe Railroad Company following an investigation held on August 15, 2000.
2. That the investigation held on August 15, 2000 was not a fair and impartial investigation under the terms required by the rules of the current Agreement.
3. That accordingly, the Burlington Northern/Santa Fe Railroad Company be directed to return J. D. Good to its service and that he be made whole for all lost wages, rights, benefits and privileges which were adversely affected by the unjust removal from service and subsequent dismissal. In addition, that all record of the matter be removed from J. D. Good's personal record.”

**FINDINGS:**

The Second 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 worked as a Towerman at the Carrier's Birmingham, Alabama, facility. His duties included driving a Carrier-owned truck used to haul men, parts and equipment. The truck was equipped with a crane which was used to load and unload materials and in the placement of parts when necessary.**

**On August 2, 2000, BNSF Superintendent of Operations and two other Carrier Officers were driving a rented vehicle through Birmingham when a BNSF truck pulled alongside their vehicle. The driver of the BNSF truck was smoking a cigarette while driving and was not wearing a seat belt. This was in violation of Carrier Rules. Unable to stop the truck, the three officers waited until the next day to confront the driver of the truck. They had noted the number stenciled on the truck.**

**The next day the truck was again spotted with the Claimant behind the wheel. Again, it was observed that the Claimant was not wearing a seat belt. One of the officers, Mr. Welte who was the Manager of Safety, followed the Claimant until he stopped at his work site. He then confronted the Claimant, told him who he was and that he had seen him the day before smoking while driving and not wearing a seat belt. He asked the Claimant for his name and employee number. He needed this information in order to complete the "Operations Test" report.**

**The Claimant refused to provide the information a second time despite the fact Mr. Welte identified himself as a supervisor and told the Claimant that a refusal to respond would be considered insubordination. Instead, he lit a cigarette and walked to the back of his truck. He never provided the information even though he said he would.**

**By letter dated August 3, 2000, the Claimant was removed from service for smoking in a BNSF vehicle, not wearing a seat belt and for insubordination, pending an Investigation into the charges. On the same date, the Claimant was sent a notice to appear at a formal Investigation at the BNSF Trainmaster's Office at the Yard Office Building, Amory, Mississippi, on August 12, 2000.**

The Hearing was postponed and held on August 15, 2000. After reviewing the evidence adduced at Hearing, the Carrier notified the Claimant on August 30, 2000, that they found the evidence sufficient to find him guilty of the charges. He was dismissed from service for violating Rules 1.6 (3), S-12.1.1, S-12.5, and 26.6. The cited Rules read as follows:

**“Rule S-12.1 Operation of Motor Vehicles**

**S-12.1.1 General Requirements:**

**Every Company driver must:**

**Know and obey local, state, and federal laws and regulations for operating vehicles, both on and off Company property.**

\* \* \*

**Rule S-12.5 Seat Belts**

**Wear seat belts while operating or riding in equipment or vehicles that are equipped with them.**

**Rule S-26.6 Smoking**

**It is (the) BNSF’s policy to completely prohibit smoking on all enclosed properties by employees, customers, vendors, and guests. Outdoor smoking should not interfere with non-smokers’ rights to clean air as they enter and leave buildings.**

\* \* \*

**‘Enclosed property’ will mean all BNSF-owned or leased office space or buildings, shops, automobiles, rail or work equipment vehicles, locomotives, cabooses, and all other railroad rolling stock.**

**‘Employee’ will mean all exempt and scheduled employees and other persons working for BNSF as consultants private contractors, temporary employees, or in similar capacities.**

**Rule 1.6 Conduct**

**Employees must not be:**

1. ....

\* \* \*

3. **Insubordinate”**

**The Organization took exception to the discipline and filed an appeal on behalf of the Claimant which they progressed on the property and then to the Second Division when the parties could not resolve the dispute.**

**The Carrier reiterates the facts of this case. The Carrier says there is substantial evidence the Claimant violated the cited Rules. Not only was the Claimant smoking in his vehicle but he was not wearing a seat belt. The Carrier notes that seat belts save lives and all employers take the issue seriously.**

**The Carrier asserts the Claimant was clearly insubordinate when he refused more than once to provide his name and employee number. The Carrier cites its policy and numerous Public Law Board Awards and other arbitration decisions which hold that insubordination is considered a dischargeable offense.**

**The Organization contends the Investigation was not fair and impartial under the terms required by the controlling Agreement. The Organization assert the Claimant was denied the right to answer the charges against him and reference questions 233-240 where the Hearing Officer asked the Claimant if he was familiar with the cited Rules but never questioned him with regard to the charges. The Organization says it was evident the Hearing Officer had predetermined the Claimant’s guilt and saw no reason to allow the Claimant to answer the charges.**

The Organization also faults the Carrier's failure to cite the specific portion of Rule 1.6 which the Claimant allegedly violated. Again, the Organization asserts that the Claimant was not allowed to answer the allegations.

The Organization says the Claimant did deny not wearing a seat belt, although he did admit he may have been smoking. In any case, dismissal is too severe a penalty even if the Claimant violated both Rules.

The Organization insists there was no evidence in the record to substantiate the insubordination charge. On the other hand, there is substantial evidence that the Safety Manager was agitated and confrontational when he approached the Claimant to ask his name. First, the Organization contends the Carrier Officer was traveling at a high rate of speed when he approached the Claimant despite the fact there was no emergency which justified such speed. Second, the Safety Manager got in the Claimant's face and raised his voice. Furthermore, the only witness to the Claimant's refusal to provide the information was the Safety Manager. The Organization submits the Claimant testified that he provided the information. The Organization submits the Hearing Officer determined the Safety Manager was more credible, however, it claims the Hearing Officer had predetermined the Claimant's guilt so his credibility assessment was invalid.

Moreover, the Organization references the testimony of Foreman Gross who was approached by the Safety Manager immediately after the incident. Therein, he claims the Safety Manager advised him to come to the office to discuss one of his employees named Jerry Good. The Organization argues if the Claimant had not given the Safety Manager his name how could he have called the Claimant by name when speaking with the Foreman. Further, the Foreman was again asked if Jerry Good was his employee when he reported to the office. The Organization maintains this surely proves the Claimant was truthful when he testified that he had provided his name to the Safety Manager.

The Board has reviewed the evidence, including the testimony presented at Hearing. This case comes down to a determination of credibility. It is well established the responsibility for determining credibility rests with the Hearing Officer unless there is substantial evidence that the conclusions arrived at are erroneous or biased. We do not find such evidence here.

The Organization pointed to the testimony of Foreman Gross. However, we do not find that testimony to be convincing enough based on the record as a whole. Although we are well aware supervisors can be just as guilty of lying as claimants, there is simply no evidence or rationale presented to convince us the Safety Manager had any motivation not to tell the truth.

On the other hand, the Claimant had every reason to provide self-serving testimony. We especially found it interesting that in his initial testimony, he did not claim he gave the Safety Manager his name, but did admit that he refused to sign a form allegedly provided by the Safety Manager. The form he allegedly refused to sign, however, did not even require a signature.

Although it is not the Board's responsibility to determine credibility, these facts certainly support the conclusions of the Hearing Officer and the decision maker. Given the Claimant's discipline history the dismissal was warranted.

**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 Second Division**

Dated at Chicago, Illinois, this 30th day of June 2003.