

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 14063  
Docket No. 13942  
14-2-NRAB-00002-120013

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(International Brotherhood of Electrical Workers  
PARTIES TO DISPUTE: (  
(BNSF Railway Company

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, Rule 40 in particular, the BNSF Railway Company, as a result of an unfair and unwarranted investigation held on March 11, 2011 at Barstow, California, unjustly and arbitrarily assessed Mechanical Department Electrician Chris P. Bradley the ultimate discipline of being dismissed from employment from the BNSF Railway.
2. Accordingly, the BNSF Railway Company be ordered to promptly return Electrician Chris P. Bradley to its service and to make him whole for any and all lost wages, rights, benefits and privileges which were adversely affected as a result of the unjust assessment of discipline and that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 40 of the controlling Agreement."

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 Organization here challenges the dismissal of Mechanical Department Electrician Chris Bradley on March 11, 2011, on grounds of possessing and distributing graphic sexual materials in violation of Mechanical Safety Rule 28.6 Conduct, as well as multiple corporate policies addressing appropriate workplace behavior and the use of BNSF's electronic messaging system.

The substantial transcript compiled at the formal Investigation in this regard conducted on February 16, 2011, indicates that the Claimant entered service in January 1997. According to the testimony of Carrier witness Robert Talley, Manager of Enterprise Security at BNSF, in the process of monitoring information stored or collected on BNSF computing and telecommunications equipment, questionable material was discovered on Claimant Bradley's BNSF e-mail account. An outside service provider, Litigation Solutions, Inc., was tasked to conduct a forensic examination of the account. On January 10, 2011, it reported to the Carrier that among the electronic messages sent from and received by the Claimant while on duty was a quantity of inappropriate material, including approximately 80 photographs, chiefly consisting of nude and partially clothed women.

The Carrier stresses that when examined carefully, the forensic report upon which it relies establishes conclusively that the Claimant both received and forwarded out of his account at various times, including November 3 and 16, 2010, a number of the objectionable images at issue. Those actions, it contends, offended numerous Carrier Rules and policies designed to ensure a safe and wholesome work environment for all employees. The Carrier takes seriously its responsibilities in that regard, and violations of such policies commonly result in dismissal. Moreover, it argues, in this instance the seriousness of the Claimant's violation was aggravated by the fact that at the time of the violations alleged, the Claimant had generated two prior Level "S" disciplinary actions, and was still subject to a 36-month probationary period arising from one such action.

The Claimant does not deny that he had improper and unacceptable sexual material in his Carrier e-mail account. Additionally, he concedes that he knew the Carrier's system was to be used only for valid business purposes. He maintains,

however, that his user name and password for some time had been accessible to others on the property after someone broke into his desk and removed that information from his desk drawer. Indeed, as testified to by Electrician Jose Nunez, he had once been given that information by another employee after being unable to log onto a Carrier laptop to work with downloaded event records. Accordingly, the Organization contends, with the Claimant's user name and password out on the property, anyone may have obtained and spread the pornographic images in question. As for the Carrier's assertions that if that had been the case, the Claimant had an unequivocal obligation to report the theft, the Claimant contends that he found himself in a "Catch 22" situation: other employees, including Supervisors, had also exchanged and shared the objectionable materials and he was reluctant to implicate them in similar wrongdoing.

Upon careful consideration of the record, the Board agrees with the Carrier on two critical points: First, the storage or distribution of the materials in evidence on the Carrier's system violated the explicit terms of the employer's policies:

"The Company forbids the storage, transmission or viewing of sexual material on any Company system. Messages and IMs that are intimidating, offensive, harassing, vulgar, obscene, contain profanity or that express animosity or bias against any individual or group are prohibited. Inappropriate material (including pornography of any kind) should not be included in files that are attached to Messages or IMs..."

The photos in evidence - all graphic and some lewd - were offensive, degrading to women, and unsuitable in the workplace. As with racial slurs, the character of those materials pureed important Rules on which everyone depends. Thus, the Board wishes to be extremely clear. The Carrier need not tolerate such conduct, nor does the Board condone it or question its seriousness.

Second, the Board concurs with the Carrier that the Claimant's defense of, "Somebody stole my employer ID" has some disappointing omissions. The Carrier's Electronic Messaging System Policy, with which the Claimant admits he was familiar, plainly states:

**“Account Responsibility. Users are responsible for the security of their Messaging System account and any Messages or IMs sent via that account.”**

In order to comply with that policy, users must take the necessary steps to both ensure that their accounts remain secure and report any suspected unauthorized use of the system. Thus, the Claimant’s position zigs and zags, seeking to excuse disregard one Rule by violation of yet another.

The Carrier in this context is not required to establish the Claimant’s responsibility for receiving and distributing sexual material beyond a reasonable doubt. Its evidence in this instance establishes that a large number of unacceptable photos were received and/or distributed from the Claimant’s BNSF e-mail account. But swirling around that proof is the countervailing and uncontradicted evidence that the security of the Claimant’s e-mail account was likely breached. Thus, the Board cannot comfortably rest on the possibility that the Claimant alone misused his account, or discount that other employees may have been complicit in this activity. Those narrow circumstances act as a baffle to reliably finding the Claimant entirely responsible for the distribution of sexual material via the BNSF Computer System.

There was, however, no such compelling question presented on this record with respect to the Claimant’s violation of the Carrier’s established and familiar policy mandating his responsibility to maintain the security of his account. As the Board reads this record, never once was he troubled to either report the break-in that he alleges, or to ask for assistance in re-establishing a secure account. Under the circumstances presented, given the expenditure of resources and distractions occasioned by that negligence, the Claimant’s conduct fell far below reasonable standards and expectations. The Board concludes that in light of the Claimant’s longevity, return to service with seniority unimpaired but without backpay or lost benefits is appropriate under the unique facts and circumstances of this case, and that the period of time already off of the Carrier’s payroll is sufficient to underscore the Carrier’s legitimate interests in enforcement of the Rules at issue.

### AWARD

Claim sustained in accordance with the Findings.

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**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 Second Division**

Dated at Chicago, Illinois, this 22nd day of January 2014.