

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 14066
Docket No. 13946
14-2-NRAB-00002-120016

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 governing Agreement, Rule 40 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed Kansas City, Kansas Mechanical Department Electrician Rohan Kerr from its service as a result of an unfair investigation conducted on March 14, 2011.
2. That accordingly, and as a result of the arbitrary, unjust and excessive discipline assessed Electrician Rohan Kerr, the BNSF Railway Company be ordered to return Electrician Kerr to service immediately and further compensate Electrician Kerr for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the dismissal, and further, all record of this matter be removed from Electrician Rohan Kerr’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.

Claimant Rohan Kerr, an Electrician at the Carrier's Argentine Yard, Kansas City, Kansas, was dismissed by letter dated March 25, 2011, following a formal Investigation on March 14, after the Carrier concluded that he had brought a television set to work with him on February 20 to watch on his shift and then dissembled when questioned about his actions. When the Organization's timely appeal contesting that action was not adjusted satisfactorily during on-property handling, it was conferenced and progressed to the Board for final and binding resolution. For the reasons that follow, the Board finds that the Carrier had just cause for termination.

According to the record evidence before the Board, on the evening of February 20, 2011, the Claimant, then a two and one-half year employee, had been assigned to perform an inspection on a locomotive positioned close to locomotive BNSF 4508, a unit not scheduled for service. Assistant General Foreman Levi McNeely testified that he had noticed blue flag protection applied on the side of BNSF 4508, despite the fact that no one had been assigned to work on it. Noticing, as well, that there were no crossing ramps in place, he proceeded to check the tag and identify the employee who had applied the blue flag protection. Upon then entering the cab, he found no one working, but did observe a television set:

"... plugged into the water cooler outlet, blue towels in the window and the visors pulled down meeting the blue towels [so] as to block the view from someone seeing into the inside [of] the cab windshield on the conductor's side."

Testimony and video surveillance tapes reviewed at the formal Investigation established, and the Claimant does not deny, that he had, as charged, carried a small television set from his home to the Argentine Yard that night, and positioned it inside the cab of BNSF 4508, where he then spent nearly one hour and 40 minutes unsuccessfully attempting to charge the unit on an outlet in the engine cab. Subsequently, however, upon being questioned by Carrier officials about his conduct, the Claimant stated that he had spent a total of 40 minutes pursuing television reception, not the more substantial period documented by Carrier videos reflecting him stealing back and forth to the unassigned locomotive to watch racing

results. Accordingly, the Carrier asserts that the record clearly proves the Claimant's violation of a variety of Rules, including those barring bringing into work and using on Company time unauthorized personal appliances such as TV sets; Rules requiring the use of crossing ramps when accessing locomotives; and Rules prohibiting dishonesty, including not being forthright in responding to the Carrier's questions in connection with the incident.

In defense of his actions, the Claimant asserts that at no time did he intentionally mislead his employer regarding exactly when he entered the locomotive cab, or how long he remained there. Rather, his recollection of exact times was simply incorrect. He was fully aware of the presence of the video cameras and, accordingly, made no attempt to mislead anyone.

Considered in context, the Claimant's assertions of faulty memory in underreporting by a significant period of time how long he dallied on BNSF 4508 appear to clutch at the frills of reality. There can be, of course, plausible explanations for clock defocus, just as with the occasional non-performance of work. Intense pre-occupation with compelling exigencies can blur time. Similarly, an employee may nod off on a non-safety position after pulling a double shift. In this instance, however, because the record speaks loudly of deliberate, purposeful planning, a grim, determined intent on the Claimant's part to hide in the cab of an unassigned locomotive and entertain himself on Company time, his explanation is not easily squared with an innocently poor memory. The Board concludes that the Carrier established sufficient credible proof to support its charges of serious misconduct. Based on that finding, the claim will be denied.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

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