

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39920
Docket No. SG-40652
09-3-NRAB-00003-080496

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Railroad Signalmen**
(**BNSF Railway Company**)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J. W. Cooper Jr., for reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on January 30, 2007. Carrier’s File No. 35-07-0015. General Chairman’s File No. 07-007-BNSF-20-C. BRS File Case No. 13980-BNSF.”

FINDINGS:

The Third 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.

On January 7, 2007, the Claimant was involved in a traffic accident while driving a company-owned vehicle. Responding to the accident were Trainmaster M. James and Police Officer Aguilar. A formal police report was written up and submitted. On January 8, 2007, the Claimant was contacted by Signal Manager W. Adams to discuss the accident. The Claimant reported that he had been the only passenger in the vehicle during the accident. This was repeated in a signed accident report filled out by the Claimant.

On January 17, 2008, Manager Adams received a copy of the formal police report, listing a man named Orlando Rose (later confirmed as Rolando Rhodes) under the section entitled "Passengers and Witnesses." Contacting Police Officer Aguilar by phone, Manager Adams confirmed that a passenger was riding with the Claimant at the time of the accident.

Following up on the accident, BNSF Claims Agent R. Dennis attempted to contact Mr. Rhodes. A voicemail was received on January 26, 2007 from Mr. Rhodes stating that all further contact would be made through his attorney. On January 29, 2007, Mr. Rhodes' attorney spoke to Claims Agent Dennis, stating that Mr. Rhodes was a passenger in the vehicle and had sustained an injury as a result of the accident on January 7, 2007.

The Claimant maintains that Mr. Rhodes was present at the accident, though not as a passenger. Instead, the Claimant says Mr. Rhodes was following the Claimant's vehicle in another car with the Claimant's son, and served as a "good Samaritan" by helping the Claimant after the accident.

In a letter dated January 24, 2009, the Claimant was instructed to attend a formal Investigation. This Investigation was held on January 30, 2007. On February 21, 2007, the Claimant was sent official notification that due to "dishonesty in reporting an accident" he had been found in violation of Rule 1.6[4] and, therefore, dismissed from service.

The Organization appealed the dismissal on procedural and substantive grounds. From a procedural standpoint, the Organization claims that the Investigation was untimely because it was not held within 15 days as required by Rule 54. On the merits, the Organization contends that the Carrier failed to provide substantial evidence that there was a passenger with the Claimant during the accident. It points out that no eyewitnesses to the accident were present at the Investigation and argues that the Carrier should not be permitted to rely solely on hearsay evidence to meet its evidentiary burden. The Organization asserts that the police report is ambiguous in that it lists Mr. Rose as a "passenger and witness," making it unclear whether he was actually in the vehicle, or merely present at the accident. The Organization further maintains that this police report provides insufficient evidence to prove the Claimant's guilt, and that its admission to the record violated the Claimant's right to cross-examine all witnesses. Finally, the Organization maintains that the penalty of dismissal is arbitrary, capricious and unreasonable.

The Carrier rejects the Organization's arguments and asserts that a fair and impartial Investigation was held, substantial evidence presented, and appropriate discipline rendered. Disputing the claim that the time limits were violated, the Carrier states that time limits begin to run when all relevant information is obtained. By this measure, the time limits were tolled on January 17, 2007, when the Carrier first received the formal police report indicating that a passenger was in the vehicle.

Addressing the question of substantial evidence, the Carrier points out that the police report and Mr. Rhodes' claims, with the addition of witness testimony, clearly show that there was a passenger in the vehicle. The Carrier points out that the police report plainly explains that Mr. Rhodes was in the passenger seat of the vehicle. The Carrier defends the admission of this police report into the record, because it is an official record from a State agency and, therefore, admissible as evidence. Further testimony provides an account of a phone call with Police Officer Aguilar confirming that Mr. Rhodes was a passenger in the vehicle.

The Board thoroughly reviewed the record and has given careful consideration to the respective arguments of the parties. We find, first, that the Carrier did not violate the time limits for holding the Investigation. Rule 54

requires "that personal conduct cases will be subject to the fifteen (15) calendar day limit from the date information is obtained by an officer of the Carrier." The record shows that on January 17, 2007, Manager Adams received the police report indicating that there was more than one occupant in the vehicle. Prior to that time, Manager Adams had no reason to believe that Mr. Adams had been a passenger in the vehicle with the Claimant. It was not until receipt of the police report on January 17, 2007 that Manager Adams possessed information suggesting that the Claimant was untruthful when he claimed to be the sole occupant of the vehicle involved in the accident. The time limits were triggered on that date. Because the Investigation was held on January 30, 2007, within the 15-day time limit, the Organization failed to establish that the Carrier violated Rule 54.

Turning to the merits, it is the opinion of the Board that the Carrier substantiated the charges against the Claimant. The police report in this case was highly probative and its reliability was substantiated by additional testimony indicating that Mr. Rhodes not only was a passenger in the vehicle, but also that he had allegedly sustained injuries during the accident. Weighed against the evidence presented by the Carrier, the Hearing Officer determined that the Claimant's denials of wrongdoing were not credible. The Board has no basis to overturn the credibility finding notwithstanding the Organization's arguments to the contrary.

The Claimant's proven misconduct was very serious. He had a third-party passenger in a Carrier vehicle that was allegedly injured while in that vehicle. The Carrier was exposed to potential liability as a result. By covering up the existence of that passenger, the Claimant impeded the Carrier's ability to defend itself against a third party's injury claim. Equally important, the Carrier has a reasonable expectation that its employees will be honest and truthful while performing their job responsibilities. The Claimant's dishonesty was a breach of Carrier's Rules for which dismissal was justified. This claim must be denied.

AWARD

Claim denied.

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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 Third Division**

Dated at Chicago, Illinois, this 31st day of August 2009.