

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37115
Docket No. SG-37397
04-3-02-3-432

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Burlington Northern Santa and Fe Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of J. C. Calhoun for reinstatement to his former position with payment for all time lost including overtime, skill differential, his benefits and seniority unimpaired, and for any reference to the discipline imposed in connection with an investigation conducted on May 9, 2000 to be removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it failed to provide the Claimant with a fair and impartial investigation and imposed discipline without meeting the burden of proving the charges against the Claimant. Carrier's File No. 35 01 0035. General Chairman's File No. 01-071-BNSF-119-D. BRS File Case No. 12112-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.

At the time of the incident on April 27, 2000, the Claimant was assigned to the position of Signal Electronic Technician at Gillette, Wyoming. At approximately 9:40 A.M., Signal Supervisor G. C. Lang arrived and entered the WyoBen storage facility at Gillette where he observed Signal Foreman L. Kent and the Claimant in the shop area of the building. Supervisor Lang noticed that the Claimant was not wearing his required safety boots and asked the whereabouts of his boots. The Claimant replied that he was in a hurry to clean up the office and that he was guilty of not wearing his safety boots. Supervisor Lang then instructed the Claimant to put on his safety boots and advised him that he was going to fail him on an efficiency test.

By letter dated April 27, 2000, the Carrier advised the Claimant that an Investigation would be held on May 9, 2000 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear your personal protective equipment while on duty at the WyoBen Building in Gillette, Wyoming, at approximately 0940 hours on Thursday, April 27, 2000. . . ." The Hearing was held on May 9, 2000, at which time the Claimant was present.

In a letter dated May 22, 2000, Signal Manager M. L. Koetter notified the Claimant that he was dismissed "for violation of BNSF Maintenance of Way Operating Rule 1.13 and BNSF Safety Rule S-21.1. . . ." According to the letter, the Claimant's prior record had been taken into account and the assessed discipline was in accordance with the Carrier's disciplinary policy.

On August 10, 2000, Signal Manager Koetter sent the Claimant a letter in which he indicated that the Claimant's dismissal had been reduced to a Level S suspension of 90 days with a probation period of three years.

The Organization claims that the discipline was unwarranted. It claims that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. The Organization contends that the Carrier failed to afford the Claimant a fair and impartial Hearing and imposed harsh and

excessive discipline against him. According to the Organization, the Carrier was unable to prove that the Claimant was guilty of any alleged infraction. The Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime and make him whole for vacation, holidays, and seniority, as though he had not been held off work.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript as developed during the Investigation leaves "no doubt" that the Claimant violated Maintenance of Way Operating Rule 1.13 and Safety Rule S-21.1, as follows:

"1.13 Reporting and Complying With Instructions:

Employees will report to and comply with instructions from supervisors who have proper jurisdiction. Employees will comply with instructions issued by managers of various departments when instructions apply to their duties.

Rule S-21.1 Personal Protective Equipment Requirements

All BNSF employees...must wear the following equipment while on BNSF property:

* * *

Safety Boots

* * *

Exceptions

Personal protective equipment (PPE) is not required in offices, automobiles or paved surfaces, or passenger-carrying rail cars.

* * *

Safety boots and safety glasses: Not required when excepted by contractual agreements."

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

After a review of the evidence, the Board finds that there was not substantial evidence in the record to sustain the Carrier's position in whole. First, we note that the Carrier proved that the Claimant did not wear safety boots as required on April 27, 2000, constituting clearly inappropriate behavior and a violation of Maintenance of Way Operating Rule 1.13 and Safety Rule S-21.1.

However, we find that the degree of discipline was too severe. It is well established that discipline should be progressive and not punitive. As the Board indicated in Second Division Award 8157:

"Carrier is certainly aware that, on many occasions, this Board has stated that it would not substitute its judgment for that of the carrier when violations are proven and discipline is reasonable. It should also be aware that this Board has consistently recognized that employee discipline should be progressive and viewed as corrective in nature, not punitive."

Based on the record, the Board concludes that the 90-day suspension with a three-year probationary period is too severe a penalty to impose. In the instant case, there are a number of mitigating factors. First, the Claimant indicated that he had been working in the office area in the WyoBen Building and was not required to wear his safety boots. He claimed that this was an office environment and, therefore, fell within the exemption of Rule S-21.1 covering offices. In addition, the Claimant also alleged that he was not wearing his safety boots at the time due to his foot condition, from which he suffers severe pain when wearing his safety boots for

long periods of time. Finally, we note that in Third Division Award 36231, the Claimant had previously received a ten-day suspension with a one-year probationary period.

We find that while discipline is required in this case, the degree of discipline was too severe and, therefore, must be reduced. We make this finding especially in light of the fact that the Claimant had previously received a ten-day suspension for the same offense. We believe that according to tenets of progressive discipline, the instant discipline should be reduced from a 90-day suspension to a 60-day suspension. The Claimant shall be made whole for the additional 30 days served. The three-year probationary period shall remain in effect.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division

Dated at Chicago, Illinois, this 25th day of August 2004.