

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37424
Docket No. SG-37808
05-3-03-3-172**

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
(BNSF 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 D. W. Miller, for reinstatement and payment of all time lost and benefits, and for all reference to this matter 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 wrongly and inappropriately imposed harsh and excessive discipline of dismissal without meeting the burden of proving its charges in connection with an investigation conducted on February 19, 2002. Carrier’s File No. 35 02 0034. General Chairman’s File No. 02-36-BNSF-119-D. BRS File Case No. 12469-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.

The dispute developed when the Carrier dismissed the Claimant as a result of an Investigation held on February 19, 2002. After receiving reports that someone had been siphoning propane from the Carrier's propane tanks, Special Agents investigated the matter. Their investigation revealed an unauthorized fixture on a propane tank at the siding at East Oriva, a CTC location on the Carrier's property. The investigation also revealed that the Claimant had been seen leaving the area, which is outside of his assigned territory.

Pursuant to this investigation, the Claimant was directed to report to the Special Agent's Office for an interview. At the beginning of the interview on February 11, 2002, the Claimant denied any involvement in the theft of propane from the Carrier's propane tanks. However, the Claimant subsequently admitted his involvement and furnished a written signed statement acknowledging that he had removed 880 to 980 gallons of propane from various locations including East Oriva during the period of October 2001 through January 2002.

By letter dated February 11, 2002, the Claimant was directed to attend a formal Investigation to be held on February 19, 2002:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of company resources, propane gas, at switch heater locations on the Campbell, Big Horn and Black Hills Subdivisions on dates between October 2001 and Monday, February 11, 2002, while assigned as CTC Signal Maintainer, headquartered at Gillette, Wyoming.

This is to advise that effective Monday, February 11, 2002, and pending the results of this investigation, you are withheld, and will continue to be withheld, from the service of the Burlington Northern Santa Fe Railway Company. . . .”

The Investigation was held on February 19, 2002 as scheduled. In a letter dated March 7, 2002, the Carrier notified the Claimant that as a result of the Investigation, he was dismissed for violations of Maintenance of Way Operating Rules 1.6, 1.9, 1.19 and 1.25.

By letter dated April 12, 2002, the Organization appealed the discipline, alleging that it was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization contends that the Carrier imposed harsh and excessive discipline against the Claimant. According to the Organization, the Claimant was denied a fair and impartial Investigation in violation of Rule 54. The Organization further contends that dismissal constitutes an abuse of the Carrier's discretion and it should now be required to reinstate the Claimant to service, compensate him for all time lost and benefits and that all reference to this matter be removed from his personal record.

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, the record contains substantial evidence to support the Claimant's culpability. The Carrier contends that the discipline was appropriate based on the nature of the offense, particularly in light of the fact that he had been previously disciplined for the same offense.

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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

After a review of the record evidence, the Board finds substantial evidence to uphold the Carrier's decision. It proved that the Claimant violated the relevant

Rules. The evidence shows that the Claimant did in fact remove propane from the Carrier's propane tanks at four different locations during the period of October 2001 and January 2002.

Based on the record, the Board concludes that dismissal is the appropriate penalty for the Claimant. He had previously received a formal reprimand in January 2000 for failure to comply with instructions in connection with his use of a Company credit card. In October 2001, he accepted a 30-day suspension and one-year probation for his misuse of Company propane gas. In February 2002, he accepted a ten-day suspension and one-year probation for late reporting of a vehicle accident. Based on the instant offense, as well as the Claimant's poor prior record, the penalty imposed upon the Claimant is reasonable and we will not overturn it. It is well established that the Board will not interfere with the assessment of discipline unless ". . . it clearly appears that the disciplinary action was discriminatory, unjust, unreasonable or arbitrary so as to constitute an abuse of sound discretion." See Third Division Award 24229.

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 Third Division**

Dated at Chicago, Illinois, this 22nd day of March, 2005.