

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41384
Docket No. SG-41057
12-3-NRAB-00003-090368**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 L. F. Sanchez, for reinstatement to his former position with payment for all lost wages, including skill differential, 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 issued 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 December 13, 2007. Carrier compounded this violation by charging the Claimant outside the time limit provisions of Rule 54. Carrier’s File No. 35-08-0028. General Chairman’s File No. 08-006-BNSF-119-D. BRS File Case No. 14128-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 Claimant was hired as an Assistant Signalman on June 18, 2007. On July 9, he was assigned to the Alliance Mobile Signal Construction Crew (Gang SSCX0291). On November 15, 2007, the BNSF Hot Line received a call from an individual who wanted to remain anonymous, reporting that the Claimant had created a hostile work environment for many employees on the Gang, including the caller, over the preceding two weeks. The Report Line summary of the call includes details of specific incidents that the caller witnessed or was part of, in which the Claimant harassed and mocked other employees, yelled, and used inappropriate language. According to the record, the caller addressed the matter with the Foreman, who advised the caller to make a call to the Hot Line. The Hot Line is staffed by a third-party entity, which reports calls to the Carrier's HR Department, which in turn forwards the information to the appropriate Department for further investigation. Several Managers from the Signal Department, HR, and Assets Protection interviewed members of the mobile crew on November 28, 2007, about the allegations in the call. Based on the information that came out in the interviews, management decided that there was sufficient evidence to warrant conducting an Investigation into the allegation of a hostile work environment created by three employees, one of them the Claimant. The notice directed the Claimant to report for an Investigation on December 10, 2007, for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged involvement in creating a hostile work environment for employees on the Alliance Mobil Signal Gang on various dates between June and November 2007, while assigned as Assistant Signalman Construction on gang SSCX0291. By mutual agreement, the Hearing was postponed until December 13, 2007.

At the Hearing, several witnesses testified that the Claimant verbally threatened them with retaliation, yelled, used profane language, used threatening gestures, and

generally created a hostile work environment. The Conducting Officer determined that the Claimant had violated BNSF Policy HR – 90.2 - Workplace Harassment, BNSF Policy HR – 90.4 - Violence in the Workplace, and MOW Operating Rule 1.6 – Conduct, and dismissed him from service under the Carrier’s Policy for Employee Performance Accountability (PEPA).

The Organization filed this claim, alleging that the termination was arbitrary and capricious, because the Carrier failed to prove during the Investigation that the Claimant had violated any Rules. Employees are human and fallible, and the workplace is the type where occasional rough language and arguments occur. The record establishes that several members of the gang had issues with one another. The Carrier was aware of the tension between members on the gang going back to June 2007, yet no one complained until November 2007. One would think that anyone who felt threatened would not wait so long to file a complaint. There is simply not enough evidence to establish that the Claimant was worse than other employees and actually created a hostile work environment. Two other employees were also charged, yet they received no discipline. The Carrier has an obligation to treat all employees fairly and equally, and issue discipline consistently. Because of such disparate treatment, the claim must be sustained. Moreover, the Notice of Investigation was not sufficiently specific in outlining the charges, thus preventing the Claimant and his representative from preparing a defense. This is a basic procedural right and the claim should be sustained on that basis alone. In addition, the Investigation was not held within 15 calendar days of the Carrier’s first knowledge of the offense, as required by the Agreement. Finally, the Manager’s notes from the interviews on November 28, 2007, are hearsay and should not have been considered as evidence in the Carrier’s decision to terminate the Claimant. The Organization does not condone threats, but the discipline of dismissal in this case was unfair and unjust considering the circumstances, and should be overturned.

The Carrier responds that the Notice of Investigation complied with the requirements in Rule 54.C and that the Hearing was conducted in a fair and impartial manner, with no showing of prejudice to the Claimant’s ability to prepare his defense and participate in the Hearing. The individuals referenced in the Manager’s notes testified during the Investigation and verified that the notes were an accurate representation of their statements that day. Nor was there a violation of the time limits for holding an Investigation: it was not until the initial interviews were

conducted on November 28, 2007, that the Carrier had knowledge of specific threats against other employees. The Carrier cannot be held to a standard that requires it to commence an investigation every time a complaint is lodged on the Hot Line, without first determining whether there is any substance to the complaint. Finally, through the Investigation, the Carrier proved with substantial evidence that the Claimant violated the Rules, and he was appropriately disciplined. The Organization did not raise the issue of disparate treatment during the on-property handling and cannot do so now.

The Timeliness of the Proceedings

Under Rule 54.A, the Carrier has 15 calendar days “. . . from the date information [about alleged misconduct] is obtained by an officer of the Carrier.” The Organization contends that the Carrier did not properly initiate the Investigation in a timely fashion, because the call to the Hot Line came in on November 15 and the Hearing was not initially scheduled until December 10, 2007.

The Hot Line is not staffed by BNSF personnel; it is operated by a third party. So, BNSF does not have knowledge of alleged misconduct immediately when calls come into the Hot Line. Calls are forwarded from the Hot Line to the Carrier's HR Department, which is where the complaint first comes to the Carrier's notice. However, it can be difficult, if not impossible, to tell from a call alone whether the complaint lodged is legitimate, rather than the product of malice or mischief, or the extent to which the caller, if sincere, has the facts straight. This is especially true of anonymous calls. As a result, it is not appropriate for the Carrier to launch a formal Investigation every time a complaint is forwarded to HR from the Hot Line. The Carrier must first make preliminary inquiries in order to determine whether the complaint lodged in the call has substance and should be formally investigated. The HR Department is not in a position to make those inquiries, but must forward the complaint to the Department concerned, for it to investigate and report back. In this case, the call to the Hot Line took place on November 15, which is also when Signal Department management was notified. The preliminary investigation, which entailed interviewing a number of gang members, was held on November 28, less than two weeks later. A preliminary investigation of such magnitude would take a while to set up; the intervening Thanksgiving holiday could not have helped in that regard. It might have been possible to set up the interviews somewhat sooner, but the time lapse

between management's knowledge of the call and when the interviews actually were conducted is not outside the bounds of reasonableness. It was not until Department management had an opportunity to interview members of the gang and evaluate their credibility that it was in a position to be able to determine whether a formal complaint against the Claimant should be initiated. The interviews were held on November 28, and notice was sent to the Claimant on December 3 for a formal Investigation to be held on December 10, 2007 – well within the 15-day period for initiating an Investigation. The parties mutually agreed to postpone the Hearing to December 13, 2007. The Carrier's actions in ensuring that the Hot Line call was genuine were prudent, despite the fact that such verification delayed the decision to launch a formal Investigation by a week or so. The delay was not so long as to prejudice the Claimant's ability to prepare and present a defense to the charges against him. The complaint was not untimely processed.

Notice of the Investigation

The Organization also contends that the Notice of Investigation was fatally flawed, in that it lacked specificity sufficient to enable the Claimant and his representative to prepare for the Investigation. The language of the notice informs the Claimant of the charge against him: creating a hostile work environment. It also provides some details: the time frame, the other employees involved, and the location(s). Under other circumstances, such a notice might not be sufficient. But in this case, the Claimant had participated in the interviews conducted by management on November 28, 2007, when management had informed him of the specific allegations against him and given him an opportunity to respond and explain. As reflected in the notes from his interview, the Claimant took that opportunity and spoke at some length, responding to a number of the allegations. The Claimant had actual personal notice of the specific complaints against him by no later than November 28, 2007, which makes up for whatever deficiencies may have existed in the formal written notice. He had sufficient knowledge of the charges to be able to prepare for the Investigation. Moreover, he was offered an opportunity during the Hearing to recess if he felt he needed additional time to prepare, but he did not request a recess.

The Nature and Quality of the Evidence

The Organization contends that the Carrier did not establish the Claimant's guilt by substantial evidence and that the management notes from the November 28, 2007, interviews should not have been introduced and used as evidence. The management notes were certainly admissible as evidence of management's state of mind when it decided to initiate the formal Investigation – it was the content of the interviews that motivated that decision. And it does not appear that the notes were used to establish the truth of the allegations made in them. Of the ten individuals interviewed on November 28, 2007, nine of them testified at the Hearing, eliminating the need to rely on the notes to establish the charges against the Claimant. Hearsay evidence is not considered reliable because it is not subject to cross-examination. That problem was cured when all but one of the individuals who were interviewed testified during the Investigation, and the Claimant had an opportunity to cross-examine them, and at least one of the witnesses backed off from his earlier testimony as a result. But only one of the six backed off.

The Carrier decided on the basis of the evidence presented at the Investigation that the Claimant had in fact been responsible for establishing a hostile work environment on the crew. The Board sits as an appellate body and does not hear evidence de novo. As a result, the Board is not in a position to make determinations about credibility or to substitute its judgment for that of the Carrier in evaluating witness testimony. That being said, there were six crew members (in addition to the two other employees who were charged along with the Claimant) who were at the Investigation and testified as to his conduct and the hostile environment it created on the crew. The situation was not, as the Organization contends, limited to the Claimant and the two other gang members who were charged and investigated at the same time. The record evidence reveals that the Claimant was aggressive, verbally abusive, hostile, and threatening toward a number of gang members over a period of time. This is not a case of a single incident that can be excused as an aberration. As for why gang members may have waited to lodge a protest, it is not uncommon for those who feel threatened to say nothing, either because they are hoping that the situation will resolve on its own, or because they have been cowed by the threat of reprisal into staying mum. Moreover, the evidence in the record was more than "suspicion, surmise, and conjecture" (Fourth Division Award 4661). It was testimony about actual events presented by participants and/or eyewitnesses to those events. The

Organization may be correct that the parties would have been well served if the Carrier had addressed tensions on the gang sooner. The Board, however, does not sit to make that judgment. The Board is limited to determining whether there was substantial evidence to warrant a finding that the Claimant engaged in the misconduct with which he was charged, and the standard of review is whether the Carrier's decision was arbitrary and capricious, biased, or otherwise unsupported by the evidence. None of those is true here.

The Board turns next to the question of the appropriateness of the level of discipline: that is, whether discharge was too harsh a penalty for the offense. MOW Operating Rule 1.6 – Conduct and Carrier Policies states:

“1.6 Conduct

Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
- Or**
- 7. Discourteous**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. . . .”

Human Resources Policy HR-90.2 – Workplace Harassment, states: “BNSF . . . does not tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another’s work performance or which creates an intimidating, offensive, or hostile environment. . . .” A first offense of threatening conduct is subject to dismissal. Human Resources Policy HR-90.4 – Violence in the Workplace, similarly prohibits “violent or potentially violent behavior,” under threat of dismissal for a first offense. As to whether the Claimant’s conduct warranted dismissal or some lesser

penalty, again, “. . . it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the Carrier’s in disciplinary matters, unless the Carrier’s action be so arbitrary or fraught with bad faith as to amount to an abuse of discretion.” (Third Division Award 30124)

The Organization contends that such bad faith is present in this case, because the Claimant was treated differently from two other gang members who were investigated at the same time but not dismissed. There is no evidence in the record indicating what happened to the other two individuals, so there is no factual basis on which the Board could render a decision.

In view of all of the foregoing, the instant claim must 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 2012.