

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41389
Docket No. SG-41364
12-3-NRAB-00003-100263**

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 T. H. Brown, for all time lost and his personal record to be cleared of any mention of this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the excessive discipline of a Level S, 30-day actual suspension without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on January 7, 2009. Carrier’s File No. 35-09-0008. General Chairman’s File No. 069-004-BNSF-33-K. BRS File Case No. 14357-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, who had almost 30 years of service with the Carrier at the time of the events leading up to the discipline at issue in this claim, was given a Level S 30-day actual suspension for violating Maintenance of Way Operating Rule 1.6- Conduct and Rule 1.25- Credit or Property.

In the ordinary course of maintaining and improving its signal operations, the Carrier produces a lot of scrap, in the form of used signal equipment, line, signal poles, batteries, even entire sheds or bungalows that formerly housed equipment, and that scrap must be disposed of somehow. The Carrier contracts with various operators to haul away scrap material, after which the scrap is no longer considered BNSF property, and the hauling contractors are free to dispose of the material as they desire: they can sell it, recycle it, or give it away, whatever they want. The material no longer belongs to the Carrier and it has no say over its disposal. If an employee wants some scrap material, there is a protocol for purchasing it from the Carrier directly through an individual whose job it is to manage such transactions. However, there is nothing to prohibit an employee from purchasing or being given scrap by a contractor after it has been discarded by BNSF and hauled off Company property.

In late 2008, the BNSF Hot Line received a call from an individual who alleged that the Claimant had Company property at his residence, specifically old signal bungalows, and a fence built using BNSF wire. On December 4, 2008, two members of the BNSF Railroad Police, accompanied by a County Sheriff, visited the Claimant at his residence. They sought, and the Claimant gave them, consent to search his property. In the course of their search, the officers observed three old signal bungalows, a number of rolls of signal wire, a fence made with what looked like BNSF signal wire and telecom fence poles like those that the Carrier uses to hold the wire along the right-of-way. From the record, it is not clear whether any of the wire was copper, which can have significant commercial scrap value, or if it was all copperweld, a cheap copper-clad wire that has little to no commercial scrap value. There were also several large poles on the property, with no markings to identify them. The BNSF Railroad Police officer in charge of the investigation asked the Claimant about the bungalows and, according to the officer's testimony at the investigative Hearing, the Claimant told him that he had purchased the bungalows through the Carrier protocol. When asked if he could produce receipts, the Claimant stated that he did not think he could, having just been through a bitter divorce, during which he lost a lot of personal property. The BNSF officer subsequently contacted the Carrier employee who

handles protocol transactions; he told the Officer that he had searched back ten years and had no record of having sold any bungalows to the Claimant. When asked about the wire, the Claimant told the Officers that his roommate, G. Bonzo, had gotten it from one of the Carrier's hauling contractors, GM Trucking, for whom Bonzo occasionally did some hauling. At the end of the property search, the Claimant was arrested. The record includes a handwritten note from the owner of GM Trucking authorizing Bonzo "to remove scrap iron from BNSF cites [sic] designated by Tom Brown, per J. D. Cleary." J. D. Clary is Brown's supervisor. The record also includes two additional handwritten statements from the owner of GM Trucking, in which he described how the Claimant had suggested some years before that he do some hauling for the Carrier with his dump trucks. In the spring, he hauls rock and dirt for BNSF projects. He has also hauls away scrap material at no charge to the Carrier. The Carrier conducted an investigatory Hearing on January 7, 2009 (the Hearing was delayed due to the Claimant having been on vacation during much of December). At the end of the Investigation, the Carrier concluded that the Claimant was guilty of having violated Maintenance of Way Rules 1.6 and 1.25, and imposed the 30-day Level S suspension that is at issue in this case.

According to the Carrier, the Claimant engaged in a scheme whereby he identified Carrier property as scrap, which was then picked up by his roommate and taken to the property that the two of them shared. The Claimant was unable to produce receipts for the bungalows that he allegedly purchased from the Carrier. Receipts that he did produce were falsified (and form the basis of another charge against the Claimant, for which he was terminated, which the Board addressed in Third Division Award 41391). The Claimant's roommate was only authorized by GM Trucking to pick up scrap iron, but Bonzo picked up numerous other items as well. The Claimant was going to be charged with felony Possession of Stolen Property and Bonzo with felony theft, but the Claimant's attorney entered into a verbal agreement with the District Attorney for the Claimant to pay restitution and to agree not to attempt to work for the Carrier again, in exchange for the charges against him being dropped. The charges were never filed and the Claimant did pay restitution in the amount of \$3,899.00, but the fact that the Organization is pursuing his two claims indicate that the Claimant reneged on his promise not to attempt to work for the Carrier again. Rule 1.25 provides that employees "... must not sell or in any way get rid of railroad property without proper authority. . . ." The Claimant had BNSF property at his residence. There is no evidence that he got the requisite authorization he needed to obtain the Carrier property. Instead, the Claimant created a process by which, acting effectively without supervision, he would decide what material went into

the scrap piles and make arrangements to have his roommate, as an authorized subcontractor of GM Trucking, pick up the material, which was then delivered to the property where the two men lived together. Dismissal was warranted in this case. Instead, the Claimant was assessed only a 30-day suspension. The Board should not interfere with the Carrier's action and the claim should be denied.

According to the Organization, the Carrier violated Rule 54 when it failed to hold the Hearing in a timely fashion and because the BNSF Railroad Officer was so clearly biased against the Claimant. In addition, the Carrier failed to establish that the suspected items in question were stolen BNSF property. The BNSF Railroad Police arrived at the Claimant's property having already concluded that he was guilty; their assumptions and their inability to identify BNSF material were very clear and unprofessional. Testimony from the Claimant and his roommate accounted for all of the allegedly stolen material and established that it was legally and properly obtained. The Carrier tried to establish that employees had to utilize the Carrier protocol to approve any material being sold to them. But employees are free to either purchase or trade former BNSF material from a hauling contractor. The Carrier has the burden of proof, and no witnesses or evidence were provided to establish that the Claimant violated any of the Rules stated by the Carrier. It is apparent that the Carrier did not take into account the facts that were brought out in the record providing that the Claimant was not guilty of theft and that he is a model employee with a good work ethic.

The Board will first address the procedural timeliness issue raised by the Organization. While it is true that the Investigation did not take place within the ten-day time limit set forth in the Rules, the delay occurred because the Claimant was on vacation. The Hearing was held within two days after his return from vacation. Such a delay, undertaken for the convenience of the Claimant, does not violate the parties' Agreement.

Turning to the substantive charges against the Claimant, that he violated Rule 1.6 and Rule 1.25, the Carrier failed to meet its burden of establishing the Claimant's guilt by substantial evidence. The Carrier has a theory of the case, but no significant evidence to support it, only speculation and assumptions.

With the exception of the poles that were identified as telephone poles, not BNSF property, no one has denied that the items in dispute belonged at one time to the Carrier. But their mere presence at the Claimant's residence does not establish that

they were stolen or otherwise inappropriately converted by him. The Carrier has a protocol for employees to purchase or obtain permission to take scrap material. But the protocol does not prohibit employees from obtaining former BNSF property after it has been abandoned as scrap and hauled away by one of the Carrier's contractors. There is no evidence that the items discovered at the Claimant's property were anything other than scrap. The Claimant's roommate testified that most of what was identified by the BNSF Police belonged to him, and that he had obtained it either as a subcontractor for GM Trucking or as a direct hauling contractor for BNSF himself – he testified at the investigative Hearing that he had started hauling directly for the Carrier several months before.

The Carrier's theory of the case is that the Claimant independently identified material for scrap for his roommate to haul back to their shared residence. However, the record simply does not support the theory. The Claimant's supervisor, J. Clary, testified at the Hearing about how the scrap material system worked. In response to the question "What do you consider scrap?" Clary responded, "Well, we pile it in a designated area and it's everything under the sun that comes off the right-of-way. It could be wire, it can be poles, it can be ties, it could be old culverts, it could be houses, cases, 240 boxes and the poles they're on." Clary stated that he authorized GM Trucking "to remove anything that we piled at our designated places." In clarifying the written statement he provided to BNSF Police, Clary stated that he had not given anyone permission to take particular items but if it was piled "with the rest of the stuff" in the designated areas, "they can take it." According to Clary, line wire was common in the scrap piles, especially as the "electrocode" project was eliminating the lines; Clary also indicated that the wire at the Claimant's residence (which Bonzo said he, not the Claimant, owned) was on a type of spool that BNSF had not used for some years. The portrait painted by Clary is one where the signal crews pile scrap material in designated areas to await pickup by one of several hauling contractors. There is nothing unusual in Brown's designating the area to pile the material, as he is a Lead Signalman. There is no evidence to suggest that Brown was cherry-picking specific material to be placed in a special spot where his roommate would come and get it. There is no evidence that any of the spots designated by Brown were inconsistent with how scrap had been disposed of over time or that he had in any way acted contrary to the normal flow of operations.

The Carrier concluded that the Claimant was guilty of both dishonesty, under Rule 1.6, and improperly obtaining BNSF property, under Rule 1.25. The evidence in the record is insufficient to establish any dishonesty on Brown's part or that he

improperly obtained the scrap that was found on his property. Most of the scrap that the Carrier identified was actually owned by the Claimant's roommate, who hauled it away as a subcontractor for GM Trucking or in his own right as a hauling contractor for BNSF.

The record also includes a May 2010 e-mail referencing a verbal agreement between the Claimant and the District Attorney in which criminal charges against the Claimant would be dropped if he would pay restitution and not attempt to work for the Carrier again. The Carrier characterized the agreement as a plea bargain. The e-mail is not sufficient, without more, to establish the Claimant's guilt. Typically, plea bargains are reduced to writing; moreover, they rarely include any admission of guilt. Without more specific facts or evidence, the e-mail does not establish that the Claimant was guilty of the charges against him.

As the Board noted at the beginning of this discussion, the Carrier has the burden of proof in discipline cases. In this case, it has not produced substantial evidence to support its conclusion that the Claimant violated Rule 1.6 or Rule 1.25. The hot line call cannot establish wrongdoing. The fact that the Claimant had former BNSF property at his residence does not, without more, establish wrongdoing on his part. The fact that he offered his friend a place to live after the two of them became divorced does not establish wrongdoing. The fact that he did his friends, his roommate, and the owner of GM Trucking, a favor by suggesting that they try to obtain work hauling for BNSF does not establish wrongdoing. The Carrier's suspicions were aroused by the Hot Line call, and BNSF Police did find used BNSF property at his residence. However, the evidence in the record does not support a finding that the Claimant had stolen or otherwise misappropriated Carrier property in obtaining it.

The claim is sustained and the matter shall be removed from the Claimant's record.

AWARD

Claim sustained.

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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 July 2012.