

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41517
Docket No. SG-41778
13-3-NRAB-00003-110374

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall 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 H. McGowan, for reinstatement to service with compensation for all time lost, including skill pay, with all rights and benefits unimpaired and with 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 investigations held on February 18 and 19, 2010. Carrier’s File No. 35-10-0018. General Chairman’s File No. 10-019-BNSF-188-SP. BRS File Case No. 14506-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 a Signaller with more than 15 years of seniority in the signal craft at the time of the incident. He had also, for some two years, been a Signal Trainer.

The Claimant was charged three separate times with falsifying work reports concerning tests and inspections of highway grade crossing warning systems. These involved alleged inspections in August, October, and November 2009 in the Redmond, Washington, area. These inspections are mandated pursuant to Federal Railroad Administration (FRA) regulations and were part of the Claimant's regular duties. When completed, Signal Maintainers are required to enter their findings into the Carrier's computerized system called RailDOCS. In 2008 the Carrier had filed a notice of exemption to abandon the rail line in question with the Surface Transportation Board (STB). This transaction was completed on December 21, 2009, after the incidents in question. It is common ground that there were no trains traversing the track in question at the time the inspections were to have occurred. However, the signals were still in place, were active, and remained subject to the FRA inspection and reporting requirements.

On December 15, 2009, a Carrier Officer visited the sites in question. He noticed that an inspection card, which is located inside a signal bungalow, had not been filled out since January 27, 2009.¹ Upon further investigation, the Carrier discovered that the Claimant had made entries into RailDOCS on five separate occasions between August and November 2009 on two different crossings, and yet the signal system analyzer had no activation entries (which would have occurred had the tests actually been performed).

¹ Inspections are required on a monthly, quarterly and annual basis.

The Claimant was charged three times with falsifying reports. After agreed-upon postponements, the three Investigations were held on February 18 and 19, 2010. The Claimant was dismissed on March 10, 2010 for violating MOWOR 1.6 – Conduct (dishonesty).

Maintenance of Way Operating Rule 1.6 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. Indifference to duty, or to the performance of duty, will not be tolerated.”

The Organization makes a number of representations on behalf of the Claimant. First, it contends that the Investigation was not fair and impartial because their repeated requests for evidence in advance of the Hearing were never complied with. Secondly, it asserts that holding three separate Investigations for similar infractions constituted evidence that the Carrier had predetermined the Claimant's guilt. Thirdly, it contends that the Claimant stated that the entries were simply honest mistakes. Finally, it points out that the rail line in question was not in use at the time and, therefore, there was never a danger to the public.²

² There was also an argument concerning settlement discussions about a waiver which was never consummated. As these discussions, if they did occur, would have been privileged, they are not considered in the decision by the Board.

With respect to the first argument, it is common ground that there is no Agreement provision which provides for discovery. In this industry, there is no pre-hearing discovery, absent agreement language to the contrary. The Carrier's investigating officer must grant reasonable time to the Organization, upon request, during the course of the hearing to review any evidence put in by the Carrier witnesses. On occasion, this might mean a hearing would be expedited by providing the evidence in advance. However, the Carrier in this case was under no obligation to do so. There is no allegation that any postponements during the course of the Investigations were insufficient to allow a full and proper defense. Therefore, the Board finds that there was neither a lack of fairness nor impartiality on this ground.

With respect to holding three separate Investigations, the Board finds nothing improper. There were three separate reports filed for three different monthly inspections. They were clearly three different events that gave rise to the concerns of the Carrier. The Carrier discovered nothing wrong until the physical inspection of the bungalows in December. While the Carrier may have had the option of holding only one Investigation to cover all of the events, it was within its discretion to hold three.

The Claimant asserts that these were simply mistakes. He contends that he must have recorded the entries with respect to the wrong crossings. The Board finds that the weight of the record evidence does not favor the Claimant in this regard. He was a Signal Trainer for a number of years. There were no physical records at the actual crossings, as would have been the norm. He consistently mis-reported for these two crossings over a series of months. On balance, it is far more likely that he falsified these reports.

The final argument of the Organization is that there were no trains running over this track and, therefore, there was never a danger to anyone even if the Claimant had falsified the reports. While it is uncontested that there were no trains, this does not obviate the need for the Claimant to do his job, and to do it honestly. There was a federal requirement to continue the inspections. Signal Maintainers are often required to work on their own without immediate supervisory oversight. They must be trusted to perform this very important work in an honest manner. It is not up to the Signal Maintainer to decide the level of acceptable risk and to allege that he did the inspections when, in fact, he did not. Deliberate falsification of these reports is

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clearly a failure in a fundamental duty of fidelity owed to an employer. An employer need not continue the employment of someone who so falsifies a report.

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 19th day of February 2013.