

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41528
Docket No. MW-41699
13-3-NRAB-00003-110351**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. H. Leibfried by letter dated June 4, 2010 for alleged violation of Maintenance of Way Operating Rule 1.6 in connection with charges relating to his involvement in the removal and sale of BNSF property during the month of February 2010 in Potosi, Wisconsin while assigned as a track inspector was arbitrary, unwarranted and in violation of the Agreement (System File C-10-D070-11/10-10-0338 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Leibfried shall now receive the remedy prescribed by the parties in Rule 40(G).”**

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.

On April 19, 2010, during conversations with the Potosi, Wisconsin, Police Department concerning an unrelated investigation into the theft of copper wire, BNSF Railway Police learned that the Potosi police had recorded video of a BNSF employee in possession of steel H-beams that had been on company property. BNSF Railway Police then investigated further into the disappearance of the H-beams. It was found that the H-beams in question had been taken by the Claimant and that he later sold them to a scrap yard.

By letter dated April 27, 2010, the Carrier directed the Claimant to report for a formal Investigation to be held on May 5, 2010. The Notice of Investigation specified that said Investigation would be held:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged Dishonesty when you were allegedly involved with the removal and sale of BNSF property...”

The Investigation was postponed by mutual consent and was held on May 12, 2010. By letter dated June 4, 2010 the Carrier notified the Claimant as follows:

“As a result of investigation held on May 12, 2010 at 1300 hours at Conference Room, 1645 Oak Street, LaCrosse, WI, 54603 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for Dishonesty when you were involved with the removal and sale of BNSF property during the month of February 2010 in Potosi, WI, while assigned as Track Inspector.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWOR 1.6 Conduct.”

That the Claimant took the scrap H-beams and later sold them to the scrap yard is not disputed. However, the Claimant defended his actions on the grounds that he discussed the Carrier’s plans for the materials with a Carrier Official and, as a result, he understood that he had tacit approval to take the scrap material for possible use at his home to shore up an outbuilding. The Structures Supervisor, with whom he discussed the Carrier’s plans for the scrap H-beams, recalled a different version of the conversation. However, there is no dispute that the Claimant did not directly request permission to remove the H-beams, nor did any Carrier Official explicitly grant him permission to do so. In addition to the foregoing, the Board takes note that when it turned out that the Claimant decided not to use the H-beams as he testified that he had planned, rather than return them to the Carrier, he elected to sell them for personal financial gain.

After a thorough review of the record, we find that the Carrier produced sufficient probative evidence to meet its burden of proof in this case. We cannot say that the discipline of dismissal was excessive in this instance. Accordingly, the claim will 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 19th day of February 2013.