

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37308
Docket No. SG-37647
04-3-02-3-781

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
(The Burlington Northern and Santa Fe 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 T. F. Swoyer, for reinstatement to his former position with compensation for all lost wages plus skill differential with his rights and benefits unimpaired and any reference to 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 meeting the burden of proving its charges in connection with an investigation held on October 1, 2001. Carrier compounded its violation by failing to cite any rule violation in its charge letter which impaired the Claimant’s defense. Carrier’s File No. 35-02-0008. General Chairman’s File No. 01-119-BNSF-161-NM. BRS File Case No. 12367-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 employed on June 9, 1980 and was working as a Signal Maintainer at Kiowa, Kansas.

On September 21, 2001, at approximately 8:00 A.M. the Claimant obtained track and time authority to perform service in the vicinity of Waynoka, Oklahoma. Subsequent to completing the work and releasing the track, the Claimant's supervisor was advised that the Claimant had performed work outside of his track and time limits while at Waynoka.

By letter dated September 24, 2001, the Claimant was notified as follows:

"You are being withheld from service effective September 22, 2001, pending results of an investigation for violation of your Track Authority # 12414 OK'd at 20:02 September 21, 2001.

You are hereby ordered to attend an investigation in the conference room of the BNSF Amarillo office located at 320 South Polk Street Suite 500 Amarillo, Texas. This investigation is scheduled for 13:00 Monday October 1, 2001 to ascertain the facts and determine your responsibility if any, in connection with your alleged failure to comply with Track & Time Authority 12413."

By letter dated October 18, 2001, the Claimant was advised that after a review of the Investigation, and in view of his personal record and in accordance with the Carrier's discipline policy, he was being dismissed for failure to comply with Track and Time 12413 at Waynoka, Oklahoma, on September 21, 2001.

By letter dated November 26, 2001, the Organization filed a claim on behalf of the Claimant appealing the discipline, alleging that the Claimant was not afforded a fair and impartial Investigation. The Carrier reinstated the Claimant to service on April 1, 2002 without pay for time lost. Therefore, the claim before the

Board is only for time lost. Effectively, the Claimant was suspended from September 22, 2001 through April 1, 2002, a period of seven months and eight days.

The Organization claims that the discipline 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 failed to allow a fair and impartial Investigation and imposed harsh and excessive discipline against the Claimant. According to the Organization, the Carrier's decision to discipline the Claimant constitutes an abuse of its discretion and the Carrier should now be required to compensate the Claimant for all lost time and benefits, with all reference to the discipline and investigation to 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 Claimant's own admissions during the Investigation demonstrate sufficient evidence to support the Claimant's culpability for the charge. The Carrier asserts that the discipline was appropriate based on the nature of the 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 accordance 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 the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

After a review of the evidence, the Board finds that there was substantial evidence in the record to uphold the Carrier's position in whole. First, we note that the Carrier proved that the Claimant was outside of his track and time limits on September 21, 2001. Such action is clearly inappropriate behavior and a clear violation of Rules 6.3.1 and 10.3.

Based on the record, the Board concludes that the seven-month, eight-day suspension is an appropriate penalty. In the instant case, the Board notes that the Claimant had previously received a Level S Record Suspension of ten days as well as one-year probation as a result of an incident in November 2000. Therefore, the instant infraction was his second Level S Violation. Based on the Carrier's policy, it would have been appropriate to dismiss the Claimant. However, he received only a suspension.

Therefore, the claim is without merit and the Board will not disturb the discipline imposed.

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 21st day of December 2004.