

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37423
Docket No. SG-37731
05-3-03-3-72

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
(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 N. D. Jenniges, for reinstatement to his former position with his seniority and benefits unimpaired with payment for all lost time including overtime and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline of dismissal on the Claimant as a result of an investigation held on November 28, 2001, and failed to meet its burden of proving the charges. Carrier's File No. 35-02-0016. General Chairman's File No. 02-004-BNSF-119-D. BRS File Case No. 12459-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 assigned as a Signal Maintainer headquartered at Gillette, Wyoming. At approximately 3:30 P.M. on October 25, 2001, the Claimant placed a telephone call to Signal Maintainer G. C. Lang to inform him that he had had an accident with a Carrier vehicle on Lakeway Road in Gillette. When Lang asked the Claimant if he was okay, the Claimant replied that he was. Upon learning that the driver of the other vehicle involved in the accident had sustained injuries and that an ambulance had been called, Lang proceeded to the scene of the accident.

It appears that the facts of the accident are uncontested. While driving a Carrier vehicle, the Claimant attempted to cross two lanes of a busy four-lane highway to make a left turn. He pulled in front of oncoming traffic and was struck. The Claimant was ticketed for failure to yield to oncoming traffic. The Claimant contended that the other vehicle was driving above the speed limit and that this contributed to the accident. However, the Board notes that no citation was issued for such an offense, although the other driver was ticketed for driving on a suspended license and for failure to carry insurance.

By letter dated October 26, 2001, the Claimant was directed to attend an Investigation to be held on November 8, 2001 for the purpose of "... ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive while performing your duties and your alleged failure to work in a safe and efficient manner while driving Company Vehicle #16692 at or near the intersection of Lakeway Road and Dogwood Avenue, Gillette, Wyoming, resulting in collision and subsequent damage to BNSF Vehicle #16692 and one privately owned vehicle at approximately 1520 hours on Thursday, October 25, 2001, while assigned as a signal maintainer headquartered at Gillette, Wyoming, on duty at 0730 hours."

In a letter dated December 19, the Carrier notified the Claimant that as a result of the Investigation which was held on November 28, 2001, he was "... dismissed from employment with Burlington Northern Santa Fe Railway for

violation of BNSF Maintenance of Way Operating Rules 1.1.1 and 1.1.2, effective January 31, 1999 and for violation of Rule S-12.1.1 of BNSF Maintenance of Way Safety Rules, in effect January 31, 1999.”

By letter dated January 7, 2002, the Organization appealed the Carrier’s decision to suspend the Claimant, contending 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 imposed harsh and excessive discipline against the Claimant. According to the Organization, the Carrier’s decision constitutes an abuse of its discretion. The Organization claims that the Claimant could not have avoided the accident due to the other vehicle’s high rate of speed. In addition, it claims that the Carrier failed to carry out a fair and impartial Investigation. The Organization asserts that the Carrier should now be required to reinstate the Claimant to his former position with his seniority and benefits unimpaired, with payment for all lost time, including overtime, and any reference to this matter 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 evidence demonstrates sufficient grounds to support the Claimant’s culpability. The Carrier met its burden of proof and the discipline was appropriate based on the nature of the offense and the Claimant’s past record. In that regard the record reveals that the Claimant has been employed with the Carrier since November 19, 1979. The Claimant received a 30-day suspension in September 1988 for failure to properly check operation of an intermediate signal resulting in an unsafe signal condition. In September 1994, the Claimant was issued a formal reprimand in connection with an accident that occurred while backing up a Carrier vehicle. In February 1998, the Claimant was issued a formal reprimand in connection with a vehicle rollover. In November 2000, he was issued a 30-day suspension with three years probation as a result of a collision and damage to a Carrier vehicle and three private vehicles. In June 2001, the Claimant waived his right to an Investigation and accepted a Level 3 suspension of ten days for failure to comply with instructions concerning smoking in a Carrier vehicle.

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 accord 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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

The Board finds substantial evidence in the record to uphold the Carrier's decision. The Claimant was negligent. The evidence shows that he was making a left turn and failed to yield the right-of-way to an oncoming traffic. Even assuming, arguendo, that the other vehicle was traveling at a rate of speed in excess of the posted limit (although no citation was issued) the Claimant was nonetheless required to yield. His failure to do so was in clear violation of the law as well as Carrier policy. Based on the record, the Board concludes that dismissal is an appropriate penalty. Therefore, the claim is without merit.

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 22nd day of March, 2005.