

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38994
Docket No. SG-39883
08-3-NRAB-00003-07-0026
(07-3-26)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn 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:

Claim on behalf of F. J. Stottler, for the discipline issued to be dismissed and his record to be cleared of any reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it issued the excessive discipline of a 30-day Level S record suspension with a three-year probation period without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on October 7, 2005. Carrier's File No. 35-06-0009. General Chairman's File No. 05-104-BNSF-103-C. BRS File Case No. 13666-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 is a Signal Foreman with 16 years of service with the Carrier. On September 16, 2005, Signal Supervisor D. Corzette was directed by Signal Manager D. Golder to deliver to the Claimant a Notice of Investigation concerning an incident that occurred several days earlier. See Third Division Award 38993. Because Corzette and Golder were unsure of the Claimant's current address, Corzette called the Claimant's cell phone, he testified, but there was no answer and voicemail for the number was not available, so he was unable to leave a message. About 40 minutes later, the Claimant returned Corzette's call by hitting the redial button on his cell phone. Corzette received the call while in Golder's office.

According to Corzette, the Claimant asked who he was, and when Corzette explained that he was a Carrier Supervisor who needed to deliver a Notice of Investigation to the Claimant, the Claimant responded, "F*** you, you will never find me. I only called this number back because I thought it might be some young rag I could meet up with later." Corzette testified that the Claimant then tried to tell him his side of the incident that was the subject of the notice Corzette wanted to deliver. Corzette stopped the Claimant and told him there was no point in discussing it because he was involved only to get the notice delivered. According to Corzette, the Claimant replied, "That was a chicken s*** way to be," and "F*** you, I'm not going to meet up with you, this whole situation is Bullshit and I can walk tall about this." Corzette testified that he objected that the Claimant should not talk to him this way. The Claimant tried again to talk about the earlier incident, and Corzette repeated that he was only the messenger and really needed to find out where to deliver the notice. According to Corzette, the Claimant answered with more profanity. When Corzette stopped him again, the Claimant said, "F*** you, you piss ant moron" and hung up the phone.

Corzette testified that the Claimant was so loud during the call that he held his phone away from his head. Signal Manager Golder, who was in the office with Corzette at the time, testified that he could hear Corzette's side of the conversation,

and heard the Claimant identify himself to Corzette and use profanity toward Corzette. Golder also testified that after Corzette explained the purpose of the call, the Claimant became more irate and angry. Golder could not hear whole sentences or complete words, but did hear the Claimant say "mother f***er," he testified.

The Claimant's account of the call differs. He first testified that he could not recall the date of the conversation, though he recalled reaching Corzette by hitting "redial" on his phone. He could not recall why Corzette wanted to meet with him, but he recalled that Corzette said that he could help him. The Claimant testified that he did not recall saying anything about a "rag," and did not recall saying anything attributed to him by Corzette, except that he "could walk tall about this." Then the Claimant modified his testimony, saying that he could not even determine whether he had had a conversation with Corzette until he obtained his cell phone bill, which he did not have at the Investigation, and said that his earlier testimony about commenting to Corzette that he "could walk tall," in a phone call he could no longer remember, "must have been a mistake." He denied having a conversation with Corzette in which he talked to Corzette "in a rude, profane, quarrelsome, and obscene manner."

On October 20, 2005, on the basis of the Hearing Officer's findings, Signal Manager Golder found that the Claimant had committed the offense charged and issued him a Level S 30-day record suspension, with a 3-year probation period.

The Carrier asserts that the Claimant was provided a fair and impartial Investigation, and that there is substantial evidence to support the finding of guilt and the penalty assessed. The Organization makes numerous procedural objections to the discipline: (1) Manager Golder was not only the Charging Officer and determined the discipline, but he also testified as a witness at the Investigation (2) the notice failed to list Golder as a witness (3) the Hearing Officer erroneously denied the Claimant's numerous requests to have the Investigation postponed to prepare a proper defense and (4) the Hearing Officer failed to sequester Corzette, who then had the opportunity to discuss the investigation with Golder while it was still in progress. Overall, the Organization asserts that these errors and the Hearing Officer's general conduct of the Hearing demonstrate that the Hearing Officer had prejudged the Claimant's guilt. The Organization also objects that it was inappropriate to discipline the Claimant for a private off-duty conversation on his private phone.

MOW Operating Rule 1.6 provides that employees must not be "... insubordinate ... immoral ... quarrelsome or ... discourteous." Supervisor Corzette's testimony provides substantial evidence that the Claimant was "quarrelsome" and "discourteous" during their telephone conversation on September 16, 2005. Although the Board does not sit to second-guess the credibility determinations made by the Hearing Officer, we note that those determinations are amply justified by the Claimant's evasive and contradictory statements. Moreover, the Claimant's language went beyond mere "shop talk." He addressed Corzette personally in insulting and demeaning terms ("F*** you, you piss ant moron"). Such profane and abusive language directed at a co-worker is a breach of acceptable employee conduct. See Second Division Award 13664. Although the conversation occurred while the Claimant was off-duty, his discourteous comments were made to a Supervisor during a conversation about a work-related matter. This was sufficient nexus with the Claimant's job to make it subject to Operating Rule 1.6. The Carrier's determination that the Claimant's comments violated Rule 1.6 should not be disturbed.

The Board is not persuaded by the Organization's procedural objections. The Hearing Officer did not deny the Claimant's requests for a recess. On the contrary, he postponed the Hearing once at the Claimant's request and then delayed the Hearing one hour in order to enable the Claimant to attend. Once the Investigation began, the Hearing Officer repeatedly assured the Claimant that the Investigation would be recessed for his convenience after the evidence then available was taken, but the Claimant and his representative eventually withdrew his request. The Hearing Officer did not deny the Claimant any Agreement due process in this regard.

The Organization's remaining Agreement due process objections revolve around Manager Golder – his multiple roles as Charging Officer, unannounced witness, and assessor of discipline. As we have noted before, such overlapping roles will not invalidate discipline unless actual prejudice or unfairness has been shown. In this case, the only possible concern might be that Golder was called as a witness, without having been listed as such, and his characterization of what he heard of the Claimant's conversation could suggest that he had prejudged the Claimant's conduct. However, Golder was not the Hearing Officer, and his testimony, merely cumulative, was not dispositive or crucial to the determination. Corzette's testimony against the

Claimant was sufficient on its own to support the finding of guilt. There is no showing here that the Claimant was prejudiced in any way by Golder's role. See Fourth Division Award 4254. Under the circumstances, any procedural error was harmless, and did not deprive the Claimant of a fair and impartial Hearing.

The final question concerns the propriety of the penalty. The Claimant's comments to Corzette violated Operating Rule 1.6, but they were not physically threatening nor outrageously obscene. Nonetheless, it is not our function to substitute our judgment for that of the Carrier over the quantum of discipline assessed. We cannot say on this record that the decision was unjust, unreasonable, or arbitrary, and, regardless of what we might have done in the Carrier's place, must decline to disturb the penalty.

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 27th day of March 2008.