

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39875
Docket No. SG-40300
09-3-NRAB-00003-080015**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 F. J. Stottler, for reinstatement to his former position with compensation for all lost time, including skill pay, all seniority rights and benefits unimpaired and his personal record cleared of any reference to this incident, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal without providing a fair and impartial investigation and without meeting its burden of proving the charges against the Claimant as a result of an investigation held on May 17, 2006. Carrier’s File No. 35-06-0037. General Chairman’s File No. 06-023-BNSF-20-C. BRS File Case No. 13827-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 in this case was assigned to the position of Signal Foreman, headquartered at Burlington, Iowa. He had approximately 17 years of service with the Carrier.

On April 26, 2006, a call was made to the Carrier's hotline by an employee who wished to have his identity remain confidential. The anonymous caller reported that he had seen the Claimant use profane language while directing employees under his supervision, urinate in a public place, and use his cell phone while serving as a look out.

In response to the claims made by the caller, the Director of Human Resources and the General Construction Supervisor interviewed the crew members working with the Claimant on April 20, 2006. Based on the statements provided, it was determined that a formal Investigation would be convened. Accordingly, the Claimant was notified by letter dated May 1, 2006 to attend a formal Investigation in connection with his "alleged cursing at other BNSF employees, your alleged urinating in public and your alleged using of a cell phone when performing lookout duties in Western Springs, IL. . . ."

The Investigation was held on May 17, 2006. In a letter dated June 13, 2006, the Carrier notified the Claimant that he was dismissed from service for violation of Maintenance of Way Operating Rules 1.6, Conduct, 1.9 Respect for Railroad Company, and 6.3.3 Visual Detection of Trains.

The Organization protested the discipline and filed the instant claim on behalf of the Claimant. The Organization contended that the Carrier failed to prove the charges directed against the Claimant and asserted that the discipline was overly harsh and unwarranted.

The Carrier denied the claim at all levels of appeal. In its December 21, 2006 denial of the Organization's appeal, the Carrier stated that there was substantial evidence to show that the Claimant used profanity towards his crew and urinated in public. With regard to the third charge of using a cell phone while acting as a look out, the Carrier said:

“The Organization’s arguments concerning the Claimant’s use of a cell phone while performing look out duties is not listed as a reason for dismissal. It was a charge under investigation but it was not shown as a cause in the Claimant’s dismissal letter. This letter states only that the Claimant was dismissed from the Carrier’s service for violation of MOW Operating Rule 1.6 – Conduct and Rule 1.9 – Respect for Railroad Company.”

The Board carefully reviewed the record in its entirety. Notwithstanding the Claimant’s assertion that he used the word “frick” on several occasions which could have been mistaken for profanity, we conclude that there is substantial evidence in the record to establish that the Claimant did use profane language during the course of his assigned work day. Moreover, the Claimant admittedly urinated outside near the crossing house, despite the fact that there were facilities nearby. The Claimant insisted that he was out of public view. As the Carrier points out, however, while such conduct might be an acceptable practice at rural locations, the situation is different where, as here, the Claimant and his crew were working in a populated suburban area near Chicago. The Claimant should have used the proper facilities. Overall, his behavior was inappropriate and contrary to Carrier Rules.

The third charge of using a cell phone while acting as a look out is more problematic. It was not proven by substantial evidence at the Hearing and indeed the Carrier in its December 21, 2006 letter expressly acknowledged that it was not shown to be a proper basis for discipline. However, it is equally clear that the Claimant was dismissed at least in part based on this charge which stands unproven. Contrary to the December 21, 2006 letter by the Carrier, the dismissal notice clearly states that all three charges were the basis for dismissal.

This circumstance becomes relevant in evaluating the propriety of the discipline imposed. Because the Carrier failed to prove all charges relied upon as the basis for dismissal, we are compelled to modify the discipline. The evidence established that only two of the charges were proven. The Claimant used profanity and urinated outside when he should have used a nearby facility. Although this behavior is not to be condoned, the Board finds that the Carrier did not establish that such misconduct, standing alone, would justify dismissal.

In addition, the Board also reviewed the Claimant’s record. While the Claimant has 17 years of service, his record is not unblemished and includes a Level

S 39-day suspension dated September 15, 2005 for inappropriate conduct and a Level S record suspension dated September 16, 2005 for the same offense.

Taking all these factors into consideration, the Board finds that the claim is sustained to the extent that there was no just cause for the Claimant's permanent dismissal. The Claimant is ordered reinstated with seniority unimpaired, but with no backpay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of July 2009.