

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41354
Docket No. SG-41395
12-3-NRAB-00003-100245**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 BNSF Railway Company:

Claim on behalf of R. K. Leach, for his personal record to be cleared of any mention of the discipline issued in a letter dated February 6, 2009, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the excessive discipline of a 30-day record suspension with a one-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 January 14, 2009. Carrier’s File No. 35-09-0006. General Chairman’s File No. 09-008-BNSF-33-K. BRS File Case No. 14318-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, a Signal Inspector, was assessed a 30-day Level S record suspension for violating Rule 1.6 (Conduct) following an incident on December 21, 2008, in which he telephoned a co-worker, after working hours to discuss several Investigations that were taking place and to try to get him to testify against other employees. The co-worker refused to cooperate, telling the Claimant that he did not have any information regarding the situations that the Claimant had asked him about. According to the co-worker,¹ the Claimant appeared to be heavily under the influence of alcohol. Ultimately, the Claimant threatened the co-worker with the loss of his job and other retaliation. According to telephone records, the call lasted 38 minutes. That same day, the co-worker called the Carrier's Hot Line to report the incident. After reviewing the complaint, the Carrier scheduled an investigatory Hearing, which was held January 14, 2009. The co-worker testified at the Hearing and corroborated his earlier statements. In the context of the conversation, he did not think that the Claimant was calling him as a friend. The Claimant stated his belief that the co-worker took the phone call wrong, that he was trying to be a friend, and he was not trying to harass the co-worker. He acknowledged that sometimes people take things he says the wrong way and he has a hard time understanding why. He has been told that his speaking demeanor is gruff. In his opinion, the motivation behind the investigation was related to concerns he had raised on the Hot Line about a battery problem on the Sub-division that he sought to have investigated.

On February 6, 2008, the Carrier imposed the discipline that is at issue in this case. The Organization filed the claim in a letter dated March 18, 2009.

The Organization argues first that the Carrier failed to meet its burden of proof to establish that there was any harassment. The Claimant was not dishonest or quarrelsome, nor did he harass anyone. The Carrier failed to demonstrate any examples of his mistreating others or lacking dignity and respect. The incident was a misunderstanding that the employees, who are friends both on and off duty, subsequently worked out, so the discipline assessed was too harsh. Moreover, the

¹ Both his written statement of the call and the call record from the Carrier's hot line service.

incident took place off duty, during which time the Claimant was not covered by any Carrier Rules; in the absence of damage to the Carrier, it may not discipline an employee for off-duty conduct. Finally, the Investigation was flawed, due to the personal role and bias of the Conducting Officer, which indicated that he had concluded that the Claimant was guilty of misconduct even before the Hearing started.

The Carrier contends that it adequately met its burden of proof. The perception of the person being harassed is what counts, and the co-worker felt threatened and harassed. Rule 1.6 covers this type of incident, prohibiting conduct that is “dishonest,” “immoral,” “quarrelsome” or “discourteous” as well as “Any act of hostility, misconduct, or willful disregard . . . affecting the interest of the Company or its employees.” The Carrier’s PEPA classifies this type of incident as a “Serious Rule Violation” for which a 30-day record suspension is the appropriate discipline.

Based on our careful review of the transcript, the Board finds that the conduct of the Hearing was unexceptional. The Organization objected to comments that the Hearing Officer made to the co-worker as demonstrating bias. However, the comments – “we appreciate you spending your time coming in and giving this true and factual [statement]. It’s not easy to come into an investigation and give testimony. We appreciate what you’ve done for us” – appear to the Board to be more in the way of a polite expression of thanks to a witness rather than bias on the part of the Hearing Officer. It is difficult for people who are not familiar with the Hearing process to testify, especially against their fellow workers, and it is not bias on the part of a Hearing Officer to recognize and acknowledge that. The findings were consistent with the evidence that was entered into the record at the Hearing.

The Board turns now to the Organization’s substantive objections to the discipline. It is true that in general an employer may not discipline an employee for off-duty conduct. The exception to the general rule, however, is when that conduct has an impact in the workplace. Although the Claimant initiated the call during the evening after work, the call was specifically work-related, in that he questioned the co-worker about various workplace investigations and issues and sought the co-worker’s assistance. That the co-worker felt his job security was being threatened is another link to the workplace. Finally, the aftermath of the conversation resonated in the workplace, with the two men having to continue to work together. The Organization

is correct in the general principle it states, but the facts of this case squarely establish a connection to the workplace that takes it outside the general principle. The fact that the call was made after hours does not shield it when the content of the call has such a direct connection to work.

The Organization contends that the co-worker misunderstood the Claimant's intent as well as the comments he made. Every human communication is filled with potential for misunderstanding. There is what the speaker intends to say, the words he actually uses to express his message, what the listener actually hears, and how he or she interprets those words. The listener's perception may not be in accord with the speaker's intent. In harassment cases, it is the listener's perception that is paramount – only he can know whether he found the statements made to him to be threatening or harassing. Here, the Claimant recalled his intent one way, but his recall may not be very good: the co-worker stressed in his hot line call, in his written statement, and in his testimony at the investigatory Hearing that the Claimant appeared to be heavily under the influence of alcohol during the conversation. The co-worker's statements, especially his written statement, are complete, credible, and convincing. He did feel threatened and harassed, and he explained exactly how at the investigatory Hearing. The Carrier's conclusion that the Claimant had made the comments with which he was charged and that the recipient felt threatened and harassed was consistent with the evidence in the record.

The Carrier has an obligation to provide its employees with a safe and secure working environment, free from harassment and hostility. The PEPA clearly defines the Claimant's conduct as a serious Rule violation, for which the appropriate level of discipline is a 30-day record suspension. The Claimant's discipline was already reduced from a five-year probation to a one-year probation because of his prior good record. Particularly in cases where an arbitration tribunal does not receive testimony directly and have an opportunity to see witnesses for itself, it is not appropriate for the Board to substitute its judgment for that of the Carrier regarding the appropriate level of discipline. Accordingly, the claim is denied.

AWARD

Claim denied.

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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 15th day of May 2012.