

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41391
Docket No. SG-41396
12-3-NRAB-00003-100314**

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 T. H. Brown, for reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and his personal record cleared of any mention of this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on March 2, 2009. Carrier’s File No. 35 09 0015. General Chairman’s File No. 09-015-BNSF-33-K. BRS File Case No. 14356-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.

At the time of his termination, the Claimant was a Lead Signalman. He was terminated for violating Rule 1.6 – Conduct, which provides:

“Employees must not be careless of the safety of themselves or others, Negligent, Insubordinate, Dishonest, Immoral, Quarrelsome or Discourteous, in addition to any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.”

This is a companion case to Third Division Award 41389 and arises from the same circumstances. Accordingly, this Award incorporates the findings of facts and conclusions from the earlier case. In Award 41389, the Carrier imposed a Level S, 30-day actual suspension on the Claimant for failing to follow proper procedures in obtaining scrap material from the Carrier after it followed up on a Hot Line call that asserted that the Claimant had Company property at his residence that he had obtained improperly. The Carrier concluded, after an investigation by BNSF Police, that the Claimant had misappropriated Company property. He was the ringleader of a group that included BNSF scrap contractors in an unlawful scheme to, in essence, steal Company property. According to the Carrier, the Claimant identified material that he wanted for his personal use as “scrap,” which his cohorts picked up and then delivered to him. In that case, the Board concluded that the record before it was insufficient to substantiate the charges against the Claimant and sustained the claim.

This case is the second of the two disciplines that were imposed on the Claimant arising out of the Carrier’s original Investigation, which was conducted on January 7, 2009. Here, the Claimant was charged with having fabricated or falsified documents that he submitted to the Carrier to substantiate his contention that he was legally in possession of the scrap: it had been given to him by BNSF scrap contractors after they had removed it and assumed ownership. The dispute here centers on “invoices” from C & T Trucking, owned by one Chris Melander. The Carrier contends that the documents are falsifications and were obtained or fabricated by the Claimant after the

fact in an effort to avoid discipline. According to the Organization, neither it nor the Claimant ever contended that the documents submitted at the investigatory Hearing were original receipts or invoices. (Any original receipts the Claimant might have had were burned by his ex-wife during their divorce.¹) Rather, they were openly acknowledged and submitted as “reproduced receipts” with no intention to deceive the Carrier.

More specifically, at the original investigatory Hearing, the Organization submitted two documents from C & T Contracting, signed by Chris Melander. The first stated: “C & T Contracting gave Tom Brown ten rolls of junk clad wire to build fence with from a job between Gardner K.S. [sic] and Olathe K.S. [sic] on 06/19/01.” The second document stated: “C & T Contracting gave Gary Bonzo miscellaneous line wire for some repair on my 953a cat loader in 2008.” (The second document is not at issue in this case.)

At the March 2, 2009, investigatory Hearing, both the Carrier and the Organization submitted additional documents. The Carrier introduced evidence that C & T Trucking did not perform any work for BNSF until 2002 and that the project referenced by Melander was not done until 2004. The Organization introduced a more recent statement from Melander to the effect that he did not recall the exact date that he gave the junk wire to the Claimant, but that it was after the Gardner-Olathe job was done: “To the best of my recollection, I gave Tom Brown 6 to 8 rolls of scrap copper weld wire several years ago from a pole line removal job in Eastern KS that I was contracted to do for BNSF Railway.” The Organization also submitted a more detailed statement from Melander:

“On the pole line jobs 80 to 85 percent of the time C&T Contracting gives the poles to the land owners parallel to the BNSF Railroad. We do this to keep good relations between landowners and BNSF Railroad for future business. The other 15 to 20 percent we haul to the crossings and whoever wants them can get them. The landowner can keep the poles for personal use or give them away. We pull the poles and set them over the fence with the crossarms included. We also give

¹ The record includes a photograph of the fire, taken by a neighbor, Ron Haslett, who happened to come by the property to feed the cattle while the fire was burning. Mr. Haslett testified at the Investigation as to the circumstances, and to the fact that the pile that was burning included receipts of various kinds.

copper clad and iron wire to farmers and ranchers to build fence with. To the best of my recollection, I gave Tom Brown 6 to 10 rolls of copper clad wire.”

The Claimant testified at the investigatory Hearing that in December 2008 he had contacted Melander, who was working on a job in New Mexico, to ask for verification that C & T had given him the wire at issue. He told Melander that he thought the date was in 2001, but acknowledged at the Hearing that he did not really recall when he got the wire, only that it was several years before. The record also includes yet another statement from Melander, to the Carrier, to the effect that Brown had contacted him about sending an invoice “for some wire that I had given him in 2001.” Melander acknowledged mailing an invoice to Brown in December 2008 and added that “I did not give him any poles or other materials.”

The Carrier contends that there was just cause to discharge the Claimant. There is an established procedure for an employee to procure company material. The Claimant told BNSF Police that he had receipts from the Carrier that had been burned by his ex-wife. The Carrier has no records of any permission having been given to the Claimant to take or use scrap material or any receipts. Instead, there is evidence that the Claimant’s roommate, Gary Bonzo, picked up “scrap” including material that was not, in fact, scrap. During the investigation of the charges arising out of the Claimant’s misappropriation of Company materials, the Carrier became aware of discrepancies and inconsistencies with respect to the statement from C & T Contracting – for whom Gary Bonzo previously worked. Criminal charges were set to be lodged against the Claimant (and Bonzo) but a plea bargain was worked out with Brown that he has now reneged on. The Claimant’s Supervisor resigned, and BNSF no longer does business with C & T Contracting or GM Trucking or Bonzo. There is a right way for employees to obtain scrap material from the Carrier, through procedures established pursuant to Rule 1.25. There is not a scintilla of evidence that the Claimant ever attempted to follow those procedures, much less receive authorization. Acting effectively without authorization, the Claimant would decide what material would go into which piles, which piles would be picked up, and by whom – Gary Bonzo, who would bring the “good stuff” to the property of his – friend and housemate. When this scheme began to fall apart, the Claimant, following his arrest, began to manufacture evidence in an attempt to give his activities the air, if not the proof, of legitimacy. He ginned up “evidence” from within his network of contractors and sub-contractors, suppliers and enablers. But the errors in his “evidence” were self-evident. The result was a cover-up of his underlying offense and

the submission of false “evidence” at the Investigation discussed in Award 41389. This is dishonesty personified and dismissal was fully warranted for the underlying offense, but even more for the Claimant’s cover-up of his own misconduct. There are multitudinous Awards upholding dismissal for theft and its variants, including submission of false evidence as true and reliable. The Board should not interfere with the Carrier’s judgment in this case and should deny the claim.

The Organization responds that first, there were significant procedural problems with the conduct of the Investigation in this case that warrant reversing the Carrier’s decision, in that the charge lodged against the Claimant was ambiguous and the Hearing Officer improperly coached one of the Carrier’s witnesses during the Hearing. Second, the Carrier failed to meet its burden of proof to establish that the Claimant was guilty of providing fake receipts. No witnesses or evidence were introduced that established that the Claimant violated Ruled 1.6 in any way. The owner of C & T Trucking provided a statement correcting the incorrect date of 2001 on his initial statement. The Supervisor who was looking into the questions about the original C & T statement failed to contact Melander to find out if it was legitimate. The record of the Investigation does not support the Carrier’s conclusions and does not meet the standard of substantial evidence showing that the Claimant was guilty of the charge levied against him. The claim should be sustained.

The Board will first address the Organization’s procedural objections. The charge as written may have lacked a certain amount of specificity, but as part of an ongoing investigation into alleged wrongdoing by the Claimant, it seems certain that he and the Organization knew that the second Investigation was about the legitimacy of the receipts provided during the first Hearing. As for the Hearing Officer’s coaching one of the Carrier’s witnesses, a review of the transcript establishes that the Hearing Officer did explain to the witness what evidence had previously been admitted, but it does not establish that he was improperly coaching the witness on what to say. Rather, it appears that he was trying to bring the witness up to speed on what evidence was already in the record in order to focus the witness’ testimony. It is not uncommon in hearings for hearing officers to do so. The fact that some of the discussion took place off the record and outside the presence of the Organization is unfortunate, but it does not warrant overturning the Carrier’s decision on procedural grounds. Such comments are better made on the record.

Turning now to the substance of the allegation against the Claimant, the Board finds that neither the Claimant nor the Organization ever contended that they were

submitting original receipts at the first Investigation.² Frequently, there is no “receipt” when someone gives something to another person in lieu of a commercial transaction. Moreover, it had been at least four years since the Claimant had obtained the junk wire from C & T, and it would not be at all unusual for any receipt to have been discarded or lost.³ So the fact that there was no original receipt has limited significance. The difference between the letterhead on which the statement was written and the letterhead C & T uses for invoices is meaningless – the statement was never intended to be a copy of an invoice. When faced with serious allegations of wrongdoing, the Claimant made an effort to establish that he had properly obtained the wire from one of BNSF’s scrap contractors by getting a statement from the contractor. The fact that the date on the original statement from C & T was incorrect, then later corrected does not automatically mean that the original statement was “false” in the sense of deliberately untrue and intended to be misleading. The Claimant was relying solely on his memory of events that had happened some years ago; any documentation that he may have had was apparently burned by his ex-wife. Melander was away from his office when contacted by the Claimant and not in a position to access any records he might have had – if there were any to begin with. When the date discrepancy became known, Melander tied the transaction to the project that he had done in eastern Kansas, presumably the pole line renewal project between Gardner, Kansas, and Olathe, Kansas, in 2004. The Carrier rejected Melander’s explanation. But the record includes evidence that C & T Trucking was a well-respected contractor, not just for BNSF, but for other railroads as well.⁴ There is no basis in the record, other than speculation and suspicion, for concluding that Melander was being less than honest in his statements – legitimately mistaken about the date in the first instance, but not deliberately dishonest. The Claimant candidly acknowledged that he was guessing at the date when he asked Melander to write a statement for him. Moreover, there is no reason to conclude that the junk wire at issue was stolen from the Carrier instead of given to the Claimant by C & T Trucking

² At the first Investigation, the Carrier alleged that there were false receipts from both C & T Trucking and Finch Signs. The second Investigation focused solely on C & T Trucking, with no mention of Finch Signs. With no evidence in the second record relating to Finch Signs, the Board has no basis on which to draw any conclusions about the Finch Signs invoice. Moreover, the Carrier’s Submission does not mention Finch Signs. Accordingly, this Award addresses only the C & T Trucking documents.

³ And in this case, perhaps burned.

⁴ See, in particular, the August 18, 2003, letter from the Signal Manager to the Assistant Vice President of Signal to the effect that C & T “has a good reputation within the industry. . . .”

as part of the scrap that it had obtained from BNSF during the pole line renewal project. There is no evidence of any BNSF theft reports. Moreover, the pole line renewal projects yield large quantities of poles and junk wire that are routinely discarded; Melander's description of the procedures used by C & T Trucking conform to appropriate practices for BNSF contractors to follow when dealing with old materials that have been removed during pole line renewal and discarded by the Carrier. In light of the evidence in the record, the Carrier's conclusion that the Claimant deliberately submitted false evidence was not reasonable. The evidence was never presented as anything other than what it was – an effort to establish his rightful ownership of the junk wire, legitimately obtained from one of the Carrier's scrap contractors, who legally owned it at the time that it gave the wire to him.

In the first Investigation, the Carrier was unable to substantiate its allegation that the Claimant had improperly converted Company property to his personal use. It has similarly failed to carry its burden of proof to establish that the Claimant submitted false evidence during the first Investigation, and the instant claim is sustained.

AWARD

Claim sustained.

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 25th day of July 2012.