

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41427
Docket No. SG-41362
12-3-NRAB-00003-100236

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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 S. J. Wamba, for reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and any mention of 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 against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation which opened on December 4, 2008, and concluded on December 30, 2008. Carrier's File No. 39-090005. General Chairman's File No. 09-003-BNSF-188-SP. BRS File Case No. 14319-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.

On November 7, 2008, the Claimant saw two police officers exiting the house across the street from his home. He had been concerned about various forms of illegal activity that had taken place in the house and approached the officers. According to the Claimant, he identified himself as a BNSF employee, gave them his business card that identified him as a Signalman, and discussed the problems the neighborhood had been having with activities in the house. The Everett, Washington, police have a different version of what happened. According to them, the Claimant clearly identified himself as a BNSF Police Officer. The Everett Police were suspicious and initiated an investigation. On November 17, they contacted BNSF Police to inform them of their investigation, and on November 25, 2008, Lt. Fudge of the Everett Police interviewed the Claimant at the Carrier's Delta Yard in Everett, in the presence of one of the officers who had been present on November 7 and a BNSF Police Officer. No union representation was present. During the interview, the Claimant repeatedly claimed that he had never represented himself as a BNSF Police Officer and that the Everett Police Officer had misunderstood him. Lt. Fudge informed the Claimant that unless he told the truth, he would be charged with a felony misdemeanor, impersonating a police officer, and if he confessed, no charges would be filed against him and the matter "would go away." The three police officers left the room. The Claimant wrote a statement that he had impersonated a BNSF police officer in order to have more credibility with the Everett Police and that he would not do so again. The Claimant was clearly under the impression that once he made the statement, the entire matter would be dropped, both by the Everett Police and by the Carrier. However, as soon as he turned in the statement, BNSF Police Officer Nelson handed him a Notice of Investigation and the Claimant was escorted off the property. Following an Investigation that was conducted on December 4 and December 30, 2008, the Claimant was terminated, effective January 28, 2009, for violating Maintenance of Way Rule 1.6, Conduct and Rule 1.9, Respect. The Claimant had 37 years of service with the Carrier and a previously clean disciplinary record. Following his termination, he was able to apply for retirement and retired effective June 1, 2009.

The Organization contends that the Investigation was procedurally flawed, in that the Notice of Investigation was both untimely and inadequate. The Claimant repeatedly denied impersonating a BNSF police officer and only "confessed" under

duress. In addition, the discipline imposed, termination, was disproportional to any offense, especially in light of the Claimant's 37-plus years of exemplary service with the Carrier. The Carrier contends that the Notice of Investigation was both timely and adequate. Termination was an appropriate level of discipline given the seriousness of the Claimant's offense, which was a form of dishonesty.

The Notice of Investigation and the Investigation itself were not procedurally deficient. The Carrier did not know about the November 7 incident until November 17 at the earliest, and the Carrier did not know any details of what had transpired until BNSF Police Officer Nelson attended the Claimant's interview by the Everett Police Department on November 25. The Investigation commenced on December 4 within the appropriate time limit.

Turning to the substance of the charges against the Claimant, the record includes statements from the two Everett Police officers, Wolfington and Soderstrom, who spoke with him on November 7. The statements are similar in relaying the officers' definite impression that the Claimant was a BNSF Police Officer, with very specific and detailed reasons why they reached that conclusion. Their statements are credible, despite the Claimant's efforts to minimize his behavior. In a technical sense, then, one could conclude that the Claimant was guilty of impersonating a BNSF Police Officer. Taking a look at the circumstances, however, it appears that the Claimant's action was not intended to cause any harm to anyone, and in fact, it did not. The Claimant did not seek or obtain any personal gain by his action. The Carrier argues that it was the victim, in that the reputation of its police suffered. That claim seems somewhat inflated: the Everett Police were suspicious of the Claimant from the start and immediately initiated their own investigation. The Claimant was guilty of trying to ingratiate himself with local police in an effort to reduce criminal activity in his neighborhood, but his thoughtless conduct really was not much more than that. The Board does not sit to second-guess the Carrier, but in the context of the Claimant's 37 years of service with the Carrier, as an exemplary employee, termination was so grossly disproportionate to his misconduct so as to amount to an arbitrary and capricious act. The Claimant was chastened by his brush with the Everett Police Department and there is every reason to believe that lesser discipline would have sufficed to impress upon him the need to reform his conduct. The Claimant shall be reinstated to his former position with seniority and benefits unimpaired, but without backpay. He did engage in an intentional, if modest and unsuccessful, deception that constituted misconduct under Rules 1.6 and 1.9. Reinstating him to his position is appropriate, but his own actions preclude an award of 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 5th day of September 2012.