

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42124
Docket No. SG-42042
15-3-NRAB-00003-120369**

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 J. Kirkwood, for reinstatement to service with compensation for all time lost, including skill pay, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal to the Claimant without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on January 18, 2011. Carrier's File No. 35-11-0026. General Chairman's File No. 11-007-BNSF-121-T. BRS File Case No. 14681-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 the events that led to his discharge, the Claimant was working as a Signalman on Gang SSCX0291 on the Gulf Division. On October 18, 2010, at about 6:30 A.M., the Bay City, Texas, Police Department received a 911 call reporting that a white pick-up truck had been driving erratically and at a high rate of speed, cutting other vehicles off, before pulling into the parking lot of a Walgreen's pharmacy. (The store was not yet open.) According to the incident report filed by one of the Officers dispatched to the scene, Police arrived and observed the truck driving through the parking lot out onto a public street. The Police then observed the truck driving on the wrong side of the road. At that point they initiated a traffic stop. The Claimant was the driver of the truck, which was a Company vehicle that he used for work. According to the Incident Report:

"I asked Kirkwood why was he driving on the wrong side of the road and he answered he didn't know he was driving on the wrong side of the road. I asked Kirkwood if he had been driving at a high rate of speed and he advised 'no.' Kirkwood had a strong odor of an alcoholic beverage emitting from his breath and person. I asked Kirkwood if he had been drinking and he advised that he was drinking the night before

. . . I asked Kirkwood to step out of the truck. Once Kirkwood exited the truck, I observed him to be very unsteady on his feet. I asked Kirkwood if he would be willing to do a Field Sobriety Test and he advised 'yes.'

The first test was the Horizontal Gaze Nystagmus. Kirkwood could not perform the test properly Kirkwood was also swaying back and forth and leaning side to side. The second test was the Walk and Turn. During the test, Kirkwood could not balance during the instruction phase. . . . On the third test, the One Leg Stand, Kirkwood swayed back and forth, and kept dropping his foot on the ground. . . ."

The Police took the Claimant into custody and transported him to the Matagorda County Jail, where a breath alcohol test was administered. According to the Incident Report, the Claimant's breath tested at .205 and .198. The legal limit for the State of Texas is .08. The Claimant was booked and sent to jail. The truck was impounded.

In jail, the Claimant was allowed two telephone calls – one he made to his wife and the other to a Bail Bondsman. Bail was set at \$5,000.00. When the Bail Bondsman arrived at the jail, the Claimant directed him to get his debit card from the truck – which

the Bail Bondsman was unable to do because the truck was locked in the Police impound. The Claimant had no more telephone access to call his Supervisor to report what had happened. The Claimant's wife was unable to get the money for bail until five days later, on October 23, 2010. When the Claimant was released from jail, he used his corporate credit card to pay the impound fees on the truck. He telephoned his Supervisor immediately to report what had happened and said that he would make restitution for the impound fees.

The Carrier sent the Claimant a Notice of Investigation directing him to report for an Investigation into charges of failure to report for duty between October 18 and October 22, 2010 while in possession of a Company vehicle; misuse of the Company vehicle; misuse of the corporate credit card; being arrested for DWI while driving a Company vehicle; and being incarcerated from Monday, October 18 to Saturday, October 23, 2010.

Following postponement, the investigatory Hearing was held on January 18, 2011. The Claimant stated that he was on his way to work when he was stopped by the local Police. He denied having been drunk, stating that had had only a single alcoholic beverage the night before, shortly before he went to bed at around 9:00 P.M. Meanwhile, on January 11, 2011, he had entered into a plea bargain in Matagorda County Court. In exchange for pleading guilty to a charge of Driving While Intoxicated – First Offense, the charge was amended to Obstructing the Roadway. The Claimant was placed on Community Supervision, a form of parole, for 12 months. Kirkwood testified that on the advice of a County Prosecutor, he decided to plead guilty to a reduced charge in order to deal with the matter and get it over with, in lieu of continuing to wait months for a trial.

By letter dated February 16, 2011, the Carrier informed the Claimant that he had been found in violation of MOWOR 1.15, MOWOR 1.19, MOWOR 1.5, and MOWOR 1.6, and that his employment was being terminated effective immediately. The Organization filed a timely appeal of the decision. The Parties having been unable to resolve the matter between them on the property, it was submitted to the Board for a final and binding decision.

According to the Carrier, there was just cause for discipline, and termination was an appropriate level of discipline. Substantial evidence in the record established that the Claimant violated the Rules with which he was charged when he misused a Company vehicle by operating it with a measurable level of alcohol in his system and when he was absent without authority or notice between October 18 and 22 due to his arrest and

incarceration. In addition, he misused a Company credit card to pay for towing and storage fees incurred due to his arrest; then he was dishonest when reporting what had happened to Carrier Officials. The Claimant stated that he acted as he did because he had no alternative, but that is not true. The charges against him were proven and termination was appropriate given the serious nature of his misconduct.

Conversely, the Organization alleges that the Carrier failed to meet its burden of proof. The breathalyzer test is not in evidence. Moreover, the Claimant was not convicted of driving under the influence – the District Attorney reduced the charge against the Claimant to obstructing the roadway. The Claimant was wrongly jailed and unable to contact his Supervisor because he had no way of communicating with the outside world. When he was released, the only way he could get the company truck released from impound was to use the corporate credit card that he had. He promptly contacted his Supervisor to report what he had done and offered to make restitution. At no time was he dishonest. While there may be cause for discipline at some level, under the circumstances, discharge was harsh and excessive, and the Claimant should be returned to work.

The Claimant was found in violation of MOWOR 1.15, Duty – Reporting or Absence; 1.19 – Care of Property; 1.5 – Drugs and Alcohol; and 1.6 – Conduct. Whatever his reasons for doing so, the evidence in the record establishes that the Claimant did plead guilty to a charge of Driving While Intoxicated. Moreover, the incident occurred while he was driving a Company vehicle and while on his way to work. The Incident Report credibly establishes that the Claimant had been driving sufficiently erratically that someone called 911 to report his behavior and that the Bay City Police dispatched to the scene directly observed him driving on the wrong side of the road. When asked about it, he stated that he did not know that he was on the wrong side of the road. There is no reason to believe that the Incident Report was falsified or incorrect. Even without the actual breathalyzer test in the record, the evidence that is in the record is enough to support the Carrier's conclusion that, at a minimum, the Claimant was sufficiently under the influence of alcohol that his driving was seriously impaired, i.e., he was unable to operate his Company vehicle safely. Both the Carrier and Organization recognize the critical importance of safe operation of the Carrier's vehicles at all times, whether on the job or off. Moreover, whatever the circumstances, the Claimant was absent from work without authority the entire workweek of October 18–22, 2010. The Carrier's conclusion that the Claimant was in violation of MOWOR 1.15, MOWOR 1.19, MOWOR 1.5, and MOWOR 1.6 is supported by substantial evidence. Being absent without authority for an entire week of work is a violation of MOWOR 1.15. Operating a Company vehicle

recklessly and while under the influence of alcohol violated MOWOR 1.19, 1.5 and 1.6.1. The Claimant's unsafe driving endangered members of the public, and if the Police had not been summoned and arrested him, the consequences could have been catastrophic. All in all, the record establishes that there was just cause for discipline and that, given the seriousness of the violations, termination was neither harsh nor excessive. Accordingly, the claim is denied.

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 13th day of July 2015.