

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42402
Docket No. SG-42514
16-3-NRAB-00003-140072

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 M. D. Eubank, for reinstatement to service with compensation for all lost wages, 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 Rules 54 and 56, 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 July 3, 2012. Carrier's File No. 35-13-001. General Chairman's File No. 12-043-BNSF-21-K. BRS File Case No. 14946-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.

An outside party, advised BNSF that he routinely observed a Company truck parked after 4 pm, blocking a narrow, commercial street. The communication was forwarded to BNSF Terminal Signal Engineer Lowell Sherrell who determined that the vehicle was assigned to Claimant Eubanks. Together with Supervisor James Langan, he observed the vehicle parked in the identified location for several hours on June 7, 8 and 9, 2012. The Claimant submitted for eight hours worked on each of those days.

The Carrier held an investigation hearing for the purpose of assembling relevant evidence. Based on the record made at the hearing, the Claimant was found to have paid himself for time not worked in violation of MOWOR 1.6: Conduct. This was the Claimant's second serious rule violation within a 36-month review period. As a result, he was dismissed on July 31, 2012 for falsification of time.

The Organization contested the termination, which the Carrier rejected on appeal. The claim was fully processed, without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

BNSF explained that because its employees often work in scattered and remote locations, it employs the "honor system" for time entry by its employees. It asserts the Claimant was observed sitting in his truck, not performing service. It points out that he submitted a payroll report enumerating duties he claimed he performed when he was actually in his truck on the side street. His time sheets show he was testing or troubleshooting switches for the entirety of the three days he was observed in a location far from the switches.

The Organization notes that the Claimant was a 29-year employee, and parked on a side street in order to perform administrative duties associated with his position. It maintains the location was strategic, allowing him to respond quickly to trouble calls. According to the Organization, he would go to the side street and work, updating his General Orders and Rule books, and studying about any equipment or tests he was unsure of.

The Organization argues that none of the evidence proves that he was doing anything other than performing job related functions: Supervisor Langan could not confirm that he was sleeping and even described him reading; though there were

several pictures, none show him sleeping; and Sherrell admitted the Claimant was sitting up straight when he was observed “sleeping.” The Claimant testified that Sherrell had instructed him not to show administrative work on his time sheets. The Organization contends that in order to establish dishonesty, the Carrier must show a deliberate attempt to defraud the Carrier. It contends the evidence provided fails to support falsification of time.

There are two essential allegations being made by the Carrier. Sherrell asserts that when the Claimant put in for time spent sleeping, this constituted falsification of time records. The second aspect of the allegations here relates to Sherrell’s assertion that the Claimant did not test switches yet put down on his timesheets that he did.

The Board has reviewed the evidence on record and can find no persuasive evidence that the Claimant was in fact asleep. The conclusion that a person is sleeping must be reached from a proximity from which one can observe whether the eyes are open or closed and also whether breathing patterns are indicative of sleep. None of the photographs submitted by the Carrier supported a conclusion of sleeping. Slumping or bad posture does not establish that a person is asleep. Though supervisors claim to have observed him for hours on end, they apparently failed to approach him or take any picture close enough to substantiate their allegations. Langan was clear in describing the Claimant on one occasion as awake and doing something, and on another occasion as reading. This evidence is not supportive of a conclusion that the Claimant was sleeping, and does not refute the Claimant’s assertion that he was doing administrative work.

That said, the question remains as to whether Claimant reported performing work that was not done because he was sitting in his truck. Claimant states he was instructed not to put administrative time down on his time sheets. Sherrell confirmed this assertion:

“ADAM STALLBORIES: Do you require your Maintainers to charge time separately for doing administrative work for example reading emails, filling out reports, reviewing and installing pages in rules books, the standards books, instruction books, PARs and books and test procedure books?

GENE SHERRELL: Uh, no, I do not. As far as filling out their hours of service, uh, should go along with what they done that

particular day if he was testing switches which that's what he claimed on two of those days. He did not test switches but yet he put it in on his timesheets. (TR 15) * * *

ADAM STALLBORIES: But as a whole though, is a Maintainer sometimes do duties inside the cab of that truck?

GENE SHERRELL: I would say yes sometimes. (TR 16)”

This testimony establishes that the Claimant was allowed to perform administrative duties in his truck and was instructed to pull the time spent on administrative duties into the time designated for performance his other work. It does strike the Board that the Claimant’s time spent in the cab on a side street was excessive. That said, Sherrell’s testimony begs the question of whether the Claimant was putting down that he was testing switches when he was nowhere near them and the work was being left undone.

The Claimant worked an eight-hour shift. On June 7, he was observed on the side street from 4:30 P.M. to 7:00 P.M., a period of two and-a-half hours, leaving five and-a-half hours to perform testing work. On June 8, he was observed on the side street from 4:15 P.M. to 5:50 P.M. and again from 7:05 P.M. to 8:59 P.M., one hour thirty-five minutes and one hour fifty-four minutes respectively, totaling three hours twenty-nine minutes and leaving four hours and thirty-one minutes for the performance of other duties. On June 9 he was observed on the side street from 4:10 P.M. to 5:20 P.M. for a total of one hour and ten minutes leaving six hours and fifty minutes for the performance of other duties. In the view of this Board, the Carrier has not shown that the Claimant could not have performed testing duties on June 7, 8 or 9.

The Carrier had insufficient evidence to sustain the charges leveled against the Claimant in this case. In addition, the Claimant’s 29 years of service constitutes a significant mitigating circumstance which was not properly considered. Though he should have known he was spending too much time on the side street, he was denied the opportunity to correct his behavior and comply with the Carrier’s expectations. The Carrier abused its discretion in failing to give him clear instructions and in failing to warn that his conduct could result in serious discipline. His termination shall be expunged and replaced by a Letter of Reprimand. He shall be paid retroactive compensation and benefits, including restoration of seniority.

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 October 2016.