

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42861
Docket No. SG-43244
18-3-NRAB-00003-150476**

The Third Division consisted of the regular members and in addition Referee Patricia Bittel 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 B. Imhoff, for compensation for all time lost, including skill pay and overtime, 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 Claimant the harsh and excessive discipline of a Level S (Serious) 36-day actual suspension with a 3-year review period, without providing him a fair and impartial Investigation, and without meeting its burden of proving the charges in connection with an Investigation held on Saturday, January 25, 2014. Carrier’s File No. 35-14-0034. General Chairman’s File No. 14-011-BNSF-87-B. BRS File Case No. 15182-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.

Maintenance of Way Operating Rules 1.13 states:

“1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”

The Carrier determined that the Claimant failed two operations tests for unacceptable vehicle housekeeping and further failed to remedy the situation after he was instructed to do so. He was found to have violated Maintenance of Way Operating Rule (MOWOR) 1.13 and was issued a Level S 36-day actual suspension with a three-year review period.

The parties to said dispute were given due notice of hearing. Failing to resolve the matter, the Organization referred this dispute to the National Railroad Adjustment Board (“NRAB”) for arbitration. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The Carrier sees this as a safety violation, noting the Claimant’s vehicle is used in rough terrain and loose items could become a safety hazard. It notes that the Claimant failed operations tests for unacceptable vehicle conditions involving two different vehicles on May 13, 2013 and again on December 13, 2013. On May 13, 2013 he had an accident when his computer bag fell toward him; when he pushed it back he swerved and hit a gate.

After the second failure, Vince Johnson, Claimant’s Signals Supervisor, spoke with Claimant and provided a “Work Plan and Expectations” document which detailed expectations for housekeeping practices. In the Carrier’s view, this gave the Claimant adequate opportunity to make changes. The Carrier maintains Claimant’s request for a “cage” or containers would not have provided adequate safety since the containers or other loose items could still get pitched. It argues Claimant was authorized to get a cage or containers, but never bothered to do so.

On January 16, 2014, Johnson reviewed a Drivecam event from January 9, 2014 and saw that despite Claimant's assertions about cleaning his vehicle, conditions were still unacceptable. The Carrier explained that Claimant was issued an "actual suspension" because his behavior threatened his own safety and the safety of co-workers. It maintained that his offence could be deemed insubordination resulting in dismissal but leniency prevailed.

In the Carrier's view, the instructions to "clean it up" were vague, and the Claimant made a good faith effort to comply by building a plywood barrier in the back. The Organization noted that the Claimant's assigned vehicle during the time in question was a 2001 Suburban, not a pickup with a covered tool-bed to store the equipment and tools used in the performance of his assigned duties. It contends a safety cage should have been installed. The Organization notes that the Claimant requested a cage to hold back his items but was never given one.

As the Organization sees it, Johnson provided the Claimant with suggestions instead of specific instructions; he did not order him to do anything specific. Johnson admitted at the Investigation: "I didn't feel it's my job to tell him what was acceptable." TR 31

The Organization points out that the Work Plan referenced by the Carrier was only in effect from June 25, 2013, through the end of 2013. The Claimant was charged on January 20, 2014, meaning the Carrier arbitrarily and wrongfully disciplined the Claimant for violating a work plan that was no longer in effect. In the Organization's view, this alone should render the discipline null and void.

Significantly, the Organization argues that at no time did Johnson claim to have warned the Claimant that failure to clean up his truck would lead to discipline. Yet, without warning the Carrier imposed a draconian measure consisting of 36 actual days of suspension. In the Organization's view, this penalty was unreasonable in the extreme.

Progressive discipline exists for a reason: to give an employee a chance to modify his or her behavior and learn from past mistakes. In this case, Claimant received no lower level discipline even though his offensive behavior had been going on for over half a year.

The Organization correctly points out that concepts of fundamental fairness require that an employee be on notice for behavior that is prohibited under the threat of discipline before such discipline can be imposed. This is to afford the employee a choice to continue his behavior and suffer the consequences, or to change it and avoid disciplinary action. The Claimant was never advised that his messy truck was viewed as a serious safety violation that, unless rectified, would result in Level S disciplinary action.

In the view of the Board, a messy truck is properly viewed as an unsafe condition, particularly since it had already resulted in one accident. However, it is atypical in terms of safety hazards, and distinguishable from situations like unbuckled seat belts or failure to wear safety glasses in that certain degrees of untidiness are tolerable; the line between the acceptable and the unacceptable can be fuzzy and gray. Following this rationale, the Board finds the Carrier within its rights to discipline for creation of an unsafe mess, but only if the employee understands that his mess has crossed the line into Level S discipline.

The Board does not expect the Carrier to condone messy, hazardous conditions inside Carrier vehicles. Rather, we affirmatively recognize the need for the Carrier to see loose objects inside vehicles as the safety hazard that they are and to take disciplinary action for allowing such unsafe conditions to exist. The problem is that in fuzzy situations like ‘messiness,’ employers must issue a clear message to the employee that he or she is on a path to disciplinary action. There was no such message here. The Claimant was put on a work plan which then expired. He was talked to, but never in terms of impending discipline. As a result, he was denied a reasonable opportunity to understand the risk he was taking before an extremely heavy penalty landed.

The claim is granted in part. The Level S 36-day actual suspension with a 3-year review period shall be removed from Claimant’s record, and shall be replaced by a Formal Reprimand with a 1-year review period.

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

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 10th day of January 2018.