

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39867
Docket No. SG-38802
08-3-NRAB-00003-050195
(05-3-195)**

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of T. L. Somera, for reinstatement to his former position with payment for all time lost, including overtime and holidays, with all seniority and benefits restored and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges that the Claimant made improper charges to his CLC card when he was absent from duty in an investigation held on April 16, 2004. Carrier compounded its violation by failing to respond to the Organization’s appeal within the time limits prescribed in Rule 68, and Carrier also unilaterally combined this case with another that was handled separately without the concurrence of the Organization. Carrier’s File No. None. General Chairman’s File No. W-68-402. BRS File Case No. 13111-UP.”

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 this dispute, the Claimant was assigned as a Signaller on Signal Gang 5837. The Claimant was scheduled to work on March 17, 2004, yet did not report to work on that date. However, it came to the Carrier's attention that although the Claimant had not reported to work that day, he made a charge to his Corporate Lodging Card (CLC) on March 17, 2004 for a stay at a hotel. Upon learning this, the Carrier reviewed the history of the Claimant's CLC transactions and learned the Claimant had made two other charges on December 29, 2003 and February 5, 2004 to his card. The Carrier investigated the matter to determine if the Claimant violated Union Pacific Rule 1.6 Conduct (4) Dishonest. The Carrier found that the Claimant violated Rule 1.6 and assessed a Level 5 discipline dismissing the Claimant from the service of the Carrier. As an aside, the Board recognizes that the Carrier charged and investigated the Claimant separately of other Rule violations based upon the incidents that are the basis of this claim.

Before addressing the merits of this claim, the Organization raises several procedural issues. The Board finds that only one of the procedural issues warrants further review and discussion. That is, the Organization's contention that the Carrier's failure to respond to the Claimant's claim appealing the dismissal decision within 60 calendar days pursuant to Rule 68 D requires the claim to be sustained. We agree.

The Board reaches the following findings: On May 18, 2004, the Organization forwarded a letter to the Carrier by certified mail rejecting the Carrier's decision to dismiss the Claimant as sustained in the Investigation held on April 16, 2004. The Organization cited that the Carrier did not meet its burden of proof to substantiate the charge of dishonesty, that the Carrier did not follow its formal discipline process (UPGRADE) and that the CLC policy singled out the Claimant and was not equally enforced. The letter detailed many excerpts of the Investigation transcript that

purported to prove its point. The letter concludes with the statement that the charge against the Claimant “must be stricken” from the Claimant’s record and that the Claimant receive all lost wages, including overtime and holidays, in full. The Organization followed up to this letter on September 16, 2004 noting a discussion with a Carrier representative on August 20, 2004 regarding this matter and the violation of the 60-day time limit and attempted to mutually extend the time limits for both the Carrier and the Organization. The Organization subsequently notified the Carrier for the fourth time, by letter on October 19, 2004 that it had not received any response to its appeal on behalf of the Claimant.

The Carrier never disputed that it did not respond to the Organization’s appeal on behalf of the Claimant until November 12, 2004. The Carrier’s letter dated November 12, 2004 indicated that the letters from the Organization had been logged and filed as something other than a claim or grievance. Without too much discussion, the Board finds the Carrier’s position to be incredible. Even if the May 18, 2004 correspondence did not present to the Carrier as a “claim,” at some point, it would have been prudent to look at the letter and respond, as requested, to avoid claims such as this. More importantly, the Carrier provided no Rule, Awards or other credible evidence to suggest that the Claimant’s letter dated May 18, 2004 did not clearly qualify as a claim or could not have reasonably been considered as such when it was received. In fact, Rule 69 A and B of the Agreement appear to only require that appeals be in writing within 60 days from notice of the Carrier’s decision and/or that an appeal reject the Carrier’s decision. We find the Carrier’s failure to respond in a timely manner (more than three months after the expiration of the 60-day time limit) a violation of Rules 68 and 69 and find no merit in its contention that the Claimant’s letter of May 18, 2004 did not suffice as a proper claim. The letter clearly identified the Claimant as the affected employee and that the Organization sought the removal of the dismissal decision. As to the procedural aspects of the claim, we agree with the Organization.

Because of the procedural issue raised in the claim and the associated decision decided by the Board for this same Claimant concerning the same facts in issue in Third Division Award 39868, the Board does not find it necessary to address the merits of this claim in depth; however, we do also find that the Carrier did not meet its “substantial evidence” burden of demonstrating that the Claimant acted with “dishonesty” when he used his CLC on the noted three occasions. The record demonstrates a clearly confused Claimant and a less than sufficient effort by the

Carrier in demonstrating that the Claimant had no basis to believe he could use the card the way he did under the circumstances. The record further reflects that the Claimant's Supervisor and Foreman's testimony did not clearly establish that the Claimant was being dishonest by using the card during his work cycle. We disagree with the Carrier's contention that an admission of use of the card requires no evidence that he intended to deceive or defraud the Carrier with that use. The very nature of a claim of dishonesty requires some degree of intent and motivation to improperly use the card. We do not believe the Carrier met this burden.

Notwithstanding the procedural defect, and the Board's finding that the evidence in the transcript does not substantiate the Claimant's dismissal for dishonesty, we disagree with the Organization's argument that the Carrier forfeited its right to discipline the Claimant per se. Although we sustain this claim, we do not believe it warrants overturning the discipline in this case given the concurrent case discussed above involving the same Claimant. Had there not been a concurrent case, the Board would be compelled to discuss any potential damages owed the Claimant. In this case, however, the Claimant received a concurrent dismissal based upon other charges that were sustained in an Award of compensation to the Claimant for the Carrier's procedural violation raised in both matters; therefore, no reinstatement is ordered, nor is damages awarded here to the Claimant independent of the other matter.

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 July 2009.