

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 24770
Docket Number MW-24203

John B. LaRocco, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Section Foreman M. T. Venstad for **alleged** violation of **"Rules 700B and 706"** and **"Form 15125"** was without just and sufficient cause, unwarranted and in violation of the Agreement (System File T-D-143C).

(2) Section Foreman M. T. Venstad shall now **be** allowed the benefits prescribed in Agreement Rule **40(G)**.

OPINION OF BOARD: On March **11**, 1980, the Carrier's Roadmaster at Minot discovered that Claimant, a Section Foreman stationed at **Towner**, North Dakota, may have misused a Carrier gasoline credit card. A Division Special Agent interviewed a service station attendant who confirmed that Claimant had tendered a Burlington Northern credit card as payment for filling Claimant's personal pickup truck with fuel on two occasions. Subsequently, Claimant conceded that he had purchased \$18.00 and **\$25.00** worth of gasoline for his own vehicle with the Carrier's credit card. In addition, Claimant admitted that he **mt** only lacked permission to use the card to buy gas for his truck but he also failed to report his purchases to the Roadmaster. **However**, Claimant thought he could justify the purchases since, in February, 1980, he had voluntarily used his own vehicle to drop off and pick up the Carrier's hyrail at the Minot motor car repair **shop**. Also, he did not make a three **hour** overtime claim for delivering the Carrier's vehicle. The Roadmaster testified that if Claimant had submitted an expense voucher, he would probably have received reimbursement for using his truck on **authorized** Carrier business. After an investigation held on March 17, 1980, the Carrier dismissed Claimant from service for violating General Rules 700 (**B**) and 706.

At the conclusion of the March 27, 1980 investigation, the Organization objected to the timing and location of the hearing. According to the Organization, the Carrier unilaterally postponed Claimant's investigation from March 24, 1980 to March 27, 1980, which is contrary to Rule 40 (I) of the applicable Agreement. Rule 40 (**I**) declares that **an** investigation "...**may** be postponed if mutually agreed to by the Company **and** the **employee** or his duly authorized representative." Since neither Claimant nor his representative expressly consented to the postponement and because the hearing was convened away from Claimant's headquarters, the Organization urges us to sustain the claim as presented. The Carrier argues that Claimant tacitly approved of the three day postponement and, moreover, the delay was necessary so all essential witnesses **would** be available to testify at the investigation.

After carefully perusing the record, we find that Claimant impliedly acquiesced to the slight delay in holding the investigation. Third Division Award No. 24084 (**Schoonover**). **Moreover**, the Carrier presented a compelling justification for seeking a postponement. Necessary witnesses were unable to attend on the original hearing date. Thus, Claimant had the opportunity to

confront all witnesses and he received a hearing free from any prejudicial defects. Third Division Award No. 22703 (**Kasher**).

We also conclude that the hearing could be held away from Claimant's headquarters point to **accomodate** all participants. Rule 40 (**E**) does not absolutely require that the investigation be convened at the charged **employee's** headquarters. The purpose of Rule 40 (**E**) is to prevent the Carrier from holding an investigation at a distant location which **would** place great hardship and expense on the charged party to attend the hearing and defend himself. In this instance, the Carrier held the hearing in Minot which was reasonably close to **Towner**.

Contrary to the Carrier's position in its submission, the Carrier shoulders the burden of proving, with substantial evidence, that Claimant fraudulently used a Carrier gasoline credit card. In this case, the Carrier has satisfied its burden of proof. Claimant candidly conceded that he purchased gasoline **for** his private vehicle **and** charged the purchase to a company credit card. By using the card without permission, Claimant converted and misappropriated Carrier funds. Claimant should have requested expenses and overtime pay instead of misusing a credit card which had been entrusted to him.

Though Claimant committed a serious offense, the penalty of discharge was excessive and unduly harsh. Claimant had accumulated thirteen years of fine service with, apparently, an excellent work record. Though his misconduct is **unexcuseable**, the Roadmaster testified that Claimant probably would have been entitled to reimbursement for expenses. The time Claimant has spent out of service should convince him that he must be honest and trustworthy. Claimant shall be reinstated to service, with his seniority unimpaired, but without compensation for time lost.

FINDINGS: The **Third** Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

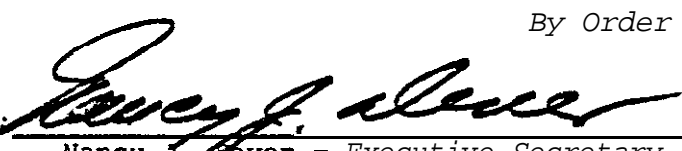
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois this 13th day of April, 1984

