Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26780
THIRD DIVISION Docket No. MW-26934
88-3-85-3-717

The Third Division consisted of the regular members and in addition Referee Edwin H. Be"" when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak)
(Northeast Corridor

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

1. The dismissal of Lineman M. Jackson for alleged 'Violation of NRPC Rules of Conduct, Rule "I" ' 'In that on or between . . . September 9, 1984 and . . . September 22, 1984, you used a Company credit card to make fraudulent purchases of gasoline and services', was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-1275D).

2. The claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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.

As a result of charges dated February 19, 1985, Trial eventually held on March 18, 1985, and letter dated April 1, 1985, Claimant, a Lineman, was dismissed from service for making fraudulent purchases of gasoline with a Carrier credit card.

The record in this case shows that as a result of a missing credit card the Carrier was charged $894.39 by Amoco Oil Company during the period September 9 through September 22, 1984, for gasoline or services. With respect to a particular purchase of gasoline shown to be made on September 10, 1984, and after checking the license number listed on the purchase, the Car-

rier contacted M. Johnson, a non-employee, whose name appeared on the purchase. At the Trial in this matter, Johnson testified that after he picked up three hitchhikers including Claimant, Claimant stated that he had a Carrier credit card and would purchase gasoline for Johnson with that card. Johnson drove his vehicle to an Amoco station and gave his driver's license to Claimant. Claimant then made a purchase and pumped the gas into Johnson's vehicle. Johnson specifically identified Claimant's picture as the picture of the individual involved on the date of the purchase. After interviewing Claimant, a Carrier Police Investigator made a similar identification to match the identification made by Johnson. Although Claimant did not appear at the Trial to give testimony, Claimant's detailed statement taken by the Carrier's Police Investigator wherein Claimant denied the conduct attributed to him was introduced at the Trial.

The Organization's argument that the Carrier erred in holding the Trial in absentia since Claimant did not receive notice of the charges is without merit. The original notice of Trial dated February 19, 1985, set the initial Trial date for February 27, 1985. However, Claimant did not appear at that Trial. In accord with Rule 71 the Organization requested and was granted a postponement. The next Trial date was scheduled for March 11, 1985. The matter was again postponed until March 18, 1985. The notices for the Trial were sent to Claimant by certified mail. On March 18, 1985, Claimant again did not appear at the Trial. The Organization requested another postponement which was denied and the matter proceeded in absentia. Although the signed return receipts for the certified letters sent to Claimant were not made a part of the record on the property (by inadvertence, according to the Carrier) but were attached to the Carrier's Rebuttal, we find it unnecessary to consider those receipts in determining on the basis of the evidence in the record that Claimant had sufficient notice of the Trial to justify the Carrier's proceeding in absentia. First, we note that the letters were sent to Claimant's proper address. The address used by the Carrier is the same address referenced by Claimant's lawyer in a letter dated September 9, 1985, cited by the Organization in its Submission and is the same address given by Claimant in a statement to the Carrier's Police Investigator. Second, by letter dated February 22, 1985, Claimant was notified that he was being withheld from service pending investigation. That letter also states "[t]he aforementioned investigation is scheduled for February 27, 1985." Claimant signed for that letter thereby conclusively showing that he had actual knowledge of the first Trial date. Third, after Claimant did not appear on February 27, 1985, the Organization asked for and received a postponement on Claimant's behalf. Under the above circumstances, and without considering the Carrier's offer of the signed certified receipts, we are satisfied that Claimant had sufficient notice of the Trial. Claimant's failure to appear was at his own peril.

The Organization's argument that the charges were vague and unclear is also without merit. In pertinent part, those charges state that "on or between the dates of Sunday, September 9, 1984, and Saturday, September 22, 1984, you used a Company credit card to make fraudulent purchases of gasoline and services." We find those charges sufficiently specific to apprise Claimant of the nature of the exact allegations against him and to permit him the opportunity to prepare his defense.

The Organization also objects to the fact that the letter dismissing Claimant was signed by a Carrier Officer who was not at the Trial rather than the Hearing Officer who conducted the Trial. We find nothing in the parties' Agreement that prohibits the procedure utilized by the Carrier in this matter. Nor do we find any evidence that such a procedure deprived Claimant of a fair and impartial Trial.

With respect to the merits, under the well-accepted standard that we are limited only to an examination of the record to determine whether or not substantial evidence exists to support the Carrier's conclusion that a Rule violation occurred, we are of the opinion that such evidence exists in this matter. The evidence at the Trial shows that Claimant made a purchase of gasoline for Johnson through unauthorized use of a Carrier credit card. Such conduct violated Carrier's Rule I which prohibits dishonest conduct. The Organization argues that Johnson's testimony should not be given weight citing Public Law Board No. 1844, Award No. 51. We do not find the extreme circumstances present in that case to be present in this matter so as to require a different result.

The fact that criminal charges brought against Claimant were ultimately terminated upon the entry of **nolle prosequi** also cannot change the result. The standard of proof in criminal proceedings and proceedings before this Board are substantially different. Fourth Division Award 4412. Further, our examination of the record evidence satisfies us that the Carrier has met its burden in this proceeding irrespective of the outcome of the criminal proceeding, which, we note, was merely a determination that Claimant would not be criminally prosecuted further rather than a determination that Claimant was not. guilty.

The Organization's Submission references statements from a documents examiner and from an individual asserting to be the owner of a service station. For the same reasons that we were unable to consider the return receipts offered by the Carrier, we are unable to consider the substance of these proffers made by the Organization since those items were not a part of the proceedings on the property. However, even if we did consider those items offered by the Organization, we conclude that they are insufficient to change the result, especially under our review standard of determining the existence of substantial evidence in the record.

Finally, we find nothing in the record to cause us to determine that the degree of discipline imposed was either arbitrary or capricious so as to amount to an abuse of the Carrier's discretion. Claimant's conduct amounted to theft which is a most serious offense deserving of dismissal. Third Division Award 24366. Therefore, we must deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1988.