

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company (formerly The
(Colorado and Southern Railway Company)

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

(1) The dismissal of Section Foreman S. F. Hernandez for alleged violation of Rules 'A', 'B', 530(b) and 535 on February 10, 1987 was arbitrary, capricious, without just and sufficient cause and a gross abuse of the Carrier's discretion (System File BN-87-08/DMWD 870515).

(2) The claimant shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered as contemplated by Rule 40."

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 employes 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 waived right of appearance at hearing thereon.

Prior to his dismissal on March 10, 1987, Claimant was working as a Section Foreman/Track Inspector with more than 16 years service. On February 10, 1987, he used a Carrier credit card to purchase \$10.00 worth of gas for his personal vehicle. For this action he was dismissed for violation of Rule 530 (B) which contains the following:

"THEFT OR PILFERAGE: Theft or Pilferage shall be considered sufficient cause for dismissal from Railroad.

RAILROAD CREDIT ACCOUNTS AND PROPERTY: Unless specifically authorized, employees must not use Railroad's credit and must not either receive nor pay out money on the railroad's account. Property of the railroad must not be sold or anyway disposed of without proper authority. All articles of value

found on railroad property must be cared for and promptly reported."

Claimant testified that while on his way to work that morning he stopped at an Amoco Station managed by Francis Schaeffer. Being almost out of gas, and not having any money with him, he told Schaeffer that he needed \$10.00 worth of gas on credit so he could make a trip to Denver on behalf of the Carrier. He stated he told Schaeffer that "I would take care of it when I come back when I got my check."

Claimant further testified that, although he had been dealing at that Station for years, the subterfuge was necessary because the station does not allow individuals to charge gas anymore.

An hour later he returned driving the Carrier's truck. He charged \$29.00 worth of gas for the truck and, instead of paying for the gas previously put in his personal vehicle, he charged it on the same Carrier credit card slip for a total of \$39.00.

Claimant does not dispute the impropriety of his action:

"Q. Mr. Hernandez, on February 10th at approximately 8:00 a.m., did you use Burlington Northern Vehicle Credit Card 1154 for purchase of gasoline at the Amoco Station at West Lincoln Way in Cheyenne, Wyoming?

A. Yes sir.

Q. Mr. Hernandez, was all the gasoline purchased on that credit card on February 10th, 1987 purchased for the Vehicle 1154?

A. No, sir.

Q. What other vehicle was the gasoline purchased for?

A. I put \$10.00 in my van in the morning.

Q. In your own personal vehicle?

A. Yes, sir.

Q. How was that paid for?

A. I used the credit card.

Q. Burlington Northern credit card?

A. Yes, sir.

Q. Mr. Hernandez, were you aware at the time that you used Burlington Northern Credit Card #1154 that that was in violation of Burlington Northern policy?

A. Yes, sir."

As to why Claimant used the credit card for his \$10.00 worth of gas instead of paying for it as allegedly planned, he stated:

"A. So to keep the man off my back, I went ahead and used the credit card....

I wasn't trying to cheat the Company. I was just trying to keep the guy happy and get it taken care of and then I was going to go back down and get it paid for out of my own pocket.

Q. You mean, when you had money, then you was going to go back down and pay for the gas and have them take it off the credit card?

A. Yes, Sir."

Claimant contends that before he actually had the chance to go back and pay for the gas the investigation started and he therefore held back to avoid the suspicion that he was interfering with the investigation.

The Organization does not deny that Claimant was in violation of the Rules nor that he acted in poor judgment. It argues vehemently that the record does not support a finding that the Claimant intended to defraud the Carrier and that, therefore, the penalty is out of proportion to the offense.

During the appeal stages the Organization presented evidence of the Claimant's character and the regard in which he is held in the community. The record shows that Claimant served honorably during the Vietnam War and works on behalf of other veterans. A friend of 15 years standing, who apparently is also the Cheyenne Chief of Police, sent a letter testifying to his honesty and reputation. Others in the community have provided similar supporting letters. Claimant's record with the Company is a good one.

The Organization has also provided substantial case support for its contention that the penalty of discharge is excessive. In Third Division Award 19037, which is similar in that claimant there was charged with one instance of appropriating gasoline for personal use, the Board held:

"In the Labor-Management field it is well established that the purpose of administering discipline to employees for infractions of rules is not to inflict punishment but rather to rehabilitate, correct and guide employees in the proper performance of their assigned tasks. The ultimate penalty of dismissal is reserved for repeated and serious infractions of work or conduct rules. This is particularly so in the case of veteran employees such as the Claimant before us.

We do not condone the misappropriation of property. However, it is a practice which, unfortunately, abounds. But the discipline must be reasonable. Thus, the punishment for petty larceny was less than for grand larceny. The punishment must fit the crime."

These are familiar tenets in the application of discipline and are cited in numerous other awards as well.

The Carrier's principal point is that misuse of the credit card on February 10, 1987, and misappropriation of the gas paid for by the company to personal use has been proven conclusively. The Claimant admitted the violation during his hearing and the small amount is immaterial in view of the acknowledged importance of reducing theft and protecting Company property and funds.

The Carrier has also provided case support for the proposition that dishonesty warrants dismissal. While the circumstances in the cases cited vary, the principle Carrier seeks to apply is well stated in Award No. 1 of Public Law Board 1844:

"The only question remaining is whether the amount of discipline imposed is appropriate in all of the circumstances. We take no pleasure in presiding over the termination of an 8-year employee. But neither can we condone outright theft of Company property. Numerous awards of the various divisions of the National Railroad Adjustment Board established the principle that dismissal is not arbitrarily harsh discipline, absent clearly established mitigating circumstances, for employees guilty of theft."

The Carrier further contends that:

"...testimony of the Special Agent on pages 11 and 12 of the transcript shows Claimant filled his personal vehicle with gasoline at this service station numerous times prior to the date involved

in this investigation charging it to the Burlington Northern charge card.

Evidence from the gasoline receipts and log entries submitted by Claimant for the months of November and December, 1986, and January, 1987, revealed Claimant had been using the BN credit card for his own personal use during these months. On page 15 of the transcript, the Carrier's Special Agent testified, this BN credit card was used in a similar fashion at other dates."

The first question which must be dealt with is the validity of Carrier's contentions that Claimant is guilty of prior instances of charging personal gasoline on the Company credit card. Carrier's letter of termination, dated March 10, 1987, refers only to the incident of February 10, 1987. Additional misuse, however, would affect Claimant's credibility.

Carrier's contention of repeated misuse of the credit card depends upon an analysis of the investigation transcript. The testimony of Special Agent Thompson, who participated in the investigation, referred to a conversation he had with Mr. Schaeffer in the presence of Mr. Alleman on February 13, with respect to a log of fuel purchases made at Schaeffer's station during January and February of 1987. These discussions led Mr. Thompson to conclude that the Claimant had misused his BN credit card in similar fashion on other dates. However this conclusion, which was denied on the record by the Claimant, is not substantiated by any evidence.

Certainly Schaeffer does not substantiate it in his statement of February 13, 1987, and Thompson's testimony of additional verbal statements by Schaeffer is inadmissible hearsay. Objections were made to the admissibility of both Schaeffer's statement and the testimony of Thompson. No further analysis of admissibility is necessary here since neither Mr. Schaeffer's written statement nor the verbal statements attributed to him contain accusations of prior misuse.

Since there is no credible evidence in the record of prior instances of misuse of the credit card, the Board turns its attention to the issue before it: whether dismissal is excessive under the circumstances of the incident of February 10, 1987, given the facts as to what occurred and the record of the Claimant. According to the Organization, Claimant misused the credit card for his own convenience, a serious abuse, but not theft or fraud. According to the Carrier, the Claimant is guilty of fraud which is tantamount to theft. On the determination of this point hangs the Board's decision because the misuse of the card has been proven beyond doubt.

Besides Claimant's admissions, the only other evidence is that of the Claimant's character and reputation in the community. It has been said that, "Reputation is character minus what you've been caught doing." Obviously, the Carrier feels this way because it has not been moved to leniency; and leniency is its prerogative, not that of the Board. Those in the community who, despite knowing why their support is needed, have given it, feel otherwise. The Board finds this an exceedingly difficult and close question, and is persuaded on the basis of the record and Claimant's reputation that despite the misappropriation of credit, he did not intend to steal or defraud the Company out of \$10.00.

The cases submitted by the Carrier and its representative have been carefully considered. We agree that length of service alone does not forgive theft; nor is dismissal always inappropriate where an intent to defraud or steal is proven even if the amount be minor. Discharge may also be justified by a single transgression, sufficiently serious in nature. The key factor is intent. As stated in Third Division Award 21513:

"We cannot overstate the seriousness of theft, if proven. In this, perhaps above all transgressions, the employer has the absolute right to protection. But...larcenous intent not being shown, the penalty of discharge is too severe."

In the case before us, the Board cannot apply the most extreme penalty simply because of a serious violation of a rule. Discharge implies an offense so serious that progressive discipline is inappropriate and dismissal is fully justified.

We trust that the exposure of this event within the community is a permanent lesson that reputation is too precious to risk twice. And, that the loss of backpay for almost a year is a lesson that foremen and veteran employees are expected to set an example, not bend the rules, no matter how pressing the circumstances.

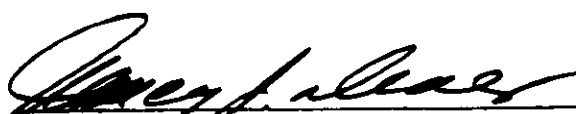
Fitting the penalty to the offense, as we have tried to do, requires understanding the nature of the offense in accordance with the record made during the investigation and hearing. On that basis dismissal of the Claimant is found to be excessive. He will be reinstated in accordance with the Agreement, but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary