

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33049
Docket No. MW-33769
99-3-97-3-237**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railroad Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day suspension] imposed upon B&B Carpenter M. A. Payne for alleged violation of Burlington Northern General Rules 1.13, 1.6 and 1.2.7 in connection with his alleged false time roll entry of January 4, 1996 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File C-96-S090-7/MWA 960509AD BNR).**
- (2) As a consequence of the aforesaid violation, Mr. M. A. Payne’s record shall be cleared of the charges leveled against him and he shall be made whole for all loss of time and benefits.”**

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.

The Claimant held seniority as a Carpenter in the Carrier's Bridge and Building Sub-Department at the Lincoln Diesel shop in Lincoln, Nebraska, at all material times.

On January 4, 1996 the Claimant was scheduled to work an eight hour day but, after four hours of work, secured approval to leave for the day in order to attend a funeral. Subsequently, on January 13, 1996, he completed his time roll indicating that on the day in question he worked eight hours. When the matter was brought to his attention by his Supervisor, the Claimant corrected the time roll to reflect that he had worked four hours and the corrected time roll was then approved and submitted for payment.

On January 22, 1996 the Claimant was advised to attend an Investigation in order to determine the facts surrounding the incident and to determine his responsibility, if any, "... in connection with your alleged false timeroll of January 4, 1996." After investigation, the Carrier suspended the Claimant for five days, which is the discipline contested herein.

The Organization first contends that the discipline is tainted by procedural error when the Carrier failed to provide to the Organization copies of the time roll in question and that the Carrier raised before this Board for the first time the issue of the Claimant's prior record. However, the record shows that the documents in question were entered into the record during the investigatory Hearing. Thus, the error complained of is that they were not provided to the Organization when the transcript of the Hearing was provided to it. As a result any harm, and we are uncertain whether this was the case, is minimal and not prejudicial to the rights of the Claimant and the Organization. In so concluding we do not mean to diminish the necessity for the Carrier to provide to the Organization and the Claimant a complete and thorough record and urge the Carrier and its representatives to do so in the future.

On the merits, the Organization contends that the charge levied against the Claimant, dishonesty, necessarily requires that the Carrier prove that the Claimant intended to defraud the Carrier and that it has failed to make that case. Alternatively, the Organization argues that even if the Claimant was guilty of intentional deception, the discipline should be set aside because the Carrier has treated similarly situated employees charged with the same offense differently. The Carrier on the other hand

asserts that it need not prove the Claimant's intent. With regard to the claim of disparate treatment the Carrier asserts that the Claimant and the other cases cited were not "similarly" situated.

We agree with the Organization that the charge of dishonesty must carry with it adequate evidence of intent. This is self-evident by the nature of the charge itself, but even those cases cited by the Carrier support this conclusion. More specifically, in Award 302 of Public Law Board No. 3304 the Board found that the claimant admitted his transgression and in Award 7 of Public Law Board No. 4212 the Board found that the claimant's conduct clearly converted "... an understandable 'oversight' to a deliberate failure to provide ... proper ... information."

However, we disagree with the Organization that the Carrier has failed to make the case on this point or that the discipline should be set aside because of disparate treatment.

On the first point, a close reading of the testimony of both the Supervisor and the Claimant leads us to the conclusion that the Claimant did not merely make a mistake and then correct the mistake when it was brought to his attention. The Supervisor testified that when he spoke to the Claimant he first asked the Claimant if he worked eight hours on the day in question and that the Claimant replied that he did. Then, apparently knowing the truth, the Supervisor asked the Claimant two more times and the Claimant again asserted that he worked eight hours on the day in question. It was not until his third reply that he admitted that he did in fact work four hours which led to the correction of the time roll. Furthermore, not only did the Claimant fail to contradict this testimony, but he agreed that he did not correct his time roll until he was "prompted" by the Supervisor. Under these circumstances, and combined with the fact that the Claimant had been disciplined once before for the same offense, we conclude, as did Public Law Board No. 4212, that what might have been a mistake or oversight was converted to a deliberate failure to provide the truth.

In light of this finding there remains only the issue of disparate treatment, an argument which we do not find persuasive. The record clearly shows that the other employees charged with the same offense were not "similarly" situated as the Claimant in light of the fact that the Claimant had already been disciplined for the same offense. Under such circumstances, a distinction could, and was, legitimately made between the Claimant and other employees.

Form 1
Page 4

Award No. 33049
Docket No. MW-33769
99-3-97-3-237

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1999.