

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36171
Docket No. SG-36204
02-3-00-3-422

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 Company:

Claim on behalf of F. R. Rose, for reinstatement to service with compensation for all lost time and benefits in connection with his dismissal in connection with an investigation held on August 13, 1999, and to have all reference of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 68, when it dismissed the Claimant without a fair and impartial investigation, and imposed harsh and excessive discipline against him without meeting the burden of proving the charges against him. Carrier's File No. 1195590. General Chairman's File No. SWGC-2028. BRS File Case No. 11233-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.

The Claimant was charged with and found guilty of failure to disclose information concerning a felony on his application for employment in violation of Carrier's Rule 1.6(4) which prohibits dishonesty. At the time of the Investigation, the Claimant had some 14 months of service with the Carrier.

The Organization advanced a number of procedural objections in its challenge to the Carrier's action. Our review of the record fails to reveal proper support for them. First, it is not per se improper for the Hearing Officer to assume multiple roles in the discipline process as long as the record shows his actions to be above reproach. In this case, the Hearing Officer also issued the disciplinary findings. But the record does not establish that he engaged in any impermissible conduct in these roles. Moreover, no Agreement provision has been cited that precludes such service in multiple capacities.

Second, the Agreement begins the running of the charging and Investigation time limits from the date of the Carrier's first knowledge of the alleged offense. The Agreement does not provide a specific definition of the meaning of "knowledge." In the absence of such guidance, this term has been interpreted to mean the date knowledge is acquired by a Carrier Official in an employee's line of supervision who is authorized to commence an Investigation. On this record, that knowledge did not exist until July 30, 1999. Both the issuance of the notice of charges and the conduct of the Investigation took place within 15 days thereafter.

Finally, although the Organization and the Claimant did not receive the Hearing transcript and disciplinary decision until 17 days after the Hearing, the Agreement does not explicitly require receipt within the 15-day time limit. It was proper, therefore, for the Carrier to have issued the notice and transcript on August 26, 1999, 13 days after the Hearing.

Turning to the merits, the record shows that the Claimant was convicted of the sale of a controlled substance on September 22, 1995. This felony conviction resulted in a sentence of probation for three years. The Claimant's employment application, which he completed on April 28, 1998, asked if he had ever been convicted of a felony or misdemeanor. If the answer was "Yes," it asked for dates and details. The Claimant marked both the "Yes" and "No" boxes. He also wrote "Traffic/Spec. Dropped to Mis," but gave no date or other information.

As written, the Claimant's entry did not accurately portray the circumstances. His felony conviction had not been dropped to a misdemeanor as of the date of his application. Indeed, it could not have been as of that date because he would not yet have completed the three-year probationary period. Even as of the Hearing date, the Claimant admitted the felony conviction had not been reduced to a misdemeanor.

According to the Claimant's testimony at the Investigation, he fully disclosed the details of his conviction to Carrier personnel at the time of his employment interview. He asserted that it was essentially discounted as unimportant by them. Although the Claimant identified both of the interviewers by name, he did not call either as a witness on his behalf, nor did he make any other effort to secure their testimony to corroborate his testimony. He had the right to do so at his own expense per Rule 68. Because his

testimony was in the nature of an affirmative defense, it was his responsibility, and not the Carrier's, to produce their testimony to satisfy his burden of proof.

Given the state of the record, we find that it does contain substantial evidence to support the Carrier's finding of guilt. The disciplinary penalty is also in keeping with the gravity of the misconduct. See, for example, Third Division Award 30820 and cases cited therein. Accordingly, we find no proper basis for disturbing the Carrier's decision.

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 20th day of August 2002.