Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36798
Docket No. MW-36612
03-3-01-3-136

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. J. S. Gotchall for alleged violation of *Maintenance of Way Operating Rule 1.6 (Conduct - Employees* must not be: 1. Careless of the safety of themselves or others 2. Negligent 3. Insubordinate 4. Dishonest 5. Immoral 6. Quarrelsome or 7. Discourteous) in connection with expense forms submitted during 1998, 1999 and 2000 while employed as a section laborer, was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-00-D070-8/10-00-0567-D(MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Mr. J. S. Gotchall shall now be returned to service, paid for all lost time and benefits, and any mention of this incident shall be removed from his personal record."

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 the position of Laborer on the Crete, Nebraska, section gang. At the time of his dismissal, he had accumulated 26 years of service, with no prior discipline on his record. According to the record, the Laborer position held by the Claimant for most of his career was non-traditional inasmuch as he did not perform actual track work. Rather, his responsibilities included managing budgets and keeping track of maintenance materials. The Claimant worked for several Roadmasters on a territory encompassing three operating divisions and his position was carried on the seniority roster as a Sectionman on the Crete gang.

According to the Organization, the Claimant "had tacit, if not explicit authorization to sign forms and bills for various Carrier Officials and routinely did so." The Claimant's position was encumbered by paperwork, according to the Organization, and his duties became increasingly more difficult to accomplish during normal work hours. The Organization avers that in order to keep overtime expenses to a minimum, through a special arrangement with former Division Engineer Kettenring, the Claimant was allowed to convert his overtime hours worked to automobile mileage expense. The Organization states that Clerk R. E. Blank, who worked with the Claimant, had a similar arrangement with Kettenring. Specifically, Blank was permitted to trade overtime worked for uncompensated time off. The Organization acknowledges that the Claimant's arrangement with Kettenring was not provided for in the Agreement and that the Claimant's immediate supervisor, Roadmaster G. L. Swanson was unaware of this arrangement.

In approximately August 1999, the Carrier terminated Kettenring's employment and appointed W. J. Seeger to the position of Division Engineer. On February 28, 2000, Seeger received an audit of the Claimant's personal expenses for 1999 up to the audit date. The audit indicated that the Claimant had received over $24,000.00 in mileage reimbursements. The Carrier notes that, "At 31 cents a mile,

the Claimant would have had to drive over 77,500 miles that year, that is almost 350 miles every day the Claimant worked for the Carrier."

The Claimant was on vacation on the date Seeger received the audit. Seeger spoke to Roadmaster Swanson, whose name the Claimant had signed on the expense forms, and ascertained that Swanson was unaware of the situation. On March 6, 2000, the Claimant returned from vacation, and Seeger asked him to explain the mileage figures. In sum, the Claimant told Seeger that based on a previous arrangement he had with the former Division Engineer, he had been allowed to claim the mileage on an expense form instead of submitting overtime claims. The Claimant explained that because he had signed the Roadmaster's name to other correspondence, including expense forms submitted by other gang members, he believed he was authorized to approve his own expenses.

After the meeting with Seeger, the Claimant was removed from service pending the outcome of an Investigation to determine whether he had engaged in dishonest behavior by falsifying his expense forms. The Notice of Investigation was issued on March 9 and specified an Investigation date of March 16, 2000. After one postponement, at the Organization's request, the Investigation was conducted on March 24, 2000. At the conclusion of the Investigation and following the Carrier's review of the record, the Claimant was dismissed on April 4, 2000 for his violation of Maintenance of Way Operating Rule 1.6 (Conduct) which states:

> "Employees must not be: Careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral quarrelsome or discourteous."

The Organization argues that the Carrier failed to schedule or hold the Investigation within 15 days from February 28, 2000, the date of the Carrier's first knowledge of the offense, in violation of Rule 40, paragraph (A) of the Agreement. The Organization stresses that the record established that Division Engineer Seeger and Roadmaster Swanson knew something was amiss on that date, but had not scheduled an Investigation by March 14, 2000, the 15th and last day, as specified by Rule 40(A). According to the Organization, the Carrier's position that it wanted to afford the Claimant an opportunity to provide an explanation before deciding to proffer any charges was an unconvincing attempt at excusing its procedural error.

The Organization also asserts that the Claimant's Agreement due process right to a fair and impartial Investigation was abridged when the Carrier allowed written statements from Division Engineer Kettenring to be entered into the record. Kettenring did not attend the Investigation and, therefore, could not be cross-examined by the Organization and the Claimant.

Regarding the merits of the case, the Organization stresses that the Carrier failed to present any credible or substantial evidence in support of its disciplinary action against the Claimant. In the Organization's opinion, the Claimant complied with Rule 1.6 by telling Seeger the truth, which the Carrier has not disproved. Furthermore, the record demonstrates that the Claimant was a dedicated and honest career employee who had worked double shifts, as substantiated by the testimony of Clerk R. E. Blank and Seeger. Some of the mileage claims were for miles actually driven and, therefore, were legitimate. Furthermore, the Claimant candidly explained that he carefully made the mileage calculations to "swap" the overtime in an equitable manner. The discipline exacted in this case was arbitrary and without just cause inasmuch as the "arrangement" between the Claimant and Kettenring was known, and condoned until the results of the Accounting Department's audit came to light.

In sum, the Organization charges that the Carrier's assessment of discipline against the Claimant was arbitrary, capricious, unjust, unwarranted and excessive. Based on the above, the Organization requests that the Board sustain this claim and reinstate the Claimant to service, with payment for lost wages and benefits, and with his seniority unimpaired.

The Carrier asserts that this case is a simple one involving an employee's proven dishonesty. The Claimant was working in a position of trust, which he violated by signing his own expense claims, in violation of corporate policy with which the Claimant was well versed given his length of service with the Carrier. In sum, the Claimant knowingly and admittedly submitted false expense forms and forged the approval signatures, as well. According to the Carrier, even if Kettenring had told the Claimant to submit the mileage claims in lieu of overtime, the Claimant nonetheless bears responsibility because "following orders" does not excuse fraudulent conduct.

At the conclusion of the Investigation, and upon its review of the record, the Carrier determined there was sufficient, credible evidence to establish the Claimant's dishonesty, in violation of Rule 1.6. Therefore, the Carrier argued that it sustained its evidentiary burden of proof. Given the severity of the offense and prior arbitral

precedent supporting employee dismissals in cases such as this, where an employee's intent to mislead or defraud the Carrier has been proven, the Carrier stressed that the Board should uphold the Carrier's findings and level of discipline assessed in this case.

The Carrier also maintains that this case is procedurally sound. The Carrier's issuance of the charges and scheduling of the Investigation comported with Rule 40 (A) because the Carrier correctly waited to talk with the Claimant before invoking the disciplinary process. By waiting for the Claimant's return from vacation, the Carrier demonstrated a willingness to hear from the Claimant before drawing any conclusions. The Claimant had been a respected employee. Therefore, there was no reason to doubt his integrity before interviewing him, the Carrier submits. Consequently, the Carrier argues that no violation occurred when, instead of scheduling the Investigation based on a February 28, 2000 "first knowledge" date, the Carrier waited until March 6, 2000 before proceeding with an Investigation.

Regarding the various procedural arguments made by the Organization during its on-property handling of the case, the Carrier asserts that the Claimant was not prejudged during the March 6, 2000 interview and that the interview was not an Investigation. Furthermore, Rule 40 contains no provision requiring the Carrier to provide discovery before an Investigation. The Carrier further maintains that it conducted a fair and impartial Investigation in all respects. Based on the volume of evidence introduced during the Investigation, the Claimant's discharge was warranted. The Carrier urges that the Board uphold its procedural handling of this case.

The Board reviewed the evidence of record and carefully considered the arguments of both parties. For the following reasons, the Board finds that while there is substantial evidence that the Claimant bears some responsibility for claiming mileage expenses that he did not actually incur, the Claimant is not solely responsible for the situation uncovered by the audit. The Board finds that, based on its review of the record, there are factors here that mitigate the penalty of dismissal and warrant the Claimant's return to service which were not given appropriate weight by the Carrier and which, therefore, require reinstatement of the Claimant, despite his proven deviation from established procedures. The primary factor is that there is strong evidence, albeit indirect, that supervision in the person of Supervisor Kettenring had helped participate, create, approve, and condone the Claimant's conduct for a substantial number of years.

Kettenring's statement that he knew nothing of the Claimant's mileage arrangement is not convincing, given Clerk Blank's unrefuted testimony regarding his own overtime arrangement with Kettenring. The Claimant's testimony that he was allowed to convert overtime to mileage expenses is more credible than Kettenring's self-serving testimony, the majority thus finds.

However, the Board also finds that, according to the record, the Claimant knew the arrangement contravened both corporate policy and the Agreement, but continued to participate in it for three years, presumably because Kettenring had approved it as a fair trade-off for overtime worked, as opposed to overrunning the overtime budget.

It is undisputed that the Claimant signed Roadmaster Swanson's name to his own expense accounts, in clear violation of corporate policy. However, there is no evidence that the Claimant's use of Swanson's signature rose to the level of an intent to defraud the Carrier. The Claimant provided unrebutted testimony that because he had signed Swanson's name to so many other forms, including the expense accounts of other gang members, he thought he had permission to sign Swanson's name to his own expense forms. The Board notes, however, that by signing his name and Swanson's to the forms, the Claimant was attesting that the expenses he claimed complied with Carrier policy. The record is clear that those expenses, which represented a conversion of overtime to mileage, were not supported by any policy, or by the Agreement. However, given the evidence of record, any "dishonesty" on the part of the Claimant has not been proven given Kettenring's acquiescence to the arrangement and his similar arrangement with Clerk Blank.

The Board has given careful consideration to the bevy of procedural arguments raised by the Organization, in support of its contention that the discipline should be overturned outright, and that the Claimant should be returned to service with full backpay and benefits. The Board finds no evidence of any procedural violations warranting the Claimant's reinstatement without any consideration of the merits. The Board is persuaded that the date of first knowledge began on March 6, 2000 when the Carrier interviewed the Claimant. Before that, especially in light of the Claimant's good reputation, the Carrier had insufficient information on which to frame a charge and schedule an Investigation. Therefore, the notification issued on March 9, 2000 scheduling an Investigation for March 16, 2000 was timely in all respects. See on-property Award 10 of Special Board of Adjustment No. 1112, Third Division Awards 26155, 35024, 36337, and on-property Fourth Division Award 4819.

From its review of the entire record with respect to procedure, the Board concludes that the Claimant's Investigation was fair and impartial. Throughout the Investigation, both the Claimant and his representative were permitted to question the Carrier's witness, review all documentary evidence, and recess the proceedings, if necessary. Rule 40 contains no provision for advance discovery procedures, and the Carrier, therefore, was not required to provide the Organization any documentation prior to the Investigation. See Third Division Awards 32384, 34082 and 35305.

As the Carrier points out, the Board has upheld dismissals in cases where an employee's falsification of Carrier records has been proven by substantial evidence. See Second Division Award 12895, Case 231 of on-property Public Law Board No. 5850, and Third Division Awards 30429 and 32454. Here, while the Claimant bears responsibility for his actions, the Board finds that the Carrier failed to consider those mitigating factors just noted that favor the Claimant. See on-property Award 18 of Public Law Board No. 4340 involving these same parties. It is important to note and the record indicates that the Claimant consistently gave forthright information about the arrangement with Kettenring and he candidly explained the basis and method of his mileage calculations. He was neither evasive nor did he deny his participation in the arrangement. Clerk Blank's arrangement with Kettenring is evidence that "deals" had been made to avoid overtime expenses within the production gang. Finally, the Claimant's long career with the Carrier and his unblemished service record leads to a finding by the majority that the Carrier's dismissal action was overly harsh, and without "just cause."

Therefore, the Claimant shall be reinstated to service with seniority unimpaired, but with no backpay or other monetary benefits awarded. The Claimant's return to service is contingent upon his successful completion of the Carrier's applicable return-to-work procedures.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of December 2003.