

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37598
Docket No. MW-38617
05-3-04-3-609

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. M. Michaelis for alleged violation of Maintenance of Way Operating Rule 1.1 – Safety, Maintenance of Way Operating Rule 1.2.7 – Furnishing Information, Engineering Instructions Rule 21.6.1 Weekend Lodging and Engineering Instructions 21.1 Lodging Procedures (General) in connection with alleged failure to comply with the BNSF corporate Lodging Policy and alleged fraudulent use of company provided lodging at the Rails Inn in Forsyth, Montana on June 6 through June 11, 2003 was arbitrary, capricious, unwarranted, excessive and in violation of the Agreement (System file T-D-2661-W/11-03-0281 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Michaelis shall now ‘. . . be paid for any lost time, from July 15, 2003 until he is returned to service, including but not limited to any and all overtime paid to any junior assigned to any position in his absence, any expenses lost and we also request that Mr. Michaelis be made whole for any and all benefits, we also request Mr. Michaelis receive accreditation for all benefits derived from days worked or monies earned, (i.e. vacation, lump sum payments, railroad retirement benefits) and his record cleared of any reference to any of the

discipline set forth in the July 15, 2003 letter from Division Engineer Time D. Knapp.”

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.

At the time of his dismissal, Claimant M. Michaelis was a 13-year Track Welder headquartered at Glendive, Montana. Following an Investigation held on June 27, 2003 he was dismissed by letter dated July 15, 2003 for dishonesty involving the Carrier's lodging policy and related misconduct.

The circumstances leading to the Carrier's action are straightforward. From June 2 through 5, 2003, the Claimant was assigned to work in the vicinity of Forsyth, Montana, some 125 miles from Glendive and 300 miles from his home in Bismarck, North Dakota. While so working the Claimant was entitled to Carrier-paid lodging. Accordingly, arrangements had been made for him to stay at the Rails Inn Motel in Forsyth through Inter Motel Leasing (IML) as required.

According to the record before the Board, the Claimant had traveled to Forsyth driving a Company welding truck, transporting his motorcycle from Bismarck, where it had been parked over the previous weekend, and picking up fellow workers en route from Bismarck to Forsyth. He then worked four ten-hour days prior to rest days scheduled from Friday, June 6, through Sunday, June 8, after which he planned to start a one-week vacation on June 9, 2003.

The Carrier's records indicate that on June 6 he checked out of the Rails Inn. However, when heavy rains prevented him from traveling to Valley City, South Dakota, on his motorcycle for an event that he planned to attend there, he checked back into the Rails Inn Motel and remained there through his first rest day, June 6. Bad weather persisted on Saturday and he held over in Forsyth at another motel on Saturday, June 7, his second rest day.

The Claimant states that on June 7 he believed that he injured his ankle while attempting to intervene in an assault. Although he did not seek medical attention at the time, thinking it was merely a sprain, later evaluation determined that he had broken his fibula. By the time the weather cleared on Sunday morning he testified that his ankle was too swollen to support the weight of his motorcycle. He had no personal checks and little cash, however, and did not hold any credit cards. He contacted IML, explained his transportation problem and checked back into a room at the Rails Inn Motel for Sunday night, June 8. On Monday, rains returned to the area, forcing the Claimant to remain at the motel through Wednesday night, June 11. Thus the Claimant remained in Company-paid lodging on the nights of June 6, 8, 9, 10 and 11, 2003 without proper authorization.

The Carrier based its permanent dismissal on findings that the Claimant was guilty of violating Maintenance of Way Operating Rules 1.1 (Safety); 1.2.7 (Furnishing Information); Engineering Instructions Rules 21.6.1 (Weekend Lodging); and 21.1 (Lodging Procedures – General). The most substantive charges implicate the latter three Rules. They read in part as follows:

Maintenance of Way Operating Rule 1.2.7: Furnishing Information

“Employees must not withhold information or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.”

Engineering Instructions 21.1: Lodging Procedures, General

“BNSF provides business-related hotel accommodations through Intermotel Leasing, (IML) for qualifying track, structures, electrical, roadway equipment, welding, telecommunications, mechanical and signal employees. Employees will be provided with

written instructions and a BNSF lodging identification card (IML) to access Company-provided lodging accommodations.

An employee cannot submit an expense report for lodging unless authorized to do so under his or her prevailing labor agreement. All other employees must use lodging that has been arranged through IML. Employees may use company-provided lodging for BNSF business-related purposes only and may not use IML for vacation or other personal reasons.”

Engineering Instructions 21.6.1

“This section applies to employees who are entitled to Company-provided weekend lodging . . . when they remain at the work site over their rest days.

* * *

Employees may retain a room over the weekend for BNSF work-related purposes only, provided that they have a reservation made through IML reservation system and check in to the lodging facility immediately after signing out from the previous work week.

Employees must advise their foremen before the end of their shift on Wednesday in the week that they are working if they desire weekend lodging or Sunday check-in. The foreman or foreman’s designee must contact the reservation center no later than Thursday morning to confirm the weekend reservations for the employee.

Due to motel billing requirements, employees must sign out on the last day of their scheduled work week, even if they desire weekend lodging or a Saturday night check-in. . . .”

The Organization asserts in its appeal that the Carrier violated Rule 40 C, by not providing the five-day advance Notice of Investigation required. Addressing the merits, it argues that it was only the luck of the draw that required the Claimant to stay in Forsyth; that bad weather and a broken bone left him stranded there with no recourse; that he did what he reasonably could be expected to do to simply keep dry

and get home, including trying without success to get a ride out of Forsyth from family members; that he had no intention of cheating the Carrier out of lodging expenses; that he checked into Company lodging fully intending to reimburse the Carrier for his bill once he had gotten some cash; that he even contacted IML in an unsuccessful effort to determine how to go about doing so.

The Board considered the Organization's Rule 40 C contention and finds it unpersuasive. The postal records establish that the Carrier sent its Notice of Investigation by U. S. Certified Mail, return receipt requested, on June 18, 2003 to the Claimant's address of record, a post office box, and that it was timely received by the postal facility. The Claimant, however, did not sign for its receipt and claim it until June 23, 2003. Accordingly, it was his delay in picking up his mail, and not the Carrier's failure to send it on the schedule mandated by the Rule that accounts for the problem the Organization cites. On the facts of record the Carrier complied with Rule 40 C.

With respect to the merits, the record demonstrates that the Claimant exhibited seriously poor judgment under the prevailing conditions. It gives us vertigo to think that any open-eyed employee would use five days of unauthorized lodging and later hope to move the world with the very limited lever of "no cash, no checks, no credit cards." Employers have an absolute right to entertain substantially higher expectations of their employees.

Balancing that, the Claimant did not submit an expense report for lodging that was unused or for which he had not been authorized. He stayed in a Company-provided motel when required to do so, and no other, but then held over without proper clearance. Under the circumstances, he displayed a lack of common sense. The real issue, however, is whether that irresponsibility rose to the level of theft or attempted theft as charged.

People may argue about whether intentionality is an essential component of certain employee misconduct - e.g., weapon on premises - but the debate shifts to quantum of proof when it comes to charges of attempted theft. Honesty is crucially important in the cases of employees working in the field, and it is well settled that major dishonesty on the part of such personnel requires no progressive discipline. But here the Carrier contends that an intent to defraud can be reasonably implied from the Claimant's delay in stepping forward to disclose his use of the motel room without permission. Given the Claimant's injury, ensuing vacation, open attempts

to explore reimbursement with several different clerks at IML, and an absence of any evidence suggesting that the Carrier's Hearing Officer made any credibility determinations in the context of the case, that is too great a reach.

We conclude that the record does not establish an intent to steal. The Claimant left the premises at an appropriate time when his work was finished at Forsyth and held over only when weather prevented his departure. In starting down the path of doing the right thing, making no attempt to cover up his use of the Rails Inn Motel for emergency purposes thereafter, and then trying repeatedly to determine how to use the IML reservations system to convert his ostensible business use to personal use, the Claimant defeated any plausible charge of attempting to defraud. His failure - and we do not minimize it - was in not immediately advising his Supervisor of his circumstances.

Insofar as the record reveals, the Claimant's service record was up to this time satisfactory. Because of his lack of judgment in this matter, the Carrier expended a significant amount of time and resources in running a suspicious-looking incident to ground. His dismissal is converted to a disciplinary suspension from dismissal to date of reinstatement. No backpay is awarded for time out of service.

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 22nd day of September 2005.