

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37628
Docket No. SG-38415
05-3-04-3-367**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of S. Rella, for return to service, compensation for all lost wages, all benefits be unimpaired and to clear the Claimant's personal record of any mention of this incident, account Carrier violated the current Signalmen's Agreement, particularly Rule 57, when it failed to provide a fair and impartial hearing and wrongfully and inappropriately issued the harsh and excessive discipline of dismissal on the Claimant in connection with a hearing that began on May 2, 2003, was recessed, and then reconvened and concluded on May 14, 2003; Carrier compounded its violation when it held the hearing outside the time limits required by the Agreement. Carrier's File No. NEC-BRS(S)-SD-1016D. General Chairman's File No. JY32101053-102039. BRS File Case No. 12969-NRPC(S)."

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.

By letter dated April 17, 2003, the Claimant, a 12 year employee, was notified of an Investigation into charges including dishonesty (theft), conduct unbecoming an employee, bringing discredit upon Amtrak by publicity, and violation of specified NORAC Rules, based upon his having pled guilty in Federal Court in New Jersey on April 3, 2003 to criminal charges related to the fraudulent use of GSA issued credit cards on Amtrak leased trucks and the results of an Amtrak Office of the Investigator General (OIG) Investigation in conjunction with GSA. After an Investigation which concluded on May 14, 2003, the Claimant was found guilty of all charges and dismissed from service.

The record reflects that the OIG began investigating the Claimant and another employee in January 2003. The Claimant called his supervisor on about January 7, 2003 informing him that an inspector was at his house asking questions about his use of GSA credit cards and that he had no knowledge of what he was talking about and had done nothing wrong. The Claimant's Supervisor, R. Nerges, relayed this information to his superior, Assistant Director of Engineering K. Superak. On February 10, 2003 in a conversation with Nerges, the Claimant admitted that he was fraudulently using his GSA credit card, information Nerges again passed on to Superak. Superak informed Nerges that the OIG was investigating and that they would let them know the outcome of their investigation. Nerges testified that he would have thought that the 30 days for initiating charges under Rule 57 would have started at that time, although admitting that the OIG did not inform Carrier management of the specifics of their investigation while it was continuing, which included the time of the Hearing.

Superak stated that the first real evidence he had of the Claimant's actions, other than rumors or things that could not be proven, was when he saw a

newspaper article dated April 4, 2003 indicating that the Claimant had pled guilty to criminal charges related to fraudulent use of GSA issued credit cards and had been convicted in Federal Court. This article, as well as a press release, identified the two individuals involved as employees of Amtrak. Superak testified that the Claimant's comment on February 10, 2003 without more was insufficient to justify charges, especially in light of his prior denial of wrongdoing and the Carrier's knowledge that he was under medical care for depression and stress. Superak posted the newspaper article on Nerges' door and left it out on the table. The charges were initiated on April 17, 2003.

The Organization initially argues that there are procedural errors requiring overturning the discipline imposed. First, it alleges that the Carrier violated Rule 57 when it waited more than 30 days to bring charges, after having learned of the Claimant's misconduct on February 10, 2003, citing Third Division Awards 16262 and 18352. The Organization asserts that a reading of the charges as well as the manner of the conduct of the Hearing reveals a prejudgment on the part of the Carrier negating the Claimant's Rule 57 right to a fair and impartial Hearing, relying on Second Division Award 11916. Finally, the Organization notes that the poor transcription of the proceedings requires that the discipline imposed be set aside, citing Third Division Award 4433, as well as First Division Award 25026.

With respect to the merits, the Organization contends that the punishment imposed was unduly harsh considering the fact that the Claimant had no prior discipline, voluntarily entered the EAP, there were mitigating factors not considered, Third Division Awards 23298 and 33383; Second Division Award 12618, the penalty was not consistently applied, Third Division Awards 23855, 21240, 8431, and dismissal was punitive rather than corrective in nature, citing Third Division Award 19037 and Second Division Award 7603. Based on evidence in the record that the Claimant has been obtaining medical treatment for conditions which may have led to his criminal activities, the Organization believes that he should be returned to work.

The Carrier contends that there were no procedural irregularities requiring that the discipline be set aside. It notes that management first became aware of the Claimant's guilty plea and conviction through the newspaper article on April 4, 2003, it had no inkling of the nature of the matter being investigated by the OIG and

received no information from them, and that the Claimant's comment to his Supervisor, which directly contradicted his prior assertion, was insufficient to provide a sufficient basis to justify the initiation of charges, citing Public Law Board No. 4788, Award 112. The Carrier states that it met the 30-day time limit of Rule 57 when it brought these charges within two weeks of learning of the basis for them. Additionally, the Carrier asserts that there is no showing that the poor transcription of the Hearing created harmful error, citing Second Division Award 9474, or that the absence of the terminology "alleged" in the charges reveals any prejudgment on its part.

The Carrier argues that it proved all of the charges against the Claimant by substantial evidence, through both testimony and documentation. It posits that the discipline of dismissal is neither excessive nor arbitrary when dealing with proven dishonesty, even for a first offense, and that the Board often upholds the Carrier's assessment of such penalty in circumstances where the bond of trust has been broken, citing Special Board of Adjustment No. 986, Case 102; Public Law Board No. 4568, Case 18 and Public Law Board No. 6693, Case 1.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving a violation of the Agreement in this case. Initially we cannot accept the Organization's argument that procedural irregularities require the overturning of the resultant discipline. The Board agrees with the Carrier that there was an insufficient showing that the February 10, 2003 conversation between the Claimant and his Supervisor gave the Carrier reliable evidence upon which to base charges, in light of his prior denial to the same supervisor, his medical status and the ongoing nature of the OIG investigation to which the Carrier was not privy. The Carrier's discovery of the Claimant's plea agreement via publication after April 4, 2003 is the proper starting point in determining the timeliness of the charges under Rule 57. As noted in Public Law Board No. 4788, Award 112, it is not in the interest of the Claimant for an investigative Hearing to be initiated until the Carrier has obtained sufficient information to reach the reasonable conclusion that an offense warranting discipline may have occurred. Further, while the charges do not state "alleged" conduct, they were based upon publication of a plea agreement that the Claimant had entered into with respect to certain of the allegations. Thus, the Board cannot find that the recitation of charges or the conduct of the Hearing indicate any prejudgment on the

Carrier's part. The Hearing transcript, which is clear enough to reveal the testimony relied upon by the Hearing Officer in his decision letter, similarly does not show either prejudgment or a denial of a fair Hearing under Rule 57.

The Investigation clearly reveals that the Carrier proved the charges by substantial evidence. Even were the Board to negate the charge of dishonesty based upon the Claimant's fraudulent use of a GSA credit card assigned to the vehicle leased by Amtrak and driven by him for more than \$10,000.00 for his own personal gain due to a timeliness violation, it is clear that one of the charges relates to embarrassment and discredit brought upon the Carrier in that the general public was made aware of his criminal activities in the media. The newspaper article and press release entitled "Amtrak workers plead guilty to misuse of credit card funds" identify the nature of the criminal misconduct as having to do with the Carrier. This publication provides substantial evidence of a violation of that charge, which is a serious enough violation of the Rules to merit disciplinary action.

With respect to the appropriateness of the dismissal penalty, the Board is unable to find that the Carrier acted either arbitrarily or excessively in meting out this discipline, and will not substitute a less severe penalty despite the mitigating factors noted by the Organization. Dishonesty, especially to the criminal extent that the Claimant admitted in this case, provides a valid basis for the Carrier to determine that the bond of trust has been breached and that continued employment is not in its interest or that of its customers. See Public Law Board No. 4568, Case 18. Certain offenses do not require the imposition of progressive discipline. Special Board of Adjustment No. 986, Case 102. Accordingly, the Board will not overturn the penalty assessed in this case and must deny the claim.

AWARD

Claim denied.

Form 1
Page 6

Award No. 37628
Docket No. SG-38415
05-3-04-3-367

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 19th day of October 2005.