

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37721
Docket No. MW-38365
06-3-04-3-315**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes**
(**Union Pacific Railroad Company (former Chicago**
(**& North Western Transportation Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (removed and withheld from service under date of July 11, 2003 and dismissed from service under date of August 1, 2003) imposed upon Mr. L. C. Hailey, Jr. for alleged violation of Union Pacific Rule 1.6 on charges of alleged theft in connection with use of the Company credit card for his personal vehicle on July 8, 2003 while working as carpenter at College Avenue Station on the Geneva Subdivision was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File 9KB-6829D/1372516D CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. C. Hailey, Jr. shall now '***be compensated all lost time, be made whole all losses and have any reference to the investigation removed from his personnel record as outlined in Rule 19(d) of the effective Agreement.' "**

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.

Prior to his dismissal, Claimant L. Hailey, Jr. had established seniority in the Maintenance of Way and Structures Department dating from May 4, 1981. On the date involved, the Claimant was assigned and working as a Carpenter.

On July 8, 2003, the Claimant used his Company credit card to purchase fuel for his personal vehicle.

By letter dated July 11, 2003, the Claimant was given notice that a formal Investigation would be held on July 17, 2003 "... to develop the facts and place responsibility, if any, for your alleged theft when you used the company credit card for your personal vehicle on July 8, 2003, while working as Carpenter at College Avenue Station on the Geneva Subdivision...."

After one postponement, the Hearing convened on July 23. By letter dated August 1, 2003, the Claimant was notified that he was found guilty of violating Rule 1.6 and was "... assessed with a Level 5 discipline and dismissed from the service of the Union Pacific Railroad Company...."

The Organization claims that the discipline was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization stressed that the Claimant admitted that he used the Carrier's credit card to pay for fuel for his personal vehicle. However, the Claimant had every intention of reimbursing the Carrier for his purchase. The Organization claims that the Claimant's actions were in no way willful or in any way intended to defraud the Carrier. Moreover, the Organization claims that based on the Claimant's 22 years of service, the punishment of discharge

was too severe. It contends that the claim must be sustained and the Claimant be made whole.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript as developed during the Investigation reveals that the Claimant admitted that he used the credit card for personal use. This, pure and simply, was theft. Theft is an extremely serious offense and dismissal was appropriate under the circumstances.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

The Board finds substantial evidence in the record to uphold the Carrier's position. The Claimant admitted that he engaged in the alleged act. While the Organization asserts that the Claimant intended to reimburse the Carrier for his purchase, he did not present such an offer until confronted. While there is no doubt that the penalty of discharge was severe, Level 5 discipline has been consistently accepted for a Rule 1.6 violation. Theft is a serious offense that deserves a harsh penalty. Other tribunals have held that theft, of even a minor value, deserves the penalty of discharge. Third Division Award 36337 involved an employee who stole five gallons of gas from a Company fuel can. In denying the claim, the Board held:

"Employee theft is one of the few offenses for which summary discharge is deemed appropriate. The Carrier is entitled to expect its employees to be honest and to assume responsibility for not stealing, no matter how large or small the value of the item. . . ."

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Based on the record in the instant case, the Board concludes that it was proper for the Carrier to discharge the Claimant for his actions.

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 23rd day of February 2006.