

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38226
Docket No. MW-38776
07-3-05-3-204

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CP Rail System (former Delaware and Hudson
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

The discipline (20 demerits resulting in dismissal) imposed upon Mr. M. Charpentier under date of February 20, 2004 in connection with alleged violation of NORAC Rule E following an investigation on charges of alleged inappropriate invoice charged on October 16, 2003 was arbitrary, capricious and in violation of the Agreement (Carrier’s File 8-00412 DHR).

As a consequence of the violation referred to in Part (1) above, Mr. M. Charpentier shall now ‘. . . be absolved of the punishment of 20 demerits and that he be made whole and allowed to go back to work.
*** The Organization also asks that Mr. Charpentier be paid any wages lost and time credited toward retirement and vacation”

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 essential facts of this matter are not in dispute. On or about October 16, 2003, the Claimant charged three baseball caps under a Carrier purchase order. The purchase was not discovered until January 2004, when the vendor notified the Carrier that certain invoices remained unpaid. In going through those invoices, the Carrier discovered the Claimant's October 2003 purchase. As a result of its discovery, the Carrier notified the Claimant by letter of January 12, 2004 to appear for an Investigation concerning his "alleged failure to comply with NORAC Rules: B, D, and E, effective January 1, 2003." Specifically, he was accused of charging unauthorized goods on behalf of the Carrier.

An Investigation was held on January 30 and continued on February 2, 2004. On February 20, 2004, the Claimant was notified that he had been found guilty of the charges against him and was assessed 20 demerits. The Claimant was also notified via Form 104, also dated February 20, 2004, that he was dismissed from the Carrier's service "as a result of accumulating 75 Demerits through progressive violation of NORAC Operating Rules." His total of 75 demerits thus exceeded the 60 allowable demerit marks by 15 demerits. NORAC Rule E reads in pertinent part as follows:

"The following behaviors are prohibited:

1. While on duty or on company property: gambling, fighting or participating in any illegal, immoral, or unauthorized activity. . . ."

There is no controversy in the record that the Claimant purchased three Larry Czonka baseball caps at a NAPA Auto Parts store at the same time he was

legitimately purchasing supplies (tie-downs) required to complete a task assigned to his gang by the Carrier. The Organization contends that the Supervisor encouraged the Claimant to do so, and also notes that the Claimant repaid the value of the caps as soon as he was informed he was under investigation. These two facts, according to the Organization, should mitigate the punishment assessed the Claimant.

A review of the Investigation transcript persuades the Board that the Claimant did not actually receive permission to purchase the caps in question. Foreman Smith testified consistently in response to questions from both the Organization and the Carrier that he did not give the Claimant permission to add the caps to the invoice for the tie-downs needed on the job. However, Foreman Smith apparently accepted one of the caps when it was offered to him. When questioned whether he directed the Claimant to buy the hats, Smith replied:

“No, I didn’t tell him to buy them. What I said is ‘what you’re buying here you sign for.’ I mean, I didn’t come out and say ‘buy hats.’ I said whatever you’re buying here, you sign it.”

The record also clearly establishes that the Claimant repaid the amount charged to the Carrier prior to his Investigation. The Carrier insists that such an action should be viewed as merely a ploy to avoid being fired. There is no testimony in the record to suggest that the Claimant’s motivation was so calculated, but the Board is persuaded that the Claimant did not have either express or implied permission from Foreman Smith to purchase the caps in question.

The third person in the gang – Trackman Eagan – was not in the store with the Claimant and Foreman Smith, yet his testimony in sum or substance confirms Foreman Smith’s version of the incidents at issue. Notwithstanding, it is not clear why Foreman Smith, if he suspected at the time that the caps were purchased on a Carrier purchase order - as Eagan’s testimony strongly suggests he did – declined to caution the Claimant at the time of the incident. Such a supervisory failing, however, is not the matter currently before the Board.

The Board carefully weighed the evidence. We are not dealing here with a long-term employee who made an isolated error in judgment. Rather, this is a situation in which a short-term employee (approximately two years’ seniority) had

already accumulated 55 demerits and was assessed another 20 for misappropriating Carrier funds. Even if the Board were to reduce the penalty to ten demerits, in light of what might have been an unthinking impulsive act on the Claimant's part, his record would still reflect 65 demerits – five demerits over the amount precipitating dismissal. With a more senior employee, the Carrier's actions might have been seen as precipitous. In this case, however, the Board has no basis upon which to reverse the Carrier's imposition of the ultimate penalty of dismissal.

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 25th day of June 2007.