

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39144
Docket No. SG-39670
08-3-NRAB-00003-060479
(06-3-479)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of D. E. Tisdale, for reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant on May 24, 2005, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on April 26, 2005. Carrier’s File No. 35-05-0072. General Chairman’s File No. 05-053-BNSF-103-C. BRS File Case No. 13660-BNSF.”

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 was a Signal Maintainer with five years of service. He worked his assigned hours on Wednesday, April 13, 2005, but was absent without leave on Thursday and Friday, April 14 and 15. On Saturday, April 16, when the Claimant entered his time into the electronic payroll system, he made a claim for eight hours plus overtime pay for the AWOL days. The Claimant's Supervisor discovered the discrepancy on Monday, April 18, when he was reviewing the time reports for the first half of the month. On Tuesday, April 19, the Supervisor issued the Claimant a Notice of Investigation ". . . for the purpose of ascertaining the facts and determining your responsibility, if any, for your alleged Dishonesty and your alleged false reporting of time on April 14 & 15, 2005, while assigned as Signal Maintainer." After a Hearing, the Carrier issued its decision on May 24, 2005, dismissing the Claimant from employment for violation of Maintenance of Way Operating Rule 1.6, Item 4, Dishonest.

The Organization contends that the Carrier failed to provide the Claimant a fair and impartial Investigation as required by Rule 54, in that the Hearing Officer considered a letter from the Claimant's Supervisor following a non-disciplinary corrective counseling session and the Claimant's subsequent written promise to improve his attendance. In addition, the Organization asserts that the Carrier failed to prove that the Claimant's time entries were dishonest, as opposed to inadvertent errors, and that the discipline was harsh and excessive. The Carrier contends that consideration of the above mentioned documents was appropriate and did not deprive the Claimant of a fair and impartial Hearing. On the merits, the Carrier asserts that the record supports its determination of fault and the measure of penalty.

The letter from the Supervisor to the Claimant dated April 5, 2005, states:

"This letter is to acknowledge that your failure to report for duty on time March 9 and 12, 2005 and failure to report to duty on March 11, 2005 is not acceptable. You are required to report for your shift on time and prepared for service, any failure to do so may result in discipline.

You are also required to submit to me in writing your plan to adhere to your reporting for duty on time, I will collect said letter on your next shift.

This letter will be placed in your personal file.”

The Claimant’s response, which was given to the Supervisor on April 7, 2005, states:

“I am renewing my contract by arriving at least 15 min prior to every shift. When not at work I will have my pager by my side. I am committed to improving my work ethic and standards by checking myself and work every day. I will make all necessary changes to remain employed with the BNSF.”

Effective supervisors routinely counsel employees about performance and attendance issues before the situation rises to a level warranting discipline. Ideally, counseling informs and encourages employees, and may nip a problem in the bud, avoiding the need for any discipline at all. A letter from a supervisor to an employee memorializing the counseling session may be an effective tool for both the employee and management. However, there is often a fine line between a supervisor’s letter that merely memorializes the substance of a counseling session, and one that is disciplinary in nature. By combining the specific allegations of tardiness and failure to report with the pronouncement that this was “not acceptable,” the Supervisor effectively declared the Claimant guilty of culpable misconduct, and crossed the line from counseling to discipline. The Claimant was entitled to a Hearing before such a document became part of his file. See Second Division Award 7588 (“Bona fide counseling is practiced and intended to inform an employee and whether oral or written is not essentially accusatory and does not make a finding of fact that the employee was guilty of culpable misconduct.”) The Supervisor’s April 5, 2005 letter should not have been considered by the Hearing Officer as evidence of the Claimant’s past record.

Nonetheless, even without the above mentioned documents, there was, as we shall discuss further, substantial evidence to support the Hearing Officer’s determination. Therefore, under the particular circumstances of these proceedings,

we find that the inclusion of these two exhibits did not deprive the Claimant of a fair and impartial Investigation.

On the merits, the Board finds that there is substantial evidence, even excluding from consideration the above referenced documents, to support the Carrier's determination that the Claimant's time entries were knowingly false, and not merely an "honest mistake," as the Claimant contends. The Hearing Officer, and not the Board, is responsible for determining the credibility of witnesses. We will only overturn a credibility determination when it is so unreasonable as to constitute an abuse of management discretion. That is not the case here. Although the Claimant contends that he did report for work on April 14 and 15, there is substantial evidence to the contrary in the Supervisors' testimony of their inability to locate the Claimant or to reach him by phone or page. The Claimant made his time reporting errors on the day after his absences. In light of many discrepancies between the testimony of supervisors and the Claimant and the lack of corroboration of the Claimant's explanations for his errors on April 16, the Hearing Officer was reasonable in rejecting the Claimant's testimony that he had reported to work or that he merely "forgot" that he had not worked the hours claimed.

However, the Board finds that dismissal for this first offense is unduly harsh and unreasonable, perhaps due to the impermissible influence of the above referenced documents on the Carrier's assessment of the facts. Because the offense was one of dishonesty, the Board finds that a severe penalty is warranted nonetheless. The Claimant shall be reinstated to service, with seniority unimpaired, but without any compensation for wages or other benefits lost.

AWARD

Claim sustained in accordance with the Findings.

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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 7th day of July 2008.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 39144, DOCKET SG-39670**

(Referee Lisa Salkovitz Kohn)

The Carrier dismissed the Claimant for falsely marking the time roll for two days he did not work – blatant dishonesty. As the Board states, there was substantial evidence in the record to support the charges. It is axiomatic in this industry that stealing time is a serious offense justifying dismissal, regardless of the length of time of an employee's service. *See e.g., First Division Award 25917*, holding, "Dishonesty is a serious offense that forever destroys the trust that the Carrier places in its employees," and upholding the dismissal of an employee with *33 years of seniority*. The Board reiterated the principle in *Third Division Award 38992* involving the same Organization and the same Carrier. Yet, in the instant case, the Majority overturned the dismissal of the Claimant, *an employee with barely five years of service*. There is no justification for overturning this discipline as ". . . so arbitrary, capricious, discriminatory or otherwise unfair so as to represent an abuse of management discretion." (*Third Division Award 38992*)

Before reaching the merits, the Majority denied a procedural challenge which claimed that the Investigation was not fair and impartial because the Hearing Officer introduced correspondence into the record concerning a counseling discussion with the Claimant regarding absenteeism. The Board did not agree with the Organization and denied the challenge. However, the Board erred by holding that the letter of warning constituted discipline and must be disregarded. This ruling is clearly outside the scope of the case. The counseling letter informed the Claimant the letter would be "placed in your personal file." Neither the Claimant nor the Organization filed a grievance disputing the language of this simple letter of counseling. The Carrier repeatedly stated in the record that the letter was not disciplinary. Further, the phrase "not acceptable" does not constitute discipline. *Second Division Award 8062* held as follows:

" . . . this Board has consistently maintained the position that letters of warning are not disciplinary in nature, and that their insertion in an Employee's file is not in violation of the investigation requirements of most agreements. We have maintained that properly used, letters of warning are an important and necessary device that can change an Employee's behavior and put him back on the track without the stigma of being disciplined"

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The opinion goes on to state that employees have the right to rebut information in such counseling letters and have false or disproven charges removed from their files. It was no different in the case at bar. But in the case at bar, the employee did not contest the information and provided the supervisor with a plan for correcting his tardiness and absenteeism. So, while the Majority says that the "Claimant was entitled to a Hearing before such a document became part of his file," it fails to consider the fact that the Claimant waived any objection. He could have, and chose not to, rebut the information contained in the letter.

We feel the Majority did not make a persuasive connection between its findings concerning the counseling letter and its conclusion that the discipline was an abuse of management's discretion. The letter is not relevant to the proven dishonesty. The Majority speculates that the letter "perhaps" had a connection to the Carrier's decision. We contend the record clearly shows the Claimant's dishonesty standing alone justifies dismissal. The Board has exceeded its authority in this case.

We dissent.

John P. Lange

John P. Lange

Martin W. Fingerhut

Martin W. Fingerhut

Michael C. Lesnik

Michael C. Lesnik

September 5, 2008