

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39474  
Docket No. MW-40028  
08-3-NRAB-00003-070259  
(07-3-259)

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

**PARTIES TO DISPUTE:** ( (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
(BNSF Railway Company (former Burlington Northern  
( Railroad Company)

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (removed and withheld from service by letter dated March 8, 2006 and dismissal by letter dated April 10, 2006) imposed upon Mr. W. Spilinek in connection with charges of alleged dishonesty and falsification of timekeeping records for February 5 and 6, 2006, while assigned as a welder, temporarily headquartered at Douglas, Wyoming, was disparate, excessive and in violation of the Agreement [System File C-06-D070-6/10-06-0220(MW) BNR].**
- (2) The Carrier further violated the provisions of Rule 40 on March 14, 2006, when it changed the dates of the alleged violation to February 3 and 4, 2006 and when it proceeded to hold another investigation on March 17, 2006 and subsequently rendered its dismissal decision on April 10, 2006.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. W. Spilinek shall now receive the remedy prescribed by the parties in Rule 40(G)."**

**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, with service for the Carrier dating from 1979, held seniority as a Welder, but on February 3, 2006, he was assisting as a Track Inspector. Having worked through lunch, he decided to leave work early, without telling his supervisor and without knowing that a derailment had occurred. Although the Claimant's crew was assigned to make repairs the evening of February 3 and 4, 2006, working overtime both dates, the Claimant was not called in accordance with his seniority and did not work either day. Nonetheless when he entered his time into the payroll system by computer, he entered the overtime hours to which he believed he was contractually entitled. Even though the Roadmaster was aware that the Claimant had not worked on the derailment, when he reviewed the Claimant's payroll records sometime between February 15 and 20, 2006, he did not catch the discrepancy. However, on March 6, the Roadmaster heard other employees complaining about the Claimant having been paid for overtime he did not work, and inquired of the Claimant, who admitted that he had claimed the hours because he was upset that he had not gotten the hours to which he was entitled. At that point, the Claimant admitted that he should have contacted the Roadmaster or filed a claim through the Organization instead.

The Carrier sent a charge letter on March 8, 2006 charging the Claimant with "dishonesty and falsification of timekeeping records for February 5 and 6, 2006," (Emphasis added) stating that the Carrier first became aware of the Claimant's

alleged violation on March 6, and setting the Hearing for March 14. A second notice was sent on March 13 that merely changed the Hearing location. At the Hearing on March 14, the error in the dates in the charge letter came to light within the first few minutes of testimony. The Organization immediately objected and requested two days in order to prepare to respond to the accusation with respect to February 3 and 4, 2006, the correct dates. The request was granted, the Hearing Officer announcing "We will continue with the investigation as though it were the 3rd and 4th." The Organization and the Claimant both agreed to the Investigation "being recessed until Friday," although at the reconvened Hearing the Organization objected that it was improper for the Carrier to proceed with the notice letter "as written." Following the reconvened Hearing on March 17, 2006, the Carrier dismissed the Claimant from employment for violating Maintenance of Way Operating Rule 1.6.

The Carrier contends that the Claimant was afforded a fair and impartial Investigation, that there is substantial evidence to demonstrate that he committed the offense with which he was charged and to support the penalty assessed. The Organization asserts that the Carrier violated Rule 40 and deprived the Claimant of his Agreement due process rights by failing to issue a timely notice of charges or by failing to identify the charges accurately. The Organization also contends that the Carrier failed to prove that the Claimant committed the offense charge, because the Claimant was guilty at most of a procedural error. Finally, the Organization contends that the discipline was excessive in light of the Claimant's 27 years of unblemished service, his lack of intent to steal from the Carrier, and the lesser discipline imposed on two similarly situated employees.

The Board sits as an appellate body only and, as such, is restricted to the record as developed on the property, both as to the merits and to any procedural objections raised. See, e.g., First Division Award 24001, Third Division Awards 37767 and 32335. Contrary to the Organization's claims, there have been no procedural violations here. Both the charge letter and the dismissal letter were sent within the time limits set by Rule 40. As soon as the typographical error in the charge letter was identified, the Organization sought and received a two-day recess in order to prepare a defense to the actual charges, and agreed, as the Hearing Officer announced that the Hearing would reconvene two days later to investigate the time entries for February 3 and 4. All this was on the record at the Hearing. Under these circumstances, the Organization and

the Claimant were fully informed of the charges made, and able to prepare an adequate defense. Rule 40 does not require the republication of a corrected charge letter under these circumstances. Although the Organization complains that it was irregular for the Carrier to hold two separate Hearings on the charges, the record is clear that there was a single Hearing that was recessed and reconvened at the Organization's request and with its consent.

The record is also clear that the Carrier's decision is fully supported by the record. We agree with the Organization that one element of dishonesty that the Carrier must prove is the element of intent. See Third Division Award 33049. The Organization also contends that an accusation of dishonesty must be proved by clear and convincing evidence rather than merely substantial evidence. We need not dwell on this point, because regardless of the standard applied, the Carrier proved that the Claimant knowingly put in for overtime that he had not worked, that he was upset about not having been called for the overtime, and that he knew that putting in for the time on his own was not the proper way to address the error. The Carrier was entitled to conclude from this that the Claimant intentionally falsified his time records. Although the Claimant testified at the Hearing that he had intended to notify the Roadmaster of his time entry, he made no effort to do so during the ensuing 30 days even though he knew that his unilateral "correction" was not proper. The Carrier was entitled to conclude that this was no mere procedural error, but instead an effort to deceive. On this record, the Board finds that there was not just substantial evidence, but clear and convincing evidence, that the Claimant was guilty of dishonesty in putting in for the February 3 and 4 overtime that he did not work.

The Organization contends that the discipline was nonetheless excessive, in light of the Claimant's many years of service and the lesser discipline meted out to other employees for similar offenses. However, dishonesty, prohibited by Operating Rule 1.6, is a dismissible offense under the Policy for Employee Performance Accountability. Moreover, Boards have repeatedly affirmed dismissal of long-service employees for similar thefts. See Public Law Board No. 4874, Award 36. Here, two other employees were charged with falsifying timekeeping records for that day. Unlike the Claimant, the Carrier afforded them an opportunity to waive the Investigation in return for a Level S 30-day record suspension. Those employees had not actually been paid for the hours not worked. As was observed in Third Division

Award 31628, "Disparate treatment means that similarly situated employees have been treated differently." The two cited individuals were not "similarly situated employees," nor were the claimants in System Board of Adjustment No. 1112, Awards 39, 60, 63, 64, 99, or 104, and thus the Organization failed to prove that the Claimant was subjected to disparate treatment.

An employer must be able to trust an employee to complete timekeeping records honestly and with integrity, particularly where the system requires manual entries on the honor system, as was the case here. While the amount of money involved was relatively modest, the damage to the trust that is at the heart of the employment relationship has been incalculable. An employee of the Claimant's seniority is expected to recognize the danger of "self-help" in these situations, and to follow proper procedures to obtain a correction. For these reasons, the Board finds that management did not abuse its discretion in assessing the penalty of dismissal for the Claimant's offense. In the absence of an abuse of discretion, the penalty cannot be modified by the Board, for, as noted in Public Law Board No. 3139, Award 101, "Leniency is within the sole discretion of the Carrier."

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 29th day of December 2008.