

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40301
Docket No. SG-40666
10-3-NRAB-00003-080507**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of G. O. Gregerson, for reinstatement to his former position with compensation for all time lost, including overtime, with his seniority and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on July 5, 2007. Carrier’s File No. 1476243. General Chairman’s File No. N 16 68 690. BRS File Case No. 13946-UP.”

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.

On July 5, 2007, the Carrier conducted an Investigation in St. Paul, Minnesota, into charges lodged against Claimant Gregerson “that while employed as a Signal Maintainer on Gang No. 2019, at St. Paul, Minnesota, [he] allegedly removed company material from the property without proper authorization” in violation of GCOR Rule 1.6 (Conduct – Dishonest).¹ On July 19, 2007, the Carrier notified the Claimant that he was found in violation and was being assessed a Level 5 discipline and dismissed from the Carrier’s service. Following denial in case handling on the property, the case was advanced to the Board for final resolution.

The record established that, as an East St. Paul Signal Maintainer, the Claimant was responsible for territory between Mileposts 6.5 and 48 on the Altoona Sub. In January 2006, an electro code installation rendered a stretch of pole line between Mileposts 8.5 and 18.5 dead and useless to the Carrier. During the following summer, the Federal Railroad Administration wrote up the Carrier on several occasions for brush and other degrading conditions along the dead pole line. This prompted Daniel Harp, Manager of Signal Maintenance, to inquire of his Maintainers whether anyone knew a contractor who might be interested in removing the dead pole line. As Harp testified, he had discussed with:

“ . . . all individuals in my area about contractors being available, if anybody knew of any contractors . . . I’d probably made comments to the fact that we – it would sure be nice to get rid of that pole line if we could find somebody to remove it. And if they had contractors in mind or people willing to remove it that I could provide them with the paperwork to fill out.”

Subsequently, in August 2006, the Claimant told Harp that he knew a contractor that might be interested in removing the line. The Claimant also asked if he could assist the contractor. Harp told him that what he did on his own free time was the

¹ Rule 1.6 “Conduct” provides, in pertinent part,

Employees must not be: . . .

4. Dishonest

Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or the performance of duty will not be tolerated.

Claimant's business and if he'd like to work for the contractor outside working hours he was free to do so, but he could not use any company equipment to perform the job.

The Claimant then asked Harp what paperwork was required to do the job so that he could get that information to the contractor. In response, Harp sent the Claimant three documents: (1) a Union Pacific Pole Line Removal Work Report ("Daily Report Log") to be completed by the contractor, (2) a September 1999 Union Pacific Document setting forth the minimum Safety Requirements for Engineering Department Contractors; and (3) a document titled 'Specifications for Pole Removal.' Harp stated that the documents were regular Union Pacific documents provided to him by Terry Hite, the Director of Signal, in Omaha, Nebraska, who is responsible for handing the Carrier's salvage.

The Claimant testified that he was advised that "the information provided was the information required of the contractor to do the job." The Claimant also noted that the Specification stated that the only required paperwork was the Daily Report Log which was to be completed after the job was finished.² The Claimant testified that

² Specifically, the Work Report form provides blanks for the contractor's name, and multiple lines for the date, location and description of the work performed and the following statement at the bottom:

This is to confirm the contractor has completed to my satisfaction and to the terms and specifications of the contract, the removal and disposal of all poles, crossarms, wire and cabling and related materials from Union Pacific Railroad Property between the Mile Posts referenced above as described in the comments.

The "General Scope of Work" clause in the "Specifications for Pole Removal" provides, in part, that:

The intent of this agreement shall be to cover the removal and disposal of all poles, crossarms, wire cable, and related appurtenances (hereinafter "material(s)" at various locations in connection with the work. All released material, whether whole or cut and regardless of condition, are to be included in Contractor's operations. . . .

In the event that the Contractor's personnel and/or equipment are unable to perform the work within these time constraints, the Railroad reserves the right to utilize its own forces or contracted labor to complete the work. This shall not constitute a breach of contract and shall not constitute a claim for loss of anticipated profits by the Contractor. . . . (Emphasis added)

The first paragraph of the General Safety Requirements provides that:

there was no mention of any written contract beyond what Harp had already provided and he believed, based on those documents and Harp's verbal representation, that he had authorization to perform the work.

Harp did not dispute the above account of the conversation with the Claimant or deny that he had provided the above documents. He also conceded that he did not recall whether he told the Claimant at the time he gave him the paperwork that this was not an agreement. He further acknowledged that the provided paperwork was a bit misleading because the Specifications and Safety Requirements document in several instances set forth requirements or instructions stating "during the term of this agreement," which made it appear as if the documents constituted an agreement.³ Harp, however, testified that he never had an agreement with the contractor to do the work; rather, there was additional paperwork that needed to be signed. The Carrier did not introduce any such paperwork during the Hearing.

Shortly after speaking with Harp, the Claimant took the paperwork and reviewed it with the contractor, Gus Menth. Then on August 22, 2006, the two of them removed the copper wire from the dead pole line between Mileposts 8.5. and 17. Left unfinished was the segment between Mileposts 17 and 18.5. The wire was stored overnight and the next day brought up to National Recycling in Hugo, Minnesota, where it was sold to the recycling center. The Claimant received a check on August 23, 2006 for \$2,975 for the scrap wire. The proceeds were split 60-40 with the contractor receiving the greater share.

The Claimant and the contractor completed one entry on the Daily Work Log at the time the copper wire was removed in August. The Claimant testified that he did not submit the Daily Work Log to Harp at that time because the Specifications stated that the Daily Work Log, which had spaces for multiple work entries, was to be submitted at the completion of the work.⁴ The Claimant testified that he and the contractor still had approximately one and one-half miles of wire left to remove.

The safety of personnel, property, rail operations, and the public is of paramount importance in the prosecution of the work pursuant to this agreement. As reinforcement and in furtherance of overall safety measures to be observed by the Contractor (and not by way of limitation), the following special safety rules shall be followed. (Emphasis added)

³ See footnote 2.

⁴ Specifically, Paragraph F ("Required Paperwork") provides that:

The Claimant also did not follow-up with Harp to let him know that the majority of the removal had taken place.

The Claimant testified that there was never any effort to remove the remaining one and one-half miles of wire on the original project because the same night in August that he and the contractor removed the wire there was a large pole line theft in Wisconsin that tied him up with trouble calls and a full day's work. That was followed by subsequent thefts. It was, he states, just a very busy time with the railroad.

Subsequently, at some point in early June, the Claimant was accused by a third party of stealing the copper wire at issue, not from the railroad, but from another company. The Claimant asserted that this was due to a mix-up in records at the recycling center which had accepted several batches of copper wire on the same day – one batch submitted by the Claimant that he and the contractor had removed and another batch stolen, but completely unrelated to the Claimant.

As a result of this third-party accusation of theft, the Claimant called Harp on June 12, 2007. He told Harp that he and the contractor had removed the copper wire last August and sold it as scrap for \$2,975.00. He apologized for not notifying Harp about this sooner and asked for a written statement from Harp verifying that the copper wire had come from the railroad and he had authorization to remove it. Harp responded that he would not provide the Claimant with any type of affidavit, but he did remember having a conversation about the wire removal and had sent the Claimant the necessary paperwork. Harp then told the Claimant that he would like the Daily Work Log signed and returned to him and that a 50% compensation for the material would satisfy the railroad - that was the normal practice - and that the other half would be considered payment for services.

The following day, the Claimant retrieved the documents from contractor Menth and gave Harp the Daily Work Log, signed and dated by Menth on June 13, and a check for \$1,500.00 made out to the Carrier for the material. The Claimant originally submitted the form to Harp with just Menth's signature; however, Harp instructed him

“Union Pacific will require the Contractor to complete a Daily Work Log (attached) to be submitted along with any pole line invoice. Once the pole line removal is complete it will be the Contractor's responsibility to notify the proper Union Pacific Representative. The UPRR Representative will make a visual inspection of the referenced area to verify the work is complete according to this contract. Any remedial clean up will be requested at that time.”

to add his signature as the “Railroad Representative.” According to the Claimant, Harp said “I would have been functioning as the Railroad Representative overseeing the – what pole would be – to be removed. So he felt that I should sign off on it as the Railroad Representative.” The Claimant made a check out to the Carrier for \$1500.00 for some of the proceeds from the scrapping. Thus, the Claimant viewed the money he received in August as compensation for his work with the contractor.

Harp testified that the Daily Work Log is used to allow a contractor to go in and remove dead pole line on the Carrier’s property. The form at issue shows work performed on August 22, 2006, and states that “initial run through, cleaning up, easy to get line wire.” Removal covered Milepost 8.5 to Milepost 17 on the Altoona Subdivision. Although Harp initially testified that this form was to have been completed “before any work is performed by the contractor,” he later testified that the signatures at the bottom confirm that the work was done. In addition, the form itself references confirmation of satisfactory completion of the work.

Harp testified that the provision regarding the split of sale proceeds of any scrap between the Carrier and the contractor is “a local provision provided by the manager when and if he ever sells scrap or disposes of scrap material. . . . It could be incorporated into a signed agreement if there was one – at this time there’s nothing in writing on that.”

It is, however, difficult to reconcile Harp’s testimony about the 50-50 “required” split in light of the following language in the Specification regarding “Ownership of Materials:”

“All materials released from projects during the term of this agreement shall become the exclusive property of the Contractor at the time that the material is removed. The Contractor assumes sole risk of loss at this time. The Contractor agrees to accept the transfer and assignment of the material as is, where is, and with all faults, and with the understanding that there is no warranty of any kind, expressed or implied, and specifically there is no warranty of merchantability or fitness for a particular use. Contractor acknowledges and agrees that none of the materials released by the Railroad shall be sold by the Contractor until such materials have been removed from Railroad property. . . .” (Emphasis added)

In any event, when questioned as to whether there was any explanation for the time delay from the time the work was done in August until the check was issued the following June, Harp conceded that: “The only delay would be because he didn’t know the - the procedures that I set forth because we hadn’t discussed that part of it – about the salvage – the cost of the property.”

After the Claimant contacted him on June 12, Harp contacted Michael R. Koscinski, Senior Special Agent, Hazmat for the Union Pacific Railroad Police Department and informed him that the Claimant had been arrested on a warrant for copper wire theft while he was off duty and, given the a number of thefts of wire occurring throughout the system, asked Koscinski to investigate whether there was any involvement by the Claimant in taking copper wire without authorization. Subsequently, Koscinski interviewed the Claimant and Harp and his testimony substantiated the above accounting of events.

Koscinski noted that “Gregerson had certainly inquired about getting the paperwork, did get the paper work, however the paperwork process or the paperwork trail wasn’t followed through.” Koscinski testified that the Claimant said that the paperwork had not been forwarded to Harp and that he should have been in better communication with Harp at the time. Koscinski also spoke with Harp who recalled that the Claimant had asked for the forms and Harp had provided them to him, but he had received no further information from the Claimant about removal of the pole line and wire and nothing had been signed from the contractor.

Koscinski testified that in reviewing the forms that Harp sent to the Claimant he did not see where they required anything to be submitted unless it was the Daily Work Log which is to be executed after the completion of the work. He also said that the Specification makes no reference to the 50-50 split. That information was provided by Harp, characterized as “the normal thing he would require.” Koscinski testified that he thought the Claimant was following his instructions from the supervisor in regards to obtaining the paperwork.

Finally, in response to a question from the Claimant about whether he had been helpful and forthright during the investigation, Koscinski, testified:

“Oh by all means. You were extremely cooperative in past vandalism and theft cases that – dealing with copper wire that’s been stolen from the railroad. And been helpful in assistance to our department of contacting local police and making reports. And during the time that –

that we spoke regarding this issue here you were very cooperative and provided the information and – and didn't hesitate to answer any of my questions. You've been very cooperative. Q: And I have ever given you reason to believe that I'm dishonest towards my manager or the company? A: No you have not."

Also admitted into evidence was an email (apparently dated June 12, 2007) from Carrier employee Carol J. Kelley stating that:

"We have seen an increased incidence of local scrap sales being initiated by various service and regional personnel over the past few months. I just wanted to reiterate the process that needs to be followed with regard to any scrap sales."

The email outlines a centralized system for handling scrap sales. In a June 16, 2007, follow-up email to unknown addressees, Harp stated that "All scrap will be handled this way from now on." After initially testifying that there was no real change in policy, Harp later conceded that "the only change would be that we used to handle it on a local level. And disposing of it as a manager, getting rid of it. Now the manager is not doing that."

The Board recognizes that a somewhat higher standard of proof may be required to sustain a charge of dishonesty implicating possible criminal behavior such as misappropriation of property. As set forth in Third Division Award 23977:

"There is little debate that theft or misappropriation of property is an offense warranting dismissal. However, the quality (quantum) of evidence to substantiate such a charge is of a considerably higher nature than required in other types of discipline cases. In addition, this burden of proof or persuasion rests with the Carrier."

For the reasons set forth below, we find that the Carrier has not sustained its burden.

The evidence unequivocally reflects a significant lapse in communication between the Manager of Signal Maintenance and the Claimant. That confusion, however, does not support a finding of dishonesty.

Although the Carrier focuses on whether there was, in fact, a contract, the critical inquiry is whether the Claimant reasonably believed he had authorization or conversely was dishonest in his dealings. Here, the Carrier requested assistance in finding someone to remove the useless pole line. The Claimant openly notified Harp about his interest in the work and received his supervisor's permission to work on the project during his off hours. The Claimant then requested the "necessary" documents and Harp provided paperwork without a full explanation as to what precisely was being provided or was required. Based on a review of that documentation, a layperson reasonably could have viewed the repeated language in the Specification stating that "this agreement" meant there was actually an agreement and the only required paperwork was the Daily Work Log to be submitted after the work was completed. The lack of any reference by either Harp or the documents themselves to any other "contract" simply fueled the misunderstanding.

Although the Claimant is at fault for not notifying Harp once the work was done, had there been clear notification by Harp to the Claimant that proceeds were supposed to be split 50 - 50, the Claimant's failure to follow-up would take on the much more sinister personality of hiding profits. The provided documents, however, clearly state that the removed property belongs solely to the contractor once off railroad property; and Harp conceded that the 50 - 50 split was neither in writing anywhere, nor was it communicated to the Claimant.

Although the ten-month delay in returning the paperwork to Harp does raise concerns, the Claimant reasonably explained that the delay in part was due to not having finished the project. Given the thefts that had been occurring and questions being raised in that regard, the Claimant testified that as time dragged on, he and the contractor determined that unless the situation changed, they likely would not complete the remaining mile and one-half removal. He also testified that the Specification recognized that projects might not be finished⁵ and in that case the Carrier would take over the final removal phase – and so he and the contractor never got back to the last mile and one-half.

Two further considerations warrant mention. First, the Carrier's own security officer, after a thorough investigation, concluded that Claimant had not acted in a dishonest manner. Second, the post-incident email exchange reflects that Harp and the Claimant both were caught up in what appears to have been an ad hoc system of taking care of abandoned pole lines. The fact that the system needed clarifying "after-the-fact" strongly weighs against a finding of dishonesty.

⁵ See footnote 2.

Based on a reading of the record in its entirety, the Carrier has not sustained its burden of proof. The Claimant shall be restored to service with full backpay, less 30 days discipline for negligent handling of paperwork causing considerable expenditure of his employer's resources, with seniority intact and all other benefits.

AWARD

Claim sustained in accordance with the Findings.

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 1st day of March 2010.