

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40306
Docket No. SG-40921
10-3-NRAB-00003-090215**

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 P. M. Casner, 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 February 12, 2008. Carrier’s File No. 1493532. General Chairman’s File No. N 68 721. BRS File Case No. 14126-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 February 12, 2008, the Carrier conducted an Investigation in Cheyenne, Wyoming, into charges lodged against Claimant P. M. Casner "that while employed as a Skilled Signal Maintainer, at Cheyenne, Wyoming, near Milepost CPW 511, Laramie Subdivision, from January 25, 2008 to January 30, 2008, [he was] allegedly observed at home during working hours, but nevertheless claimed eight (8) hours pay for each of these days" in violation of Rule 1.6 (Conduct) and Rule 1.15 (Duty-Reporting or Absence) as contained in the General Code of Operating Rules, effective April 3, 2005.¹ On February 26, 2008, the Carrier notified the Claimant that he was found in violation of Rules 1.6 and 1.15 and he was being assessed 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 on January 24, 2008, the Claimant's supervisor, Michael H. Sheets, Manager of Signal Maintenance, received a call from his Maintenance Foreman alerting him to a possible problem involving the Claimant.

¹ Rule 1.6 (Conduct) provides, in relevant part, that:

Employees must not be:

3. Insubordinate;
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 to the performance of duty will not be tolerated.

Rule 1.15 (Duty—Reporting or Absence) provides that:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

Continued failure by employees to protect their employment will be cause for dismissal.

Specifically, Sheets was told that some of the employees were questioning why they had to be at work full time when the Claimant apparently did not. It was brought to his attention that the Claimant and his company-issued truck allegedly had been seen in Colorado. Sheets told his Maintenance Foreman that he would check things out during the next week to determine whether there was, in fact, a problem.²

Subsequently, over the next three work days between January 25 and January 30, 2008, members of management observed the Claimant's company-issued truck parked in front of his residence during working hours. Specifically, on Friday, January 25, Sheets and R. A. Bradshaw, a Signal Supervisor, observed the Claimant's truck parked at home between approximately 2:00 P.M. and 4:00 P.M. Sheets discussed his observation with Mark Hauser, Director of Signal Maintenance for the Northern Region, who subsequently also observed the Claimant's truck at home on January 28 from 11:42 P.M. to 12:21 P.M.; and January 29 at 10:27 A.M. and 11:50 A.M.

During the relevant time period, the Claimant's normal shift was Monday through Friday, 7:30 A.M. to 4 P.M., with a one-half half hour lunch scheduled between 11:30 A.M. and 12:00 P.M. Sheets testified that, according to the Claimant's time rolls, during each of the above days in question, the Claimant should have been on duty for the company on Carrier property and had not asked to be excused from duty. According to Sheets, it would be irregular for the Claimant, who was responsible for maintaining the signal system at Cheyenne, Wyoming, to be at home during work hours. The Claimant's payroll records showed that he was paid eight hours for each of the days in question.

The Claimant did not dispute that during the days in question his assigned hours reflected the above 7:30 A.M. to 4:00 P.M. schedule. Nor did he dispute that he was at home during the three occasions that management observed his truck in front of his house.

² The Organization objected to this evidence as hearsay. Although evidentiary rules are not strictly applied in these cases, the Board notes that in making its determination it did not consider the phone conversation for the truth of the matter asserted, but merely as background material to explain why Sheets decided to place the Claimant's work habits under observation.

With respect to the questionable two hour period on January 25, the Claimant testified that he had completed all required testing for that week and was on-line checking on the scheduled FRA tests, their location, and other things that he had coming up for the following week so that he could plan his week according to train traffic. The Claimant acknowledged, however, that he had not informed Sheets that he was at home performing these duties and there was no way to document that he spent the time in the way that he indicated.

The testimony is conflicting as to whether the Claimant received permission to perform Carrier-related computer work at home. The Claimant testified that he had been told that he could do his on-line Rule exam and Maintenance of Way training at home, and the Claimant did have a Carrier-provided key fob that allowed him to access the Carrier's computer off-site. Thus, at a minimum, it would appear that he had permission to take tests that are downloaded for the Carrier to update and validate that he is in compliance with Maintenance and Operating Rules. He was permitted to take those at home and claim the time for them.

It does not appear, however, that the Claimant received express permission to do any other type of computer work at home including the type allegedly performed on January 25. Sheets testified that the Claimant never asked and he has never authorized the Claimant to work out of his home to perform the duties of his job. If he had a need for computer time, he was expected to do it in the office in Cheyenne. "That's why we added computers so everybody had the opportunity to download or upload or do their work there in the office."

With respect to his time at home during work hours on January 28 and 29, the Claimant conceded that he was at home, but asserted that he was eating lunch. There is no prohibition against eating lunch at home. Nor are employees required to take their lunch precisely at the scheduled time. Hauser testified that employees are allowed a one-half hour lunch and could take their truck home for lunch, but noted that normally, people either pack a lunch or secure a lunch near the property, but he would not object if an employee wanted to eat at home unless it was an extended lunch.

It is undisputed that employees received a daily 30 minute unpaid meal period. The Claimant testified that he can make it from his territory to his house

within seven minutes. Management observed him at home on January 28 from 11:42 A.M. to 12:21 P.M. Taking into consideration the 14 minutes round-trip to get home and back, the Claimant would have expended 53 minutes for lunch on January 28. With respect to January 29, he stated that he was home early for lunch and conceded that his lunch ran a little long that day, but he did not believe that he needed to notify anyone of that fact.

“That longer lunch period, I went home early ‘cause I couldn’t get any time anywhere. And basically, it was 20 minutes over per se. . . . that day, I would’ve been discussing some personal business with my wife about my children and that’s why it extended a little bit over the time.”

Again, counting travel time on this date, the Claimant expended one hour and 37 minutes for lunch. Despite running over, the Claimant claimed eight hours pay for both January 28 and 29. On three straight work days (Friday, January 25, Monday, January 28, and Tuesday, January 29) the Claimant spent unauthorized time at home. Even crediting the theory that he, in fact, was performing Carrier-related computer work at home on a Friday afternoon with the implied consent of the Carrier, it remains clear that he knowingly exceeded the well-established time limits for his unpaid meal period without notifying his Supervisor or accounting for the overage on his time submissions. The undisputed evidence established that the Claimant, at a minimum, charged the Carrier for one hour and 30 minutes of time during which he was not, in fact, working. If the undocumented computer time is added to the mix, the overcharge is three and one-half hours.

Based upon the foregoing, the Board finds that the Carrier satisfied its burden of proving by substantial evidence the alleged misconduct at issue. We recognize the Claimant’s ten-year tenure with the Carrier. However, for the very serious charge of dishonesty which was established we find no reason to conclude that the penalty imposed was arbitrary, capricious or unjust.

As the Board noted in Third Division Award 37054:

“It has long been held that dishonesty, in any form, is a dismissable offense. Time card manipulation, the dishonesty in the instant matter, is tantamount to theft, which is also summarily dismissible.

The Board cannot substitute its judgment for that of the Hearing Officer, absent arbitrary, capricious, or discriminatory behavior or an abuse of managerial discretion. None is found here. Regardless of whether the Claimant's work history is accounted for, in view of the Claimant's admissions at the Investigation, the Board has no alternative but to deny the claim on these grounds."

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 1st day of March 2010.