

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40532  
Docket No. SG-40297  
10-3-NRAB-00003-080006**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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. A. Kerr, to be returned to work with payment for all time lost and all rights and benefits restored with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rules 48, 49 and 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 September 21, 2006. Carrier’s File No. 1456987 D. General Chairman’s File No. UPGC-68-1268. BRS File Case No. 13847-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.

The Claimant in this dispute held the position of Manger of Industry and Public Projects, a non-Agreement position. On September 13, 2006, the Carrier terminated the Claimant and he attempted to exercise his Agreement seniority, displacing an employee and returning to his craft. There is no dispute that the Carrier denied the Claimant that right. The Carrier further issued a Notice of Investigation.

A Hearing was held on September 21, 2006 to determine whether the Claimant "allegedly exhibited unethical conduct and may have been dishonest when you used your position to receive various gifts from Industrial Railways Company, IRC." Thereafter, the Carrier concluded that the facts documented a violation of the General Code of Operating Rules, Rule 1.6 (Conduct) Part 4 (Dishonest) Rule 1.13 Reporting and Complying with Instructions, Rule 1.26 Gratuities, and Item 10-A, in the System Special Instructions pertaining to misconduct. The Claimant was dismissed from service.

The Organization argues that the Carrier's actions were improper, in that the Claimant had every right to exercise his seniority back to his craft. It argues that the Carrier violated Rule 49 in refusing to permit the Claimant his proper right to return, whether or not he voluntarily or involuntarily left his non-Agreement position. The Organization asserts that the Claimant had every right to terminate the Claimant from his non-Agreement position, but had no right to deny his return to his craft. The Carrier argues that when the Claimant sought to return to the craft, the Investigation was properly initiated. Further, the Carrier argues that Rule 49 has no applicability.

The Board reviewed Rule 49 and agrees with the Carrier. Rule 49 is titled Seniority Retention and its content refers to membership dues. Under the circumstances of this case, the Rule has no direct relevance to the disciplinary decision of the Carrier. The Claimant was terminated for unethical behavior in a non-Agreement position and thereafter he attempted to displace. There is no

dispute that he failed to pay his membership dues and failed to retain seniority in his craft.

The Organization also maintains that the Carrier violated Rule 48, Promotion to Official Positions. The Carrier again argues that the Rule lacks applicability because the Claimant was terminated. The Board must agree with the Carrier given the language of the Rule. Rule 48 states in pertinent part:

“Employees promoted to an official . . . position; . . . will retain and continue to accumulate seniority on the seniority rosters on which they hold seniority. . . An employee relinquishing or demoted from such position will be permitted to return to the seniority class from which promoted and to displace the junior employee (if his junior) in such class. . . .”

The Board notes that the key word lacking from the above language is “terminated.” The Claimant in this instance was terminated; he was neither “relinquishing” his position, nor was he “demoted.” As such, Rule 48 is not found to be applicable. Further, the Board agrees with prior decisions that once the Carrier terminates an employee, they are not thereafter an employee with rights of displacement, unless proof of misconduct is not forthcoming. The Board finds the Carrier’s formal investigation proper to make that determination.

The Organization also argues that Rule 68 (Investigations, Discipline and Appeals) was violated. It maintains that the Carrier failed to prove the allegations and even if they had proven that the Claimant engaged in the alleged misconduct, the highest level of discipline would have involved a Letter of Reprimand or Corrective Action Plan, not dismissal. The Carrier contends that dishonesty is a Level 5 offense for which dismissal is appropriate.

After full consideration, the Board finds no procedural errors. On the merits, the Board closely studied the record. It involved the Claimant’s relationship with Industrial Railways Company (IRC) for which, as a Carrier employee, he was not to accept gratuities. In this instance, there are allegations that the Claimant accepted a gun safe, Tuff Shed and a hunting trip from IRC representatives. It is an allegation that the Organization argues was not proved.

The Board reviewed the testimony, beginning with Carrier Supervisor Gosch. Gosch, who was a Supervisor on the Corporate Audit Staff, testified that he had received allegations that the Claimant accepted gifts, particularly a gun safe and a Tuff Shed. Gosch testified that on April 5, 2006, he interviewed the Claimant who stated that he had purchased both the safe and the Tuff Shed. As for the safe, he had purchased it off of the internet when he moved into his house. As for the Tuff Shed, he was unclear if he had bought it at Home Depot or Lowe's.

The next day, April 6, 2006, the Claimant, according to testimony from Gosch changed his story, indicating that "he had actually purchased the safe from Christopher Stocka, of Industrial Railways for \$800 cash." At a follow up meeting, the Claimant produced a note that he was paying the money in four installments. Subsequently, testimony and evidence document that the safe was purchased by another employee of Industrial Railway, Trevor Haddix for more than \$1500.00 and shipped to the Claimant's home address.

The Board finds that the record on the safe supports the Carrier's determination of dishonesty. The Claimant changed his story and provided documentation that did not coincide with the invoice. The Claimant states that he was honest. In fact, he testifies that he engaged in no dishonesty. With regard to the Tuff Shed, the Claimant indicates that he obtained it through IRC, because they could get a discounted price. The Board notes that testimony of Gosch is that the Claimant first indicated that while he did not remember exactly which store he had purchased it at, he suggested it was Home Depot or Lowe's.

The Board studied the Claimant's testimony. It changes. The Board also noted that there is substantial evidence that the Claimant received items from IRC. There is also testimony regarding IRC hunting trips. The Claimant maintains that he reimbursed IRC for associated costs. A review of documentation from the Claimant is neither substantial, nor clear. In fact, the Claimant argues that Stocka was a personal friend and that there were no deceptions. The Board is persuaded that the Carrier's credibility decision, determination of guilt and ultimate termination is grounded with sufficient proof. Under the full circumstances of this case, evidence supports the Carrier's argument that the Claimant abused his position by obtaining personal gratuities from IRC. There is nothing in this record to consider the Carrier's actions to be improper or the discipline excessive. The

Form 1  
Page 5

Award No. 40532  
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Board will not interfere with the Carrier's judgment (Special Board of Adjustment No. 924, Award 243; Public Law Board No. 6302, Awards 87, 88, 89, 101; Public Law Board No. 6402, Awards 39 and 40). The claim is denied.

**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 15th day of June 2010.