

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41155
Docket No. MW-41262
11-3-NRAB-00003-100111**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(National Railroad Passenger Corporation (Amtrak)
(– Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [*‘Thirty (30) calendar days suspension, in conjunction with an additional Fifteen (15) calendar days suspension, that was held in abeyance in connection with a prior discipline case (File #07-085BM) for a total of Forty-Five (45) calendar days suspension to be served, effective immediately.’* (Emphasis in original)] imposed upon Mr. J. Rivera by letter dated February 24, 2009, for alleged violation of Amtrak’s Standards of Excellence as stated under the headings of: Amtrak Values (Integrity); Trust and Honesty; Professional and Personal Conduct (Teamwork); Attending to Duties; and alleged violation of Rule 4233 of the Amtrak Safety Rules and Instructions for Maintenance of Way Employees, in connection with alleged failure to properly disclose, report and/or misrepresent suspended driver’s license was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-4814D AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Rivera shall now have the aforesaid discipline removed from his record and he shall be compensated for all lost wages as a result of this improper suspension.”

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 progression of this proceeding on the property reveals it was handled in the usual and customary manner, including placement before the highest officer of the Carrier designated for such matters. Following a conference discussion on May 6, 2009, the dispute is now properly before the Board.

In this appellate forum, the Board does not sift the evidence anew; however, the record is reviewed to determine whether there is substantial evidence to support the charged misconduct lodged against the Claimant. Should there be substantial evidence supporting the misconduct as charged, the Board will not disturb the penalty imposed by the Carrier. Where the Carrier abuses its discretion and acts arbitrarily and/or capriciously towards the Claimant, the Board examines the penalty.

The Claimant holds the position of Electric Traction Lineman; a requirement for this position is for the Claimant to possess a valid Commercial Driver's License (CDL). On August 4, 2006, the Claimant signed for receipt of the Motor Vehicle Driver's Certification of Compliance with Driver License Requirements wherein it states that Sections 383.33 and 391.15 of the Federal Motor Carrier Safety Regulations require him to notify the Carrier by the next business day should his license be revoked or suspended.

Notwithstanding the Claimant's knowledge of these State and Federal requirements, he testified that he did not notify the Carrier that his license was suspended on January 8, 2007 and February 22, 2008. As for the January 8, 2007 suspension, the Claimant's license was reinstated when he paid a fine on February 14,

2007. Similarly, after his license was suspended on February 22, 2008, it was reinstated on February 29, 2008 when he paid another fine. Payment of these fines reveals that the Claimant knew his license had been suspended. Nevertheless, he did not notify the Carrier in either instance.

Given the Claimant's awareness that (1) his job required possession of a valid CDL (2) his payment of fines and (3) his testimony that he did not notify the Carrier at any time that his license had been suspended, there is substantial evidence of the charged misconduct lodged against the Claimant.

The Claimant's misconduct violated State and Federal regulations, as well as the Carrier's Standards of Excellence (Trust and Honesty, Conduct, Attending to Duties) by intentionally not disclosing to the Carrier that he did not have a valid license. Without this disclosure, the Carrier could not accurately assess his commercial motor vehicle driver qualifications. As a result, the Carrier unknowingly used the Claimant to operate a vehicle when he was not licensed, thereby placing the public at risk and subjecting the Carrier to unwarranted liability. His 30-day suspension is not harsh or punitive given these circumstances.

Three procedural errors are raised by the Organization. In this regard, it contends that if any one of the procedural errors is established then the Carrier's case against the Claimant must be overturned and the Claimant's record cleared of any wrongdoing. For the reasons that follow, the Board finds the procedural objections are without merit.

The first such purported error is that the Claimant was not properly notified of the charges such that he could not adequately prepare for the Hearing. The record shows that the Claimant received the written charges of his alleged misconduct on June 11, 2008. The Hearing was postponed twice; the Hearing finally commenced on February 11, 2009. The Claimant had eight months to prepare for the Hearing. The Board finds that the Claimant clearly had adequate notice of the charges lodged against him and sufficient time to prepare.

The second purported error is that the Claimant was not provided a true and complete copy of the transcript as Rule 72 requires. There are parts of the transcript where statements or testimony are marked inaudible. However, those parts are few and inconsequential. Moreover, the Claimant did not maintain that any errors in the transcript were caused by the Carrier or other ill acts. A true and complete transcript

does not equate to a perfect transcript as the Claimant seeks. Consistent with Rule 72, the Claimant received a true and complete copy of the transcript containing testimony, arguments and exhibits presented at the Hearing.

The third such purported error is that the Carrier violated Rule 73 by requiring the Claimant to serve his suspension rather than waiting for the outcome of his appeal. Rule 73(a) states that for a major offense, the discipline may be effective at any time after a disciplinary decision is issued. A major offense is not determined by whether the Claimant was dismissed from service. The Claimant's decision not to disclose his license suspension to the Carrier constituted a major offense because his operation of a vehicle without a license placed the Carrier at legal and financial risk. The discipline notice was issued on February 24, 2009 and the Carrier made it effective while the Claimant's appeal of that decision was pending. Such is not a breach of Rule 73.

In sum, the Board concludes that the Carrier did not abuse its discretion or act arbitrarily or capriciously towards the Claimant because the charged misconduct is established by substantial evidence and the disciplinary suspension is commensurate with the proven misconduct. Therefore, the claim will be 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 21st day of November 2011.