

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41282
Docket No. MS-40363
12-3-NRAB-00003-080150**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(David Brackett

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

- “(1) The dismissal of Machine Operator D. E. Brackett on September 11, 2006, for his alleged violation of Maintenance of Way Operating Rules 1.6 - Conduct and 1.19 - Care of Property after an investigation on August 28, 2006, is arbitrary, capricious and in violation of the agreement.
- (2) As a consequence of the violations referred to in Part (1) above, for Machine Operator D. E. Brackett to be reinstated to service, seniority rights unimpaired, and compensation for all wage loss suffered.”

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 Petitioner represented himself before the Board.

At the time of his termination, the Petitioner was a Burro Crane Operator with 17 years' seniority. He had a good work record with no disciplinary history.

On the evening of August 14, 2006, the Petitioner was stopped by police near the Carrier's fueling facility in Galesburg, Illinois. An employee of a neighboring company had seen the Petitioner leaving the property carrying two gas cans, was suspicious, and called the police. Initially the Petitioner, who was not carrying the gas cans when the police found him, told the police that he was on his way to see a female friend. The officers searched the Petitioner and found a key labeled "Fuel Storage" in his pocket. The Petitioner then stated that the fuel gauge on his truck was broken, so he never knew when his truck was going to run out of gas. He kept gas in the back of the truck in case he did. He had taken two five-gallon cans and filled them at one of the Carrier's pumps. He then told the police that he had dropped the gas cans in a grassy area nearby when he thought he was being watched. The cans were found and the gas returned to the Carrier. The Petitioner was arrested.

The Carrier notified the Petitioner by letter dated August 15 of its intent to hold a formal Investigation, which took place on August 28, 2006. At the Investigation, the Petitioner agreed that the substance of the police report was correct and expressed sincere remorse for his action. He explained that his paycheck had not come in the mail and he was low on cash. He needed gas and thought that it might be alright if he took some to use when he drove his truck on company business. He could not recall if his supervisor had given him permission to use the fuel in lieu of using mileage reimbursement forms. Although he was entitled to be reimbursed for his fuel expenses when he used his personal vehicle for company business, he had never submitted a reimbursement form in the two years that he had been using his truck on company business. He stated that he thought that using his personal vehicle was what he had to do to keep his job. He had seen other employees fueling their personal vehicles at the Carrier's fuel tanks in the past, but he acknowledged that it was wrong. He had taken gas once before, while he was on duty and nearly out of fuel.

Following the investigative Hearing, the Petitioner was notified on September 11, 2006, of his dismissal for violations of Rules 1.6 and 1.19.

At the arbitration Hearing before the Board, the Petitioner apologized for his poor judgment, saying that he only wanted enough gas to be able to work over the next few days and that he chose the wrong way to reimburse himself for the gas he had not been reimbursed for in the past. He also acknowledged that he was not blameless and some punishment would be appropriate, but dismissal was too harsh in light of his prior 17 years' exemplary service with the Carrier and the fact that the gas was returned to the Carrier. He also raised procedural objections to the Investigation conducted on the property, in that he was not allowed to call his supervisor to testify as to his character and that the Carrier's investigator did not testify.

From the Carrier's perspective, theft is theft. Under its PEPA policy, theft is listed as a "terminable offense" for a first incident. The Petitioner admitted his guilt, and in combination with the witness' report to the police and the police report itself, the Carrier contends that it met its burden of proof. There is no way to know how often the Claimant has stolen from the Carrier in the past, or to guarantee that he will not steal again. Nor would leniency on account of the Claimant's past service be appropriate. Finally, there were no procedural defects in how the on-property Investigation was conducted. The claim should be denied.

Theft has long been recognized in arbitration as providing just cause for immediate termination, even where an employee has long service. Such an act breaks the bond of trust that is necessary between an employer and an employee. In this case, the Petitioner knew that he was not authorized to take gasoline from the Carrier's fuel tanks, but he rationalized his action by the fact that his paycheck had not arrived and he was short on cash. That is not a sufficient excuse. Had he not been caught by the police, he would have put the gas in his truck — and perhaps been back again in the future. He admitted to having taken gas in the past on one other occasion; there may have been others. Were the Petitioner returned to work, it would be difficult, if not impossible, for the Carrier to be able to trust him. In a workplace where a number of employees are coming and going frequently and are expected to act with a high degree of independence, such mistrust is intolerable.

A review of the transcript establishes that the investigative Hearing was properly conducted. While the Petitioner's supervisor did not testify regarding his character, the Hearing Officer was nonetheless aware of the Petitioner's long and otherwise exemplary service. Moreover, numerous prior Awards from the Board have recognized that long service is no bar against immediate discharge for theft. Given the totality of the record evidence before the Board, the instant claim must 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 28th day of March 2012.