Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41394
Docket No. SG-41474
12-3-NRAB-00003-110023

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of L. Weidenhamer, for his personal record to be cleared of any mention of this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it imposed the excessive discipline of a Level S, 30-day record suspension with a probation period of three years without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on July 9, 2009. Carrier compounded this violation by failing to comply with the time limit provisions of Rule 54. Carrier's File No. 35-09-0019. General Chairman's File No. 09-026-BNSF-20-C. BRS File Case No. 14425-BNSF."

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.

At the time of the events giving rise to this claim, the Claimant was a Signal Foreman on a Mobile Gang that was headquartered at Wataga, Illinois. The Carrier assessed a Level S, 30-day record suspension against the Claimant for manufacturing and filing counterfeit receipts for expense account reimbursements from January through June 2008.

In December 2008, one of the Signal Supervisors told the General Construction Supervisor that he thought that the expenses submitted by the Claimant for washing vehicles seemed to be excessive and some of them looked suspicious. The General Construction Supervisor had been approving the Claimant's expenses, which raised the question of why the Claimant had started sending them to the Signal Supervisor, who is in a different cost center, for approval. The two men decided to call the Resource Operation Center and have them look further into the matter of whether the Claimant's travel expenses were legitimate. They could not contact the Claimant directly because he was on a leave of absence. He had taken himself out of service on October 13, 2008, and sought treatment through the Employee Assistance Program for alcoholism. After visiting the car wash facilities whose names appeared on the receipts in early January 2009, the Special Agent assigned to the investigation determined that there were ten fraudulent receipts, for $20.00 each, among the Claimant's expense reports. The investigation remained open until the Claimant returned from leave on June 8, 2009. The Special Agent interviewed the Claimant the same day he returned from treatment. During that interview, the Claimant admitted that he had fabricated the receipts. The record developed on the property includes photocopies of the "receipts," along with a statement from the Claimant acknowledging that he made the receipts using Microsoft Word:

> "They were made by me because I did not get a receipt from the car wash. I washed the truck usually on the weekends on my own time, because either we were too busy during the week or I couldn't get anyone else to do it during the week.
>
> I didn't know that by making my own receipts was wrong or illegal. [sic] When I submitted my expense report they were approved by Dan Dunn and never question [sic]. If they had been questioned, I would have

certainly done it differently by getting a receipt at the place of business. So in concluding the receipts were for truck and trailer washes and cleaning supplies, Windex, wax, etc."

With the Claimant's statement, the report was completed, and the Carrier issued the Notice of Investigation into this matter on June 12, 2009. After being postponed by mutual agreement, the Investigation was held on July 9, 2009. At the Hearing, the Claimant testified that he made his own receipts in order to obtain reimbursement when he could not get a receipt at the car washes he used because there was no attendant on duty. He did not talk to his Supervisor or anyone else before manufacturing the receipts. He conceded that some of the receipts were for supplies that he himself used to keep his truck clean in accordance with Maintenance of Way Safety Rule S-12.7, which makes drivers assigned to vehicles responsible for maintenance, cleanliness and inspections. The Carrier notified the Claimant of the Level S record suspension by letter dated August 9, 2009.

The Carrier implemented a "Travel eX" on-line electronic system for employees to submit their expense reports. Under the Travel eX system, only expenses in excess of $10.00 require a receipt. Pursuant to the Carrier's Travel Expense Policy, Section 3.2, an employee's immediate Supervisor is charged with reviewing and approving any expense account request for reimbursement, including "determining whether: (i) the employee was on business matters for the dates and locations indicated, (ii) the level of individual expense is reasonable and customary, (iii) the expenses are submitted in accordance with this policy, (iv) adequate support for expenses exists, including legibility of imaged receipts."

The Carrier contends that the Level S record suspension was proper. The Rule 54 time limits were adhered to: the Carrier did not have official knowledge of the misconduct until June 8, 2009, after the Claimant had been interviewed and the Special Agent – who is not considered "an officer of the Carrier" under Rule 54 – had been able to complete and turn in his report. The Hearing was scheduled within 15 days as required by Rule 54. There was no prejudice to the Claimant as a result of when the Investigation was held. The Hearing itself was fair and impartial. As for the charges against the Claimant, the Carrier proved with substantial evidence that he violated Rule 1.6 when he submitted falsified receipts for reimbursement by the Carrier. If the facility he used did not provide receipts, several options were available to him: he could go to a different car wash, he could wash his truck at a time when an attendant was available to give him a receipt, or he could have called his Supervisor to explain the situation and receive instructions on how

to proceed. He did none of those things. Nor is the Claimant's alcoholism an excuse. His testimony establishes that he knowingly and willingly created the receipts and his alcoholism was not a factor. He stated that he created the receipts because Travel eX and Company policy required them, not because his judgment was impaired by his disease. His supervisors did not immediately question the receipts because they trusted him. The Carrier has provided substantial evidence of a violation of Rule 1.6 as charged, and the level of discipline assessed was appropriate for the violation given the unique circumstances. The Carrier could have dismissed the Claimant but it did not. Instead, it granted him leniency, and the Board should not substitute its judgment for that of the Carrier.

According to the Organization, the five-month delay between when the Carrier knew that the receipts were fraudulent, on January 5, 2009, and the charges, which were not made until June 12, 2009, constitutes a denial of the Claimant's fundamental Agreement due process rights and is a violation of Rule 54, which requires the Carrier to initiate an investigation within 15 days of its first knowledge of possible misconduct. In fact, the Carrier first knew something was wrong in October 2008 and certainly no later than December 2008 when the two Supervisors conversed. The discipline should be overturned on the procedural basis alone. The Carrier also failed to meet its burden of proof. The Claimant freely admitted that he made the receipts because he washed his truck and trailer on the weekends when the car wash did not have an attendant on duty who could provide a receipt. There is nothing dishonest in what the Claimant did: he spent more than $10.00 on the Carrier's behalf and then presented a receipt for reimbursement, just as the Carrier's policy dictates. There is no shred of evidence to prove that the car wash receipts did not document an actual expenditure by the Claimant. "Dishonesty" includes misappropriation, theft, or any conduct that perpetuates a fraud on the Carrier resulting in financial loss. However, prior Awards have recognized that when an employee is proved to have falsified records, the evidence of dishonesty must be "truly substantial" and "it must be shown that the act was a deliberate one with intent to defraud rather than a mere oversight or lapse of memory." (Third Division Award 21122) The Carrier failed to prove that the Claimant's actions were dishonest, and the claim should be sustained.

Under ordinary circumstances, a six-month delay between when Carrier Officials learned of misconduct and when it sent a Notice of Investigation would be unconscionable. But this is not a case of ordinary circumstances. The Carrier initiated its Investigation in December 2008, at a time when the Claimant was undergoing treatment for alcoholism and was unavailable. The Special Agent obtained confirmatory evidence from the car

wash facilities whose receipts the Claimant had fabricated on January 5, 2009. The Claimant, however, was still in treatment and remained there until returning to work on June 8, 2009. The Organization's position that the Carrier should have initiated the Investigation while the Claimant was in treatment is not persuasive. For one thing, it is a fundamental principle of Agreement due process that an accused must have an opportunity to tell his version of events before being judged guilty. It would have been absolutely improper for the Special Agent to have completed his investigation without contacting the Claimant and obtaining his input. And the Claimant was in treatment and unavailable until June 8, 2009. The privacy and treatment needs of employees on medical leaves of absence, including treatment for substance abuse, must be respected. It would have been highly counterproductive, stressful, and disruptive to have notified the Claimant and engaged him in an investigation into alleged misconduct while he was in the midst of treatment. This is especially true here because the original scope of the Special Agent's preliminary investigation included possible criminal charges. The Special Agent could not complete his investigation until he interviewed the Claimant, and the Claimant could not be interviewed until he returned from treatment. The Carrier acted appropriately in waiting to complete the initial investigation into possible wrongdoing until the Claimant returned to work. The Notice of Investigation was issued shortly thereafter and the formal Investigation was originally scheduled within the time limit set by Rule 54. Under the unusual circumstances of this case, the delay between the Carrier's initial knowledge of misconduct on January 5, 2009, and the final completion of the Special Agent's report, which officially triggered the Carrier's "knowledge of misconduct," was justified by the Claimant's treatment needs and his right to participate in the preliminary investigation.

This brings us to the substance of the charges against the Claimant. The Claimant freely acknowledged in his interview with the Special Agent, and in his statement, that he fabricated the receipts because he could not obtain them from the car wash facilities he used. He also acknowledged at the Hearing that some of the "car wash" receipts were for supplies such as Windex and car wax that he himself purchased to use on his truck. This calls into question the legitimacy of all of the receipts: businesses that sell Windex and car wax have cash registers and are not dependent on attendants to provide receipts to their customers. Employees are entitled to be reimbursed for money they spend on the Carrier's behalf, and BNSF has established a system for them to claim such reimbursement. Under the Travel eX system, any expense in excess of $10.00 must be accompanied by a receipt. If the Claimant had expenses in excess of $10.00 without a receipt, it was his obligation to consult with a Supervisor, or someone in the Department that administers the Travel eX system, about how to claim such expenses. Even if he had

spent the money at the car wash, it was not appropriate for him to decide on his own to fabricate receipts and pass them off as legitimate. Nor was this a one-time occurrence; the Claimant engaged in the conduct repeatedly over a period of months. The fact that his Supervisors accepted the receipts may have lulled the Claimant into a false sense that his conduct was acceptable, but their acceptance was a product of their trust in him and did not reflect acceptance on their part of false receipts: they did not know, or have any reason to know, that the receipts had been fabricated. The Claimant himself did not attempt to justify his behavior as the product of his alcoholism, and it does not excuse his conduct. The evidence establishes that the Claimant violated Rule 1.6, and the Carrier was justified in imposing discipline. As for the level of discipline, the Board will not substitute its judgment for that of the Carrier, especially as it appears that the Carrier took the Claimant's circumstances into consideration when it decided to impose a lesser Level S record suspension in lieu of an actual suspension or dismissal.

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 25th day of July 2012.