

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41439
Docket No. MW-41665
12-3-NRAB-00003-110161**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service by letter dated January 15, 2010 and subsequent dismissal by letter dated February 4, 2010) imposed upon Mr. K. Hegney for alleged violation of MOWOR 1.6 Conduct in connection with charges of alleged theft of fuel on January 8, 2010 was arbitrary, capricious on the basis of unproven charges and in violation of the Agreement (System File T-D-3666-W/11-10-0176 BNR).
2. As a consequence of the violation referred to in Part (1) above, Claimant K. Hegney shall now receive the remedy prescribed by the parties in Rule 40(G).”

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 January 11, 2010, the Carrier directed the Claimant to report for a formal Investigation on January 18, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged theft of fuel when you were observed by BNSF Senior Police Agent Terry Wood and Surrey, North Dakota Police Chief Brad Seideman parked alongside locomotive crane BN 975439 and a flat car with the hose and fueling handle from the flat car service tank placed inside of your personal vehicle's tool box fueling a hidden personal storage fuel tank at approximately 1510 hours, at Elevator Track, Surrey, North Dakota, on January 8, 2010.”

On February 5, 2010, the Claimant was found guilty as charged and was immediately dismissed from service.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Claimant was pre-judged as exhibited by the fact that he was held out of service prior to the Hearing although he was no threat to anyone. The Organization next asserted that the most outrageous procedural violation concerned the fact that one of the Carrier's witnesses engaged in improper multiple roles – first as a witness against the Claimant and subsequently as the Carrier Officer who rendered the dismissal decision. The Organization argued that a Carrier Officer who testifies against an employee cannot possibly be a fair and impartial trier of facts. Based upon these procedural violations, it asked that the claim be sustained without even reviewing the merits. Turning to the merits, it asserted that the record shows that the Claimant was not stealing fuel for his personal use. It argued that the Claimant did not remove fuel and place it into the fuel tank of his personal vehicle, but instead put the fuel into a storage tank to bring fuel to his loader when he is out in the field on a job. It pointed out that witness M. Schmidt testified that he had on occasion had the Claimant fill his front-end loader out of the tank which he allegedly used to steal fuel on January 8, 2010. The Organization concluded that the entire investigative process was unfair and asserted that the Carrier did not meet its burden of proof. Consequently, it requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record shows that the Claimant received a “fair and impartial” Investigation and Division Engineer D. Douglas’ role as a witness

and decision maker did not deprive the Claimant of his Agreement “due process” Rights. It argued that the multiplicity of roles issue has been arbitrated on numerous occasions. The Carrier cited Third Division Awards 25148 and 27764 as standing for the principle that a Carrier Officer can hold multiple roles in the investigative process without denying the Claimant a “fair and impartial” Investigation. It further argued that Division Engineer Douglas did not present any evidence, was not asked, nor did he answer, any pertinent questions during the Hearing. Additionally, the Carrier stated that the transcript proves that the Claimant pulled his personal vehicle up to the locomotive crane and proceeded to pump fuel out of the tank car, which was on a flat car that travels with the crane, into a 30-gallon tank on his personal pick-up truck for his personal use. Because of that, it asked that the claim remain denied.

The Board thoroughly reviewed the record and transcript and determined that two procedural questions raised by the Organization need to be addressed. The first concerns the Claimant having been pulled out of service prior to the Hearing and the second involves the Disciplinary Officer also being a witness at the Investigation.

The first question raised by the Organization was: as Inasmuch as the Agreement allows for employees to continue to work unless they are dangerous or would disrupt the Carrier's business, why was it necessary to pull the Claimant out of service prior to the Hearing ? The Organization asserted that by withholding the Claimant from service pending the Hearing, the Carrier demonstrated pre-judgment. The Board is not persuaded that the Claimant's removal from service prior to the Investigation constituted pre-judgment in this case. However, there was no showing in the record that allowing the Claimant to remain in service pending the Hearing would harm, damage, disrupt or otherwise threaten the Carrier's operations, or that the Claimant was a danger to himself or others.

The Carrier did not explain its reasoning for the Claimant's removal from service. In Third Division Award 21341, the Board held, in pertinent part, as follows:

“ . . . This rule thus protects the Carrier from a finding of unfairness or partiality attributable to a pre-hearing removal, but the rule does not relieve the Carrier of the obligation to have a rational and reasonable basis for making the removal in the first instance. In this case the record is barren of any indication that there was any compelling reason or urgency to remove the Claimants from service immediately.”
(Emphasis added.)

As previously stated the Carrier provided no rationale for its removal of the Claimant from service pending the Hearing. The Board finds that the logic and reasoning expressed in Award 21341 is applicable in this instance. Accordingly, the Claimant is entitled to five days' compensation for the Carrier's violation of the Agreement when it suspended the Claimant prior to affording him an Investigation.

The second question raised by the Organization was: Did the Carrier deny the Claimant his right to a "fair and impartial" Investigation because the decision maker was also a witness? The issue of Hearing Officers, Charging Officers and Disciplinary Officers improperly holding multiple roles in the formal Investigation process has been the subject of countless Awards and authority can be found on both sides of a variety of different issues. On this property, involving the same parties, there are two recent decisions from Public Law Board No. 7048. Awards 30 and 55 addressed a similar issue. In both instances PLB 7048 ruled that the Agreement guarantees the employee a right of "due process" and that right was not afforded the Claimants because the decision maker assumed the role of judging witnesses' credibility including his own. The key difference between those two cases and the instant case is the fact that the decision maker in both of the aforementioned cases testified against the Claimant and offered his opinion and interpretation of what had transpired, after which he reviewed his own testimony. In the instant case, the decision maker testified on two pages of a 282 page transcript when he was questioned solely about the Carrier's procedures involving the establishment of a formal Investigation and offered nothing about the content and/or merits of the dispute. Therefore, the Board finds that aforementioned Awards are not on point and do not assist the Claimant because the Disciplinary Officer in this case did not act improperly. However, the Board does reiterate that if and when a decision maker testifies against a claimant and then subsequently reviews his own testimony Awards 30 and 55 of Public Law Board No. 7048 would be applicable. There is no showing in this instance that the Claimant was denied his Agreement "due process" rights.

Having determined that there were no procedural violations worthy of setting aside the discipline without reviewing the merits, the Board turns its attention to the facts.

The facts indicate that on January 5, 2010, BNSF Senior Special Agent T. Wood received an email regarding an anonymous tip alleging that the Claimant was stealing diesel fuel from a locomotive crane parked in Surrey, North Dakota. Senior Special Agent Wood notified the Claimant's Roadmaster, D. Gibson, who surveyed the location of the crane and found fuel that had recently drained onto the snow. On January 6,

Senior Special Agent Wood contacted Surrey Chief of Police B. Seideman and requested assistance in watching for suspicious activity near the crane.

On January 7, 2010, Senior Special Agent Wood began his surveillance of the Elevator Track at Surrey where the locomotive crane was parked. On January 8 at approximately 3:15 P.M., the Claimant was observed by Wood and Seideman filling a fuel tank located in the toolbox of his personal vehicle from a Carrier-owned fuel service tank on a railroad flat car.

The Claimant testified that he intended to transfer the fuel to the locomotive crane that was standing next to the Carrier's service tank to "top it off," because the crane was going to be moved on the following Monday. The Carrier argued that the Claimant's theory was questionable because there were two fueling hoses that led from the service tank to the locomotive crane. It asserted that the testimony provided by Roadmaster Gibson proved that the longer hose could reach the fueling port on the locomotive crane. Therefore, it was not necessary to use the Claimant's fuel tank to transfer the fuel to the crane. In rebuttal, the Claimant testified that the long hose did not operate properly in cold temperatures. However, Gibson further testified that the locomotive crane's fuel tank was full and could not be filled any further. The Board's close examination of the transcript reveals that the Claimant never offered a reason as to why he did not check the fuel tank on the locomotive crane before beginning the process of transferring fuel to his personal vehicle. Additionally, there is no record evidence that the Claimant had permission to transfer fuel to his personal vehicle.

The Organization offered a defense which asserted that the Claimant's actions were a standard practice for Machine Operators as verified by two witnesses. The first witness, M. Schmidt, testified that the Carrier had purchased a mobile fuel tank that he towed with his personal vehicle to fuel Carrier equipment. Although the second witness, T. Jones, never testified that he used a personal vehicle to transfer fuel, he suggested the Claimant's actions were not an uncommon practice. Our examination of both witnesses' testimony failed to substantiate that there was practice of employees transporting fuel in their personal vehicles for the Carrier's use. The fact that Schmidt towed a Carrier-owned mobile fuel tank to be used for fueling Carrier machines was distinctly different than the Claimant's allegation that he was doing the same thing by transporting the Carrier's fuel in a storage tank located in his tool box that supplied fuel directly into his vehicle fuel system. As previously stated, there was no record evidence that the Claimant had permission to transfer the fuel in question to his personal vehicle, nor was there a showing that this was an accepted practice on the property for the transfer of fuel. Substantial evidence was adduced at the Investigation

to warrant the conclusion that the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, the Claimant had approximately 15 years of service with and good work record. However, theft under the Carrier's Policy for Employee Performance Accountability (PEPA) is a dismissible offense no matter how much service an employee might have or how good their service record had been. The Board finds and holds that the Claimant's termination was in accordance with PEPA. The Board will not set aside the Claimant's termination because it was not excessive, arbitrary or capricious. However, as noted above, he is entitled to five days' at the straight time rate of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of September 2012.