Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41708
Docket No. MW-41759
13-3-NRAB-00003-110390

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes 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 (removed and withheld from service by letter dated July 9, 2010 and subsequent dismissal by letter dated August 9, 2010) imposed upon Mr. J. House for the alleged violation of Maintenance of Way Operating Rules (MOWOR) 1.13 and MOWOR 1.6 following charges of alleged theft and dishonesty in connection with the entry of eight (8) hours straight time and four (4) hours overtime for June 25, 2010 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File T-D-3764-W/11-10-0383 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. House shall now '. . . be immediately returned to service, he must be paid for his lost time, including any and all overtime paid to the position he was assigned to, any overtime on any position where the claimant could hold, or the work performed by any junior employe in the absence of the claimant, and any expenses lost and we also request that Mr. House be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the notice received by the

Organization on August 10, 2010 in an August 9, 2010 letter from David Douglas, Division Engineer.'"

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 his dismissal, the Claimant had worked for the Carrier for some 38 years. At the time of the event that led to his dismissal, the Claimant was assigned as the Assistant Foreman on the Zone 4 Maintenance Gang. The Claimant entered the time worked on June 25 by the Zone 4 Maintenance Gang.

On Friday, June 25, 2010, the Claimant took his annual physical required by the U.S. Department of Transportation in order to retain his Commercial Driver's License. The parties agree that accepted practice was to consider the physical (including travel to and from the site of the examination) the equivalent of an eight hour workday.

On Friday, June 25, 2010, the other members of the Zone 4 Maintenance Gang worked four overtime hours. When the Claimant entered the time worked by the Zone 4 Maintenance Gang into the computer system the following week, he reported that all members of the group had worked eight straight time hours and four overtime hours. The computer entry in question most likely took place on Tuesday, June 29. The computer entry was witnessed by a fellow member of the work group. Later that day, the co-worker reported to the supervising Roadmaster (Greg Mackley) that the Claimant had entered hours of work for himself for June 25, 2010 that were incorrect.

Roadmaster Mackley checked the computer time roll on July 1 and by letter dated July 9, 2010, the Claimant was informed that he was being withheld from service pending an Investigation of an allegation of ". . . theft and dishonesty when you falsified your time for June 25, 2010, when you entered 8 hours straight time and 4 hours overtime."

The formal Investigation was conducted on July 15, 2010. The Conducting Officer was the Jamestown Roadmaster. Thereafter, by letter dated August 9, 2010, the Claimant was notified: "As a result of investigation held on Thursday, July 15, 2010 . . . you are hereby dismissed effective immediately from employment with the BNSF Railway Company for theft and dishonesty when you falsified your time for June 25, 2010, when you entered 8 hours straight time and 4 hours overtime." The letter was signed by the Division Engineer.

By letter dated August 20, 2010, the Organization filed its appeal alleging that the dismissal was unfair and without just cause. The letter stated: "By reference, but not limited thereto, Rules 1, 2, 24, 25, 29, 40, 42, and 80 are made part of this letter." The letter alleged that (1) neither the Hearing Officer nor the Investigation was fair and impartial, (2) the Carrier's decision had been made before the Investigation and (3) the Claimant's entry was an error made when the Claimant was rushed.

By letter dated September 1, 2010, the Carrier denied the appeal, asserting in relevant part:

> "The principal's culpability was evident throughout the transcript. His claim for four hours overtime on June 25, 2010 was outright theft of BNSF monies. The testimony offered by two of his coworkers established the fact that Mr. House did not perform any service other than the four to five hours required to undergo a physical examination . . . ."

By letter dated September 28, 2010, the Organization further appealed the matter and made explicit its view that the Carrier had violated Rule 40:

> "The Carrier witness that initially 'informed' it of the allegation established by testimony that the Carrier had knowledge of the incident on June 29, 2010. * * * That fact, in and of itself, requires any

hearing to be held not later than fifteen (15) days from June 29th or by July 14th."

The appeal was processed by the parties according to Rule 42 without resolution and was ultimately progressed to the Third Division of the Board.

The Carrier's Submission summarized its position as follows:

"Joseph House, an Assistant Section Foreman, had to get his annual DOT physical, required to retain his CDL license. This took, by his own account, four (4) hours on a Friday morning. When he put in the payroll on the computer the next Tuesday morning, he claimed, for himself, not just 8 hours straight time, not just 1 hour as per diem, but also 4 hours overtime. He did this even though, and in spite of the fact that a member of his own crew questioned him about this as he was making the data entries."

The Submission presented the Issue as: Did the Company present substantial evidence of the Claimant's charged offense?

The standard to be applied in this case is "substantial evidence." As the Carrier's November 18, 2010 letter to the Organization states:

"The 'substantial evidence rule" has been set forth by the Supreme Court of the United States as:

'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

Involuntary loss of employment is a most serious matter and it is more serious still when that loss is triggered by a charge that includes matters – such as dishonesty – that could bring opprobrium to an employee. Such a consideration places the evidence that is required to support a termination based on a charge of dishonesty on the upper levels of the substantial evidence continuum.

The Organization challenges the Carrier's action on both procedural and substantive grounds. Among the procedural objections are that the Carrier failed

to schedule and hold a timely Investigation, and that the Claimant was improperly withheld from service.

Rule 40 of the Agreement between the parties states:

> "A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the company (excluding employes of the Security Department) and except as provided in Section B of this rule.
>
> B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefore."

Procedural Concerns

The Carrier contends that the actions it took after learning of the alleged wrongdoing were because of the seriousness of the charge. The Board agrees that theft is a most serious transgression; however, two procedural concerns arise.

1. The suspension pending the Investigation. The Organization's argument that the Claimant's suspension was not justified because the Claimant's admitted action was a mere mistake, not theft, is not persuasive. One would not have a basis for determining whether the action was error or theft until a full and fair Investigation had been completed and a justified conclusion drawn. According to the Roadmaster's stated understanding of what was reported to him, the allegation concerned an action that — if proven — indicates that theft had taken place. Theft would be a "serious infraction of Rules" and could justify dismissal. Suspension pending an Investigation of a charge of theft would be a valid action.

2. In his September 1, 2010 response to the filing of the claim, the General Manager of the Twin Cities Division wrote: "Mr. House was withheld from service pending investigation due to the serious nature of the allegation." (Emphasis added)

However, depending on which version of the report one employs, one is forced to consider that the Carrier waited eight or ten days – the period from the date of notice (June 29 or July 1) until July 9 – to remove the Claimant from service. Although the allegation of theft would justify suspension pending Investigation, the fact that the Carrier waited more than a week before withholding the Claimant from service undermines its argument that such action was justified.

3. The timing of the investigation. The letter instructing the Claimant to attend the Investigation and the dismissal letter both state: "Carrier's date of first knowledge of this theft and dishonesty is July 1, 2010." The implication of these assertions by the Carrier is that the notice clock provided in Rule 40 (A) did not start ticking until the Roadmaster checked the computer on July 1. This assertion is contrary to what is stated in the Carrier's Submission to the Board:

> "On the morning of Tuesday, June 29, Mr. House entered his crew's time on the computer. For Friday, June 25, for himself, he showed 8 hours straight time, 1 hour per diem and 4 hours overtime. As he was doing this, another member of the crew, Kevin Gustafson, was sitting nearby, watching Mr. House as he did the input. That afternoon, after work, Kevin Gustafson called the Roadmaster, Greg Mackley, alleging that Mr. House had put in four hours overtime for the previous Friday that he wasn't entitled to." (Emphasis added)

The Carrier's argument that the "offense wasn't established until . . . [the Roadmaster] reviewed the timeroll entries, for that was when 'information was obtained by an officer of the company' and that occurred two days later on July 1," is without merit. To accept this approach is to modify Rule 40 (A) to mean that the time limit in Rule 40 (A) – which is, after all, a limit on management – may be unilaterally extended by the Carrier merely by having an Officer of the Company do nothing for several days after receiving an allegation of wrongdoing and then, at a time of that person's choosing, review official records.

The Investigation was held on July 15, 2010. That date is 16 days from June 29; the date information was obtained by an Officer of the Carrier. Rule 40 (A) requires that the Investigation be held ". . . not later than fifteen (15) days . . . from the date information is obtained by an officer of the Company . . . and except as provided in Section B of this rule."

The clear implication of Section B of the Rule is that in cases where an employee is held out of service, an interval of fewer days is allowed before the Investigation must be held. Holding off suspension for more than a week after Rule 40 (A) notification does not provide more days before the Investigation is held.

The Board finds that the Investigation was untimely. Rule 40 (J) specifically states:

> "If an investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe shall be considered as having been dismissed."

Accordingly, the charges against Claimant J. House shall be considered as having been dismissed.

The Substantive Concern

Given the opprobrium contained in the charge of theft, dismissal of the charges because of a procedural shortcoming is not sufficient redress for the Claimant if the charge of theft lacks substantiation. It is for this reason that we proceed to discuss the charge itself.

The remaining question is whether the Claimant's computer entry that he had worked eight straight time and four overtime hours on June 25, 2010 was done purposefully or in error.

In his September 1, 2010 response on behalf of the Carrier to the filing of the appeal, the General Manager of the Twin Cities Division wrote:

> "The principal's culpability was evident throughout the transcript. His claim for four hours overtime on June 23, 2010 was outright

> theft of BNSF monies. The testimony offered by two of his coworkers established the fact that Mr. House did not perform any service other than the four to five hours required to undergo a physical examination that began at 9:00 am on the date in question; including one and one-half hours travel time to and from the clinic.
>
> Theft is among the most egregious offenses an employee may perpetrate against his employer and dismissal for such is supported by numerous awards."

Material from the Carrier conflates two separate aspects of what took place on Friday, June 25, 2010: the claim for eight hours' straight time pay and the claim for four hours of overtime. The record establishes that it was accepted practice to consider the physical examination at issue in this case as a full eight-hour day of work regardless of the actual time involved. Thus, the sole question in this case is the entry, admitted by the Claimant, which reported that he, like the other members of his crew, had worked four hours of overtime on June 25, 2010.

Although the following passage from the Carrier's Submission assumes the Claimant's guilt, it is helpful in that it states the two ways that the incorrect entry could have been made:

> "So there were two ways that he could have input his attempt to secure 4 hours overtime for himself for June 25: he could have put that in his own entry, with a starting time and a reason code; or he could have called up the pre-population of the field with the four crew members, put in the starting time, and the ending time, and the reason code for one of those four, and then chosen to click the 'select all' box . . . ."

In his responses at the Investigation, the Claimant offered the following explanation. Because he had been at the physical on June 25, he entered the time worked into the computer on either Monday or Tuesday. He asked a fellow worker what he got for overtime on June 25 and was told four hours. He put that number in and clicked. The co-worker who reported the matter to the Roadmaster confirmed the Claimant's description of his method of entry, "Cause he did it in just one shot." In short, the record indicates that the Claimant included all members of the work crew when he, with one click, entered the data into the computer. Such a

method of data entry is consistent with the Claimant's assertion that he had made an error.

The conflation by the Carrier of straight time and overtime hours shows up most significantly in the Roadmaster's testimony that the reporting worker: "[A]lleged that Mr. House had put in four hours overtime for the preceding Friday that he felt he wasn't entitled to. * * * [T]he employee also stated that, he called Mr. House on it, that he didn't think he was entitled to the time. Mr. House just shrugged his shoulders and continued on with what he was doing."

Those assertions were not confirmed by the employee.

Under questioning by the Conducting Officer, Kevin W. Gustafson, the co-worker who reported the entry explained his exchange with the Claimant when the entry was made:

> "I guess I just asked him if he had anything special that he had to put in for being gone, and he said, nope, and, okay, cause I guess I didn't know for sure. Cause I don't . . . ." (Emphasis added)

The Vice General Chairman asked the reporting employee:

> "Do you remember talking to Mr. House about this issue? Did you say anything to him about how come you put in eight straight and four overtime, or you just questioned whether it should have been a, a vacation day or getting paid?"

The co-worker's response to this question made clear what his concern was:

> A: "[W]hen we were, when I was driving him back on Thursday . . . we were talking about it, and I told him, I think, I said, that's when I thought, I didn't know for sure what the company policy was on it, so I thought he should have to take a vacation day to have the day off. But, and then when he was putting the time in, in the morning, I just asked him if he had to put in anything special for having the whole day off." (Emphasis added)

According to the Roadmaster's hearsay account, the Claimant was directly challenged on the erroneous overtime entry and had shrugged the matter off. If this were an accurate description of what had happened, it would have indicated that the overtime entry was purposeful and would have justified the Carrier's conclusion that theft had taken place. However, the direct evidence is that the only question raised with the Claimant at the time of data entry was about putting in eight hours of straight time for the physical rather than taking vacation time. (The co-worker's assumption that vacation time should have been used was not correct.)

In short, it is clear that the basis for the Claimant's dismissal was the Roadmaster's hearsay version of what he had been told by Gustafson. However, according to what Gustafson stated at the Investigation, he questioned the Claimant about the straight time, not the overtime entry.

Because erroneous hearsay does not amount to substantial evidence, the claim must be sustained to the extent provided in the parties' Agreement.

AWARD

Claim sustained.

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 16th day of September 2013.