

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41798
Docket No. MW-42135
13-3-NRAB-00003-130093

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Pan Am Railways/Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed by letter dated February 8, 2012 upon Mr. G. Mazzantini for alleged violation of Safety Rules PGR-C (para. 2 & 3), PGR-L (para. 1) and PGR-N (para. 4) in connection with allegations that he was at a scrap company for non-authorized work on numerous occasions was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier's File MW-12-05).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. G. Mazzantini shall be returned to work, have his record cleared of the charges and be compensated for all lost wages and benefits as a result of the Carrier's improper discipline.”

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.

By letter dated November 22, 2011 the Claimant was directed to report for a Hearing on December 7, wherein it was alleged that on November 9, after questioning, it was determined that he was at a scrap company for non-authorized work while on duty on numerous occasions, in violation of specific sections of Safety Rules PGR-C, L & N, which provide, in relevant part, that employees must not be dishonest, enter time on time slips for time not actually worked, and act in willful disregard of Company interests. After two unilateral postponements, a Hearing was conducted on January 26, 2012 and, by letter dated February 8, 2012, the Claimant was found guilty of all charges and dismissed from employment.

The following provisions of Article 26 - Discipline, are relevant to the arguments raised in this case:

“26.1 No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 14 days of the Carrier’s first knowledge of the act or occurrence The hearing will be scheduled to take place on a regularly scheduled work day within 30 days of the Carrier’s first knowledge of the act or occurrence

26.2 An Employee may not be suspended pending a hearing except when the act or occurrence to be investigated is of a serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier. Suspension pending a hearing will not be considered as prejudicial to the employee and will be used sparingly by the Carrier.

26.3 The employee will have the opportunity to request that the Carrier provide necessary witnesses not listed on the notice of hearing and will have the opportunity to secure the presence of witnesses in his own behalf

26.7 If the Carrier’s discipline decision is modified or overturned at any stage of the handling resulting in a payment to the employee, such payment may be offset by any earnings received by the employee during the relevant time period which would not have otherwise been

earned but for the discipline. The Carrier will work with the appropriate government agencies to assure that no Railroad Retirement benefits are adversely affected by the operation of the above provision.”

At the Hearing, Carrier Police Officer Murphy testified that during the course of his overall investigation into the theft of rail commencing in early September, he was given the names of various employees, including the Claimant. Murphy stated that although the Claimant was not found to have been involved with the theft of rail, during the investigation he became aware that the Claimant had been at Apkins Scrap Yard when he was supposedly working on a number of occasions, and obtained detailed Vendor Tickets to this effect on November 1, 2011. Executive Director of Safety and Security Nagy testified that he obtained the Claimant’s time records and compared them with the Vendor Tickets establishing the Claimant’s involvement with stealing time from the Company a couple of days before taking him out of service on November 9, 2011. The Claimant, a 33-year employee serving as a Surfacing Foreman in the Engineering Department for 20 years, stated that Nagy questioned him that date about who was involved with the rail theft and gave him “the chance to come clean” on that issue, and after he replied that he had no knowledge of that information, he was told by Nagy that he was being removed from service because he may have visited Apkins Scrap Yard to scrap items for personal gain while on Company time, which he also denied. Over the Organization’s objections, the Hearing Officer admitted signed, sworn statements from two employees of Apkins Scrap Yard concerning their procedures and records, without requiring the attendance of any representative of Apkins Scrap Yard at the Hearing for the Organization to be able to question, especially in light of the Claimant’s written statement and that of his son, about his son’s use of the Claimant’s account to scrap items at Apkins Scrap Yard during the relevant time.

Without going into further detail about the nature and extent of the evidence relied upon by the Carrier in determining the Claimant’s guilt of the charges, the Board will address certain of the procedural Agreement due process arguments raised by the Organization both at the Hearing and during the on-property claim handling process. The Organization argued that the Claimant was improperly withheld from service on November 9, 2011 based on the contention the allegations against him do not rise to the level of seriousness or a threat to the Carrier or its property required under Article 26.2, citing Third Division Awards 21834, 27009, 28767, and 29588. It also asserts that the Carrier failed to issue a Hearing Notice within 14 days of when it had first knowledge of the act involved, and failed to schedule and hold a Hearing within 30

days of such date, in violation of Article 26.1, and that failure to comply with both clear contractual time limits requires overturning the resulting discipline without reaching the merits of the claim, relying on Third Division Awards 16262, 19275, and 28927. Finally, the Organization contends that the Claimant was denied his Agreement due process right to a fair and impartial Hearing by the Carrier's failure to provide necessary witnesses for questioning at the Hearing, citing Third Division Award 13240.

The Carrier argues that the Claimant received a fair and impartial Investigation, and that it first learned of the actions leading to the charges after speaking with the Claimant on November 9, 2011, making both the November 22 Notice of Hearing and the original Hearing date of December 7, 2011 timely under the parameters of Article 26.1. It also contends that there was substantial evidence in the record to support the charges. It asserts that this conduct met the seriousness requirements for removal from service under Article 26.2 because it involved dishonesty, and that the serious nature of the offense warranted dismissal, as noted by the Rules cited, making the penalty neither arbitrary nor unreasonable.

After careful review of the record, the Board is of the opinion that we need not reach the merits of the case, because the record supports the conclusion that the Carrier's official designated to conduct an investigation of individuals including the Claimant learned, and obtained documentary evidence, on November 1, 2011 that the Claimant was present at Apkins Scrap Yard on dates and at times when he was normally working. The Notice of Hearing charging the Claimant with theft of Company time based upon this information was not issued until November 22, 2011, outside the required 14-day period contained in Article 26.1 for the issuance of Hearing notices from "the Carrier's first notice of the act or occurrence." Additionally, the initial December 7 Hearing date falls outside the required 30-day time limit for scheduling a Hearing set forth in the same provision. Even accepting Nagy's testimony that he first knew of the Claimant's actions when he put together the Apkins Scrap Yard information with time record documentation a couple of days before his conversation with the Claimant removing him from service on November 9 or earlier - the November 22 Notice of Hearing is still outside the permissible time limits of the Agreement, and the December 7 Hearing date would not be within the requisite 30-day period.

We adopt the following rationale set forth in Third Division Award 28927 as equally applicable in this case.

“The time limit as set forth is clear, unambiguous, and mandatory. It has not been met by the Carrier in this case. We will not, therefore, examine the merits of the discipline inasmuch as the Investigation was not timely held. This Board has ruled in many cases, too numerous to require citation here, that time limits such as those found in Rule No. 25 are meant to be complied with. When they are not complied with, we will sustain the Claim of the Organization.”

Having so found, the Board need not address the other procedural Agreement due process arguments raised by the Organization. The claim is sustained, and the Claimant shall be returned to work, have his record cleared of the charges, and be compensated for all lost wages and benefits commencing on November 9, 2011 when he was removed from service. In accordance with Article 26.7, the Claimant's interim earnings are properly deducted from the compensation owing herein.

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 17th day of December 2013.