

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32962
Docket No. MW-33635
98-3-97-3-104**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Assistant Foreman R. Billie for alleged violation of Rules 1.6 and 1.15 in connection with his being observed attempting to enter a fellow employee's vehicle on June 27, 1995, was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File D-240/960263).**
- (2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated 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.

In addition to challenging the discipline on the merits, the Organization raised the procedural objection that Claimant was removed from service without first having a fair and impartial Hearing. Our review of the record, however, discloses no procedural impropriety by Carrier. Rule 48 (o) specifically permits removing an employee from service where serious and/or flagrant violations of Company Rules or instructions are apparent. Carrier's official observed Claimant for several minutes trying to unlock a co-employee's vehicle using a piece of wire. The official's initial inquiry revealed that Claimant did not have the owner's permission. Rule 48 (o) also establishes certain time limits for conducting the Investigation and issuing discipline whenever an employee is held out of service pending an Investigation. The record shows that Carrier complied with those requirements.

Carrier's finding of culpability is also supported by substantial evidence. Claimant admitted he was attempting to gain entry to the locked vehicle without the owner's knowledge or permission. During the time spent trying to unlock the vehicle, Claimant was several hundred feet away from his work assignment. Given this evidence, Carrier did not act unreasonably in determining that Claimant was guilty of violating Rules 1.6 and 1.15.

Finally, the Organization challenges the degree of discipline. It was noted that Claimant and the vehicle owner were friends and there was no damage done. Claimant also said he had no wrongful intent. He was just looking for a place to sit down. On the other hand, according to the record, it was well known that the vehicle owner kept his wallet in the vehicle at the time.

The wrongful intent associated with Rules prohibiting dishonesty and immoral conduct is often the subject of vigorous evidentiary disputes. This is because intent is a state of mind at a moment in time. It is not susceptible of precise measurement by objective means. As a result, unless there is a confession of guilt, which is not the case here, the element of intent must be inferred from the surrounding circumstances. Like any other disputed issue, the Carrier's determination of wrongful intent must be based upon substantial evidence. While reasonable people might differ over the meaning of the evidence in this record, it is sufficient to support Carrier's determination that Claimant's conduct was dishonest and immoral.

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 23rd day of November 1998.