

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36167
Docket No. MW-36270
02-3-00-3-479

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim on the System Committee of the Brotherhood that:

- (1) The dismissal of Foreman A. M. Stroud for his alleged misuse of rapid drafts between September 19 and November 28, 1995, alleged failure to maintain a valid driver's license, alleged failure to notify the Carrier of no valid driver's license and alleged driving of a Company vehicle without a valid driver's license was without just and sufficient cause, arbitrary, capricious, excessive and discriminate discipline and in violation of the Agreement (System File D-05-99-450-01/8-00370 CMP).**
- (2) The appeal as presented by General Chairman M. S. Wimmer on September 24, 1999 to AVP-Labor Relations C. S. Frankenberg shall be allowed as presented because said appeal was not timely disallowed by AVP-Labor Relations C. S. Frankenberg in accordance with Rule 47.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman A. M. Stroud shall now be reinstated to service and compensated '... for all lost wages including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled*****"**

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.

Prior to his termination on December 18, 1998, the Claimant had 26 years of service with the Carrier or its predecessors. He had 19 years of service as a Foreman in the Track Sub-Department. Prior to January 30, 1996, the Claimant had been working as an extra gang Foreman on a surfacing gang at Kirkland, Illinois.

On January 30, 1996 the Claimant was removed from service. He was subsequently notified to attend an Investigation regarding alleged timeroll discrepancies during November and December 1995. The Investigation was held on February 16, 1996. On March 5, 1996 the Claimant was notified that his employment was terminated for falsification of time on December 2 and 3, 1995.

On April 2, 1996 the Carrier mailed the Claimant the following letter:

"Please refer to my letter dated March 5, 1996 advising your services with the Company were terminated. Subsequent to your termination, discrepancies were noted regarding your alleged misuse of rapidrafts; your alleged failure to maintain a valid driver's license as required; your alleged failure to notify the Company of no valid driver's license and your alleged driving Company vehicle without a valid driver's license.

Inasmuch as you have been dismissed from the service of the Soo Line Railroad (CP Rail System) as a result of your responsibility in connection with a previous incident, a formal investigation in connection with the charges outlined above will not be conducted at this time. However, should

you for any reason be returned to the service of this Company through a third party, these charges will be reviewed for appropriate handling."

In May 1998 the Claimant was reinstated to service without backpay by Public Law Board No. 6017.

On September 21, 1998, the Carrier activated the above charges that had been held in abeyance since April 2, 1996. The Claimant was notified to attend an Investigation on October 8, 1998 to develop the facts and circumstances involving these charges and to place responsibility, if any, regarding them. The Claimant remained out of service pending the Investigation.

On September 28, 1998 the Claimant was advised that the Investigation scheduled for October 8 was postponed by mutual agreement of the Organization and the Carrier. He was also told by the Carrier that:

"Please refer to BMW General Chairman M. S. Wimmer's request of September 22, 1998 for postponement of the investigation/hearing scheduled to be conducted on October 8, 1998. This will advise that, per mutual agreement between the BMW Organization and this carrier, the aforementioned hearing is postponed and will be held on Wednesday, November 4, 1998 at 9:00 a.m.

In addition, supplementing the letters of April 2, 1996 and September 21, 1998, please be advised that the notice should be modified to read as follows:

. . . alleged misuse of rapid drafts between September 19, 1995 through November 28, 1995.

. . . alleged failure to maintain a valid driver's license as required.

. . . alleged failure to notify the Company of no valid driver's license.

. . . alleged driving Company vehicle without a valid driver's license.

Balance of the original notice remains the same.”

The Investigation was held on November 4 and 5 and concluded on December 4, 1998.

On December 18, 1998, the Claimant’s services were terminated effective immediately. According to the Carrier, the evidence presented at the Investigation demonstrated that:

- Claimant was dishonest when he failed to notify it that his motor vehicle license had been revoked in 1983 and he continued to drive company vehicles from 1988 through 1995.**
- Claimant intentionally withheld from the Carrier that he did not possess a valid driver’s license and continued to work various positions requiring a valid driver’s license in 1992, 1993, 1994 and 1995.**
- Claimant misused rapid drafts when he received cash back from 13 separate rapid drafts he made out between September 19 and November 28, 1995.**

The Organization appealed the Claimant’s termination in accordance with Rules 18 and 47 of the Schedule Agreement. The Carrier denied the appeals and the dispute was progressed to the Board for resolution.

It is the Organization’s position that this dispute is so procedurally flawed that it is unnecessary to consider the merits of this appeal. The Organization strenuously argues that the charges against the Claimant were untimely because the Carrier waited over four months after it became aware of the Claimant’s purported misuse of rapid drafts before initiating charges. According to the Organization, this was a clear violation of Rule 18(b) of the Schedule Agreement.

The Organization further contends that the Carrier violated Rule 47 of the Agreement because AVP-Labor Relations Frankenberg never responded to its appeal. The Organization maintains that the wrong Carrier Officer (Manager Track Maintenance Howard) responded to the appeal.

In addition to these procedural errors, the Organization argues that the Claimant was also denied a fair and impartial Investigation because Hearing Officer King was involved in the Claimant's 1996 Investigation. Moreover, he did not render the decision in this dispute even though he was the Hearing Officer at the Claimant's Investigation.

Notwithstanding the Organization's strenuous objections, we do not consider the dispute before us procedurally flawed. The Carrier had the right to wait until its Investigation was complete before initiating charges against the Claimant.

Additionally, it was not improper for Manager Track Maintenance Howard to respond to the Organization's appeal because a copy of the appeal was sent to him by the General Chairman.

A reading of the Claimant's extensive Investigation convinces the Board that the Investigation was fair and impartial. The Hearing Officer showed no prejudgment toward the Claimant and allowed him wide latitude to respond to the charges. Furthermore, Rule 18 does not require the Hearing Officer to render the decision in a disciplinary proceeding on this property.

The evidence demonstrates that the Claimant used rapid drafts to pay for supplies he purchased for his railroad truck at Hilltop Gas and Save in Monroe Center, Illinois. On some occasions the rapid drafts exceeded the exact amount owed the station and the Claimant would receive small change back from the service station. He claims that he used this change to wash his railroad truck.

The Carrier maintains that its policy requires employees to use rapid drafts for the exact purchase price of supplies. They are not allowed to receive any cash back when writing rapid drafts, according to the Carrier. While the Claimant may have inadvertently violated this policy there is not a scintilla of evidence in the record before the Board that he used any monies he received from using rapid drafts for his personal gain. He insisted that all the change returned to him after using rapid drafts was used to wash the railroad truck assigned to him. His contention was never refuted. Accordingly, the Claimant's unintentional violation of the Carrier's policy regarding rapid drafts would not justify termination of his employment.

The Claimant admitted that he did not have a valid driver's license prior to February 2, 1994. In 1992, 1993 and prior to February 2, 1994, he operated a Carrier vehicle without a valid driver's license. This was not an insignificant violation.

Nevertheless, in view of the Claimant's 26 years of service with the Carrier and its predecessors, this offense would not justify his termination.

Based on all the foregoing, the Board finds that the Claimant must be reinstated to service with the Carrier with his seniority restored but without compensation for any lost wages.

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 20th day of August 2002.