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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37054
Docket No. SG-36928
04-3-01-3-469

The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of J. Fontenot for reinstatement to service with compensation for all lost time and benefits and for the discipline to be removed from his personal record. Account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued harsh and excessive discipline against the Claimant without the benefit of a fair and impartial investigation and without meeting the burden of proving the charges against him in connection with an investigation held on November 9, 2000. Carrier compounded the initial violation by failing to render a decision and provide a transcript of the investigation within the prescribed time limits. Carrier’s File No. 1244879. General Chairman’s File No. S-68-(C)-075. BRS File Case No. 11707-UP.”

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.

The Claimant was a Signal Maintenance Foreman for the Carrier until his discharge on September 7, 2000. The Claimant had been found to have falsified time records on August 7 and 10, 2000; the Claimant himself testified to having over-reported hours at the August 29, 2000 Investigation. The Claimant was found to have violated Union Pacific Rules 1.6 and 1.13, effective August 2, 2000. The Rules state in relevant part:

"1.6: Employees must not be . . . 4. Dishonest . . . Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the Company or its employees is sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be condoned.

1.13: Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

The Claimant and the Organization contend that the discipline should be overruled on two grounds: 1) the discipline imposed was "harsh and excessive" and 2) the Carrier failed to comply with proper discharge procedures. The Claimant does not dispute that his actions constituted violations of Rules 1.6 and 1.13.

The Organization contends that Rule 68 of the Agreement of February 1, 2000 requires a "fair and impartial" Hearing prior to the institution of discipline. To that end, the Organization cites precedents for the proposition that such discipline should be corrective and progressive, not punitive. See Third Division Awards 19037 and 22085. Rather, the Organization states that informal conferencing, per the Carrier's Discipline Diversion program should have been imposed. To that end, the Organization cites to a portion of the transcript where the Claimant's supervisor, Mr. Dean, acknowledges that the Claimant might not

have been the subject of an Investigation if informal conferencing had been used after the first infraction. The program description, however, does not make such conferencing mandatory, stating only that it "is encouraged, when appropriate."

It has long been held that dishonesty, in any form, is a dismissible offense. Time card manipulation, the dishonesty in the instant matter, is tantamount to theft, which is also summarily dismissible. The Board cannot substitute its judgment for that of the Hearing Officer, absent arbitrary, capricious, or discriminatory behavior or an abuse of managerial discretion. None is found here. Regardless of whether the Claimant's work history is accounted for, in view of the Claimant's admissions at the Investigation, the Board has no alternative but to deny the claim on these grounds. See Third Division Awards 24825, 27795 and 36579.

With respect to the procedural flaws alleged, the Board also must deny the claim. Rule 68 states in relevant part:

"In cases wherein the Claimant is being held out of service, a decision will be rendered and the employee notified within fifteen (15) calendar days after the completion of the investigation. If discipline is to be assessed, a transcript of the testimony taken at the investigation will be furnished to the employee under charge and his representative within fifteen (15) calendar days after the close of the investigation."

The Organization asserts that the Carrier violated this provision and cites Board precedent for the proposition that the discipline must be voided. See Third Division Awards 18354 and 22748. The precedents cited are distinguishable. In those cases, time violations occurred pre-hearing, thereby prejudicing the underlying Investigation. The violations alleged herein are post-hearing and only have the effect of potentially prejudicing appellate procedures. The Organization's contention that the defect alone, without any demonstrable prejudice, requires reversal is misguided. It would be impossible to hold that the charges against the Claimant have not been sustained and there is no contractual remedy provided for violations of Rule 68 unless there was some negative affect on the Claimant's rights to due process. See Third Division Awards 20423 and 31625.

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Based on the foregoing, we have no alternative but to deny the claim.

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 22nd day of June 2004.