

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37473
Docket No. MW-37927
05-3-03-3-348**

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. S. W. Thomsen on July 12, 2002 for alleged violation of G.C.O.R. Rule 1.6 Conduct, Safety Policy Handbook General Rule O and the expense instructions in connection with an investigation on June 24, 2002 was arbitrary, capricious, without just cause and in violation of the Agreement (System File D1662-03-02/8-00434).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. S. W. Thomsen shall now be reinstated to service and paid for all time lost with all rights and benefits unimpaired.”**

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.

On June 24, 2002, an Investigation was conducted to determine the Claimant's responsibility, if any, in connection with his alleged attempt to claim reimbursement for lodging and meal expenses not actually incurred in March 2002, while he was assigned to a mobile production rail gang working in the vicinity of Monticello, Minnesota. At the time of the incident, the Claimant had accumulated approximately five years of service within the Carrier's Maintenance of Way and Structures Department, and had at least one disciplinary notation on his record, a ten-day suspension, the record shows.

By letter dated July 12, 2002, the Claimant was informed that the testimony and evidence adduced during the Investigation substantially established his responsibility in connection with the charges. As a result, the Claimant was dismissed from service, as set forth in Part (1) of the claim, above.

The Organization contended that in this dismissal case, the Carrier's quantum of evidence necessary to substantiate the charges is considerably higher than that required in other types of discipline cases. According to the Organization, the Carrier presented no evidence to prove that the Claimant violated any Rule or that his actions were motivated by dishonesty or an intent to purposely defraud the Carrier. As a result, the Carrier failed to sustain its burden of proof and the discipline should be entirely expunged from the Claimant's record, because such discipline was assessed without "just and sufficient cause." Thus, the Claimant must be reinstated and compensated for all lost time accumulated during the period of dismissal, the Organization strenuously argued.

The Organization furthermore asserted that through the testimony obtained on the record, it was shown that the Claimant had not been afforded any training or instruction on the proper procedures for completing the expense reimbursement forms associated with production gang work, a mitigating factor in this matter. Moreover, the Claimant's testimony at the Investigation clearly established that on the dates in dispute, he was assigned to the production gang and the lodging had been paid for in cash.

Thus the Organization stressed that the Claimant's subsequent request for lodging reimbursements for the week of March 10 through 14, 2002 was completely proper, and the Carrier did not establish by persuasive evidence that the Claimant

engaged in fraudulent conduct by submitting an expense form for each of those dates when he knew he was not entitled to any expense reimbursements. Indeed, according to the Organization, the record contains no evidence that after paying cash for the rooms, the Claimant then purposely charged the rooms to the Carrier through use of the Corporate Lodging Card and then subsequently submitted a personal expense form for the room charges in an attempt to reap some sort of personal financial gain.

Finally, the Organization contended that the record established there was "considerable confusion" regarding the lodging charges and that the motel bill had contained "mis-charges," or errors, which the record never showed were somehow attributed to the Claimant. In the Organization's view, "what we have here is an instance where the Claimant established that he paid cash for his lodging on the dates involved here but the lodging facility nonetheless charged the Carrier for payment of said room charges."

The Carrier argued that the evidentiary record clearly established that the Claimant provided a Corporate Lodging Card to the motel and signed an invoice authorizing the Carrier to pay for the room expenses, clear evidence of his duplicitous conduct. According to the Carrier, the explanations proffered by the Claimant as regards the supposed confusion between the direct payments and the use of the Corporate Lodging Card were not substantiated by the record. Indeed, in the Carrier's view, Audit Supervisor Sutherland's detailed testimony was incontrovertible proof that on the dates of March 10 through 14, 2002 the Claimant requested to be reimbursed for lodging expenses after the Claimant had, at the time of registration at the hotel, signed the paperwork necessary for the room charges to be directly billed to the Carrier through the Corporate Lodging Card. Therefore, the evidence and testimony adduced on the Investigation record was substantial proof that the Claimant, through a "double-billing scheme," claimed lodging expenses to which he knew he possessed no entitlement.

With respect to the issue of expense account training, the Carrier contended that the Claimant never disputed the direct testimony of Track Program Supervisor Balmer that the Claimant had received training at the beginning of the production season regarding the proper procedures for using the Corporate Lodging Card and completing expense account forms. Thus, Track Program Supervisor Balmer's testimony that the Claimant had been trained was unrefuted, even if that supervisor had not himself specifically delivered the training.

In light of the above, Balmer's testimony was strong evidence the Claimant had been trained on the proper methods for using the card and completing the forms. Moreover, the Carrier points out that the expense form submitted by the Claimant was not accompanied by any receipts which, in the Carrier's view, may have substantiated the Claimant's assertion that the rooms had been paid for in cash and that the mix-up involving the charges incurred on the Corporate Lodging Card might have been attributable to the lodging establishment.

The Carrier emphasizes the charges proven at the Investigation by the testimony and documentary evidence adduced on the record were serious, and the Claimant's deliberate attempt to obtain expense reimbursement monies after such had been directly paid by the Carrier to the lodging establishment through the Corporate Lodging Card was incontrovertible evidence that the Claimant willfully submitted fraudulent expenses, it further submits. Therefore, the Carrier stressed that, in light of the proven charges, the assessment of strong discipline was clearly warranted, and the dismissal was commensurate with the proven offenses. As a result, the Carrier urged the Board to uphold the Carrier's assessment of discipline in full, and deny the Organization's claim.

The Board carefully reviewed the parties' Submissions, the Investigation transcript and attached exhibits and finds substantial evidence of the Claimant's guilt of the charges. At the outset, we note that both parties asserted various jurisdictional and procedural errors. The Organization argued the errors it pointed out required a removal of or change in the discipline. We have carefully considered the parties' objections including the Organization's objections which, if sustained, might preclude the Board from reaching the merits of the case. We conclude that, under the factual circumstances of this case, the jurisdictional and procedural arguments asserted by both of the parties were not convincing. Thus, the Board is compelled to afford this case a full review, both as to merits and from the standpoint of whether, if guilty, the Carrier's penalty of dismissal was consistent with the just cause standard.

From our close review of the record, particularly the testimony and documentary evidence presented by the Audit Supervisor which, we find, was not materially contradicted by the Claimant's own testimony, we have determined that the Claimant bore some responsibility for the billing errors. However, we emphasize we are persuaded that the evidence that his misconduct did not rise to the level of deceitfulness or willful intent to defraud the Carrier, as the Carrier has

principally argued. But, contrary to the Organization's position, the evidentiary record establishes to the Board's satisfaction that the billing mistakes cannot be construed as having been solely attributable to the lodging establishment, as we read the evidence of record. The mistake was the Claimant's.

Specifically, the Claimant essentially testified that notwithstanding the fact that his fiancée had paid for the room in cash, he did present the Corporate Lodging Card to the employee stationed at the motel's front desk. Because he had presented the card, we reason that it was not unreasonable for the motel employee to charge the room to the Carrier, especially if that was the customary practice with regard to this Carrier's traveling employees.

In light of the above factual circumstances, we find that because the record reflected that the Claimant had been given sufficient training regarding the procedures for using the Corporate Lodging Card and filling out expense forms, his explanation that he did not believe that producing the card or signing a ledger sheet related to the card's use would generate a direct bill to the Carrier was self-serving and, and under the specific factual circumstances, was not believable. Thus, we find that when the Claimant used the card for registration purposes, although there was no evidence that he produced it for some fraudulent purpose, it was not unreasonable for the motel to use the card to process the room charges once the Claimant had tendered it. In sum, we find that the Claimant's sloppy handling of the card, and perhaps not making it clear that the room had been paid for in cash, caused the billing error. Again, we stress that the Claimant's carelessness was not tantamount to dishonesty in the sense of a proven intent by Claimant to cheat the Carrier.

We further find it is not insignificant that the Claimant attempted to obtain room fee reimbursements, without having submitted all the necessary receipts with the expense claim. During the Investigation, it was amply established through the Claimant's own testimony that he did not possess the receipts, but that they still might have been in the possession of his fiancée or the motel. During a brief recess, the Claimant attempted to locate the missing receipts, to no avail. Again, the lack of receipts while illustrative of the careless manner in which the Claimant handled his lodging expenses for the week of March 10, 2002, is not in and of itself sufficient evidence of an intent to defraud the Carrier, we are persuaded.

Therefore, as the Organization argued, after our careful review of the extensive record in this case, we find no probative evidence which establishes that the Claimant sought to deliberately defraud the Carrier of expense monies on the dates in dispute. His lack of intent to defraud is clearly a strong factor in mitigation, we again emphasize.

Thus, while we find that the charges of improper use of the corporate credit card were proved by substantial evidence, corrective as opposed to punitive discipline is warranted in this case, given the mitigating factor of a lack of proven dishonest intent. As a result, we hold that, under the factual circumstances and given the status of the Claimant's prior disciplinary record at the time of this offense, the dismissal imposed upon the Claimant was perhaps excessive, but strong discipline was clearly required in this instance. We rule that, from the standpoint of a corrective disciplinary approach, the dismissal should be reduced to a suspension with all time served in that status to apply as a period of actual suspension and Claimant thus be reinstated, without backpay.

The Claimant's disciplinary record shall be accordingly modified to reflect the Board's reduction of the discipline, and the Claimant shall be reinstated, but without backpay. The Claimant's return to service is conditioned upon his satisfactory completion of the Carrier's standard return-to-service requirements. The award to that effect follows.

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 19th day of April 2005.