

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37678
Docket No. MW-38470
06-3-04-3-441

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. S. Kehler under letter dated July 15, 2003 in connection with charges of violating Maintenance of Way Operating Rule 1.6 Part 4, concerning an expense report for weekend travel allowance between April 11, 2003 and April 13, 2003, was harsh, excessive and unwarranted [System File C-03-D070-8/10-03-0494 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, it is requested ‘. . . that the harsh discipline of dismissal of a 25 year employee with an excellent work history be set aside, and that Mr. Kehler be returned to the service of the Carrier and he be made whole for all lost earnings and benefits.’***”

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.

Claimant S. Kehler began his employment with the Carrier in 1978. Prior to his dismissal, the Claimant had established and held seniority in various classifications within the Maintenance of Way and Structures Department. At the time of the incident leading to his dismissal, the Claimant was assigned and working as a Group 5 Operator on the RP18 Production Gang. There is no dispute that prior to the instant incident, the Claimant had incurred no discipline.

An internal study of weekend travel claims submitted by the Engineering Department employees revealed that some claims exceeded the limits of credibility. The Claimant was identified as one of the employees who had submitted such claims. The issue was turned over to the Carrier's Resource Protection Team, who assigned a Special Agent to investigate and issue a report.

By letter dated May 6, 2003, the Claimant was requested to attend an Investigation to be held on May 16, 2003. "The purpose of this investigation is to ascertain the facts and determine your responsibility, if any, in connection with your alleged falsification of expense report, concerning weekend travel allowance, between April 11, 2003 and April 13, 2003. This incident occurred while you were assigned as a Group 5 Operator on the RP18 Production Gang."

Two separate Investigations were eventually held on June 24, 2003, during which the Special Agent testified that out of the ten weekend travel claims submitted by the Claimant between January 31 and April 17, 2003, the Claimant made only one trip home. In both Hearings, the Claimant admitted his fraud and asked for leniency. In a letter dated July 15, 2003, the Carrier notified the Claimant that subsequent to the Investigation, the Claimant was being dismissed from employment for violation of Maintenance of Way Operating Rule 1.6 Part 4.

The Organization filed a timely appeal of the discipline, alleging that the discipline was unwarranted. The Organization asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met to prove that dismissal was appropriate. According to the Organization, the Carrier's decision to dismiss the Claimant is harsh and excessive, especially

considering his long and unblemished record. While the Organization does not contest that the Claimant engaged in the acts alleged, it contends that the penalty is excessive. Further, the Organization contends that the Carrier should now be required to expunge the discipline from the Claimant's record and compensate the Claimant for all lost wages and benefits.

Conversely, the Carrier takes the position that it has met its burden of proof. The Claimant was clearly afforded a fair and impartial Investigation. The Carrier considers the Claimant guilty as charged. According to the Carrier, the record in this matter provides substantial evidence to support the Claimant's culpability. The Carrier claims that it has met its burden of proof and that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166).

After a review of the evidence, the Board cannot find that there was substantial evidence to sustain the Carrier's position in whole. While the Carrier has been able to prove that the Claimant violated the relevant Rules, the Board finds that the discipline was especially harsh, considering the Claimant's long and unblemished work record. While it is uncontested that the Claimant engaged in the violations alleged, the penalty of dismissal was excessive in light of the Claimant's excellent 25-year tenure.

Therefore, while we do find that the Claimant violated the relevant Rules, we find that in light of his long and unblemished service, the Claimant shall be reinstated with seniority unimpaired, but without pay for time lost or benefits.

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 30th day of January 2006.