

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37812
Docket No. MW-38683
06-3-05-3-66**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The dismissal of Mr. L. Lemaster for alleged violation of Burlington Northern Santa Fe Railway MOW Operating Rule 1.6 in connection with alleged unauthorized use of railroad credit card, personal use of Company Vehicle #14658 and falsification of payroll records between 09/05/2003 and 10/13/2003 while assigned as foreman for Mobile Surface Correction Gang #51 working near Crawford, Nebraska was arbitrary, capricious, unwarranted and in violation of the Agreement [System File B-04-03D/13-04-0006 BNR].**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant L. Lemaster shall have the discipline rescinded from his record and he shall be reinstated to service with all seniority and rights restored and compensated for all wage loss suffered.”**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.

By letter dated October 17, 2003, the Claimant was notified to attend a formal Investigation in connection with the Claimant's alleged unauthorized use of company credit, personal use of company property, and falsification of payroll records. After several postponements, the Investigation was conducted on November 20, 2003. By letter dated December 12, 2003, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged, and he was being dismissed from the Carrier's service. The Organization thereafter filed an appeal challenging the Carrier's decision to discharge the Claimant. The Carrier denied the appeal.

The Carrier initially contends that the Claimant is guilty of the violations for which he was dismissed. The Carrier points out that it is well established that theft and dishonesty are dismissible offenses. Moreover, the Carrier maintains that the weekend travel allowance (WTA) is intended to offset some of the expenses that an employee incurs for traveling home over a weekend by means other than Carrier-provided conveyance. In addition, as a Foreman on a mobile gang, the Claimant did not hold a position that rated a company vehicle that he could take home.

The Carrier emphasizes that the Claimant is not a stellar employee. The Carrier asserts that the Claimant was dismissed in 1997 for dishonesty in acquiring company property, although the Claimant subsequently was reinstated as a matter of managerial leniency. The Carrier argues that what the Claimant did was not a

mistake or a misunderstanding of the Rules. Instead, the Claimant's intent was clear, and he had a well-thought-out plan designed to get him home on the weekend for free, and with compensation for expenses that he never incurred.

The Carrier contends that the Claimant used a company van to travel home, and he used a company credit card to pay for gas, yet he claimed WTA on these weekends. The Carrier points out that the Claimant submitted a request for payment under the Agreement, WTA, to help offset the cost of his trip home, but the Claimant did not actually incur any such costs because he was using the Carrier van and Carrier credit card. The Carrier insists that this case is different from those disputes over the payment of travel and WTA for a gang move where travel occurs over the weekend. The Carrier maintains that in the Claimant's case, no one knew that the Claimant was taking the Carrier van home. The Claimant's supervisors assumed that he was driving himself or riding with another gang member. Moreover, at least four of the Claimant's trips occurred on weekends when the gang did not move. The Carrier insists that the Organization did not present any probative evidence that the Claimant's actions were normal and acceptable procedure, or that the Carrier pays WTA to employees who drive Carrier vehicles home on the weekend.

The Carrier points to the testimony of the Assistant Roadmaster, in which he acknowledged authorizing the Claimant to make one personal trip in the van on a limited basis. The Carrier argues that this testimony contradicted the Claimant's assertions that the Assistant Roadmaster authorized his use of the Carrier van on his weekend trips home. The Carrier maintains that the Hearing Officer weighed the testimony and made a credibility determination that only the Hearing Officer could make; the Hearing Officer found that the Claimant's story lacked credibility. The Carrier argues that it is well established that the Board must defer to the on-property credibility decisions of hearing officers.

Addressing the Organization's contention that the Hearing was incomplete and that all of the facts were not brought out, the Carrier points out that the Organization represented the Claimant at the Hearing, and it had the opportunity to call and cross-examine witnesses and to submit evidence. The Carrier insists that the Hearing Officer conducted a fair and impartial Hearing, even calling Organization witnesses a second time to ensure that he understood their testimony.

The Carrier maintains that it established what its policies are, and the Claimant admitted that he knew the policy, although he asserted that no one ever followed the policy. The Carrier asserts that at this point, the Organization had the burden of showing that the Carrier never followed its policy, but the Organization was unable to make this showing. The Carrier argues that the Investigation was complete, but it just does not support the Organization's position.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that a careful and objective review of the Hearing transcript fails to establish that the Claimant was guilty of performing any intentional act of dishonesty. The Organization acknowledges that the Claimant did utilize a Carrier vehicle to make weekend trips home during September and October 2003, and he did use the Carrier's credit card to purchase gasoline for this vehicle on these weekend trips. The Organization argues that the transcript contains probative evidence that the Claimant was acting in direct compliance with his supervisor's instructions. The Organization emphasizes that the Claimant's testimony on this point was bolstered by that of his fellow employee, who repeatedly heard the Claimant being instructed to take the gang vehicle home over the weekend.

The Organization points out that the Carrier bases its case on the testimony of the Assistant Roadmaster, who claimed that he did not give the Claimant permission to take the gang vehicle home on the weekends at issue. The Assistant Roadmaster also testified that the Claimant should not have claimed the WTA in connection with these weekend trips. The Organization asserts that this testimony was not corroborated by any other witness. The Organization contrasts this uncorroborated testimony to that of the Claimant, which was supported by the testimony of another employee and by two written statements that were entered into the record. The Organization asserts that the Carrier has shown nothing more than that the Claimant simply followed the directions of his supervisor.

The Organization argues that, at best, the Carrier's decision to discipline the Claimant was based on speculation and conjecture that the Claimant may have violated a Carrier Rule. The Organization insists that the Claimant merely was

following orders. The Organization emphasizes that a large number of Board decisions have recognized that a carrier's decision to discipline an employee must rest on substantially more than speculation and conjecture. The Organization asserts that even if some discipline was warranted here, the record establishes that the Claimant did not enjoy the benefit of progressive discipline before the Carrier implemented its decision to sever his employment relationship. The Organization points out that there is ample precedent that an employee must be subjected to progressive, corrective discipline before receiving the ultimate penalty of dismissal.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit.

The Board also reviewed the evidence and testimony in this case, and finds sufficient evidence in the record to support the finding that the Claimant was guilty of unauthorized use of a railroad credit card and falsification of payroll records between September 5, 2003, and October 13, 2003. The record reveals that the Claimant traveled home and requested payment under the Agreement, despite the fact that he did not incur any costs in that trip because he used a Carrier van and credit card. The Claimant's actions were clearly in violation of the Rules.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was found guilty of very serious offenses involving dishonesty. The record reveals that the Claimant was previously dismissed in 1997 for dishonesty and later reinstated on a leniency basis. It is fundamental that dishonesty is a very serious offense in the railroad industry. Given the previous disciplinary background of the Claimant, the Board cannot find that the action

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taken by the Carrier in terminating the Claimant's employment was unreasonable, arbitrary, or capricious. Therefore, the claim will be denied.

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 21st day of June 2006.