

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39310
Docket No. MW-39477
08-3-NRAB-00003-060289
(06-3-289)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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. A. Delgado under letter dated August 20, 2004 in connection with charges of alleged falsification of expense reports concerning weekend travel allowance between April 2, 2004 and April 4, 2004, was harsh, excessive, unwarranted and in violation of the Agreement [System File C-05-D070-1/10-05-0002 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. A. Delgado shall now receive the remedy prescribed by the parties in Rule 40(G).”

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 notice dated July 12, 2004, the Claimant was directed to attend a formal Investigation to determine his responsibility, if any, in connection with alleged falsification of expense reports using a forged and counterfeit receipt, concerning weekend travel allowance from April 2 through April 4, 2004. After a postponement, the Investigation was conducted on July 27, 2004. By notice dated August 20, 2004, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge the Claimant.

The Carrier initially contends that the record contains substantial evidence that confirms the Claimant's intent to defraud the Carrier of monies through the submission of counterfeit receipts attached to his weekend travel allowance form. The Carrier asserts that fraud or theft is an offense that warrants dismissal under its Policy for Employee Performance Accountability, and the Claimant's dismissal therefore was appropriate.

The Carrier addresses the Organization's argument that the Investigation was not timely held in accordance with Rule 40A of the Agreement. It contends that it was not made aware of the results of the Special Agents' Investigation until July 12, 2004, which is the official date of the Carrier's first knowledge for purposes of Rule 40A. The Carrier emphasizes that the Claimant was withheld from service on July 12 and the Investigation was scheduled for July 20, 2004, within the ten-day period specified by Rule 40B. The Organization requested the postponement until July 27, 2004. The Carrier insists that its actions were timely and in accordance with the provisions of Rule 40. Pointing to other cases that dealt with determining the date of first knowledge, the Carrier asserts that it did not violate the Agreement, and the Organization has not proven otherwise.

The Carrier contends that even if it had violated Rule 40, any such violation would not be fatal because the Claimant was not deprived of Agreement due process. The Carrier argues that the Investigation was conducted in a fair and impartial manner. It points out that Special Agents are not responsible for actually filing charges against employees; instead they conduct investigations and report their findings to the designated Carrier officer, who then takes appropriate action. As substantiated by arbitral precedent, the date of the Carrier's first knowledge of the matter occurs when the Division officer receives information from the Special Agent.

The Carrier then contradicts the Organization's assertion that the Carrier violated Rule 42 when General Manager Klaus failed to timely respond to the initial claim. The Carrier points out that the initial claim is dated October 6 and General Manager Klaus responded by letter dated November 4, 2004, addressed to the Organization's Vice General Chairman, well within the 60-day period set forth in Rule 42. The Carrier acknowledges that this letter erroneously was sent to the address of the General Chairman, but this was an innocent mistake. The Carrier asserts that what is questionable is the Organization's handling of the misdirected letter; the General Chairman waited 30 days, until December 8, 2004, to advise Klaus that he had sent his November 4 letter to the wrong address. Moreover, the General Chairman returned the letter to the Carrier, instead of forwarding it to the Vice General Chairman.

The Carrier emphasizes that while the Organization disingenuously asserts that the declination of the claim was untimely, this is not a fatal flaw. The Carrier asserts that the Organization has not shown that the Claimant was denied any Agreement due process, or that he was adversely affected by the alleged late response. Moreover, the General Chairman contributed to the extended delay when he held the letter for 30 days before taking any action. The Carrier points out that the very same procedural issue has been dismissed in prior Awards. The Carrier argues that while the Board may find that General Manager Klaus' response to the claim was tardy, this is not fatal to the instant case. The Claimant was not denied Agreement due process, he was provided a fair and impartial Hearing, and the Carrier has proven through substantial evidence that the Claimant did violate the Rules as charged. The Carrier insists that the Claimant's dismissal was warranted.

The Carrier then contends that it is evident from the record that the Claimant had every intention of defrauding the Carrier of monies under the guise of weekend travel allowance using counterfeit receipts. It points out that the Claimant admittedly provided Gayton, the counterfeiter, with authentic receipts, although he suggested that he did not know for what purpose. The Claimant further admitted to accepting a counterfeit receipt from Gayton, presumably to use in case he did not travel home. The Carrier emphasizes that because the receipt dates had to coincide with the weekend travel, it can be concluded that the Claimant had no intention of traveling home to Casper on the weekend of April 2-4, 2004. Otherwise, the Claimant would not have provided post-dated receipts as templates, nor would he have accepted the counterfeit receipts.

The Carrier asserts that intent to defraud is tantamount to theft, and it carries the same penalty of dismissal. The Carrier points out, in addition, that there is extensive arbitral precedent, including a number of on-property cases, that dismissal is the proper penalty.

The Carrier further asserts that it depends upon the honesty and integrity of its employees, and it rightly expects those employees to be honest. When employees fail to comport themselves in an honest fashion, they forever destroy the trust that the Carrier places in them. In the instant case, the Claimant forever destroyed any trust that the Carrier may have had when he submitted counterfeit receipts because he intended to use those receipts to defraud the Carrier in the event he did not travel home over the weekend in question. The Carrier emphasizes that the tragedy is that the Claimant had no reason to submit counterfeit receipts because he did in fact travel from Lafayette, Louisiana, to Casper, Wyoming, and he was entitled to the weekend travel allowance payment that he received. The Carrier points out that had the Claimant attached the authentic receipts that he obtained during his travel, he still would be in the Carrier's service.

The Carrier goes on to argue that the Board cannot fall for the Claimant's plea for mercy. The Carrier contends that leniency reinstatements are at the sole discretion of the Carrier, and the Board repeatedly has found that it will not substitute its own judgment for that of a carrier. The Carrier asserts that contrition after doing wrong does not undo the wrongdoing. The Carrier contends that in a

discipline case, it may enforce its Rules and policies to the fullest extent possible under the Agreement. In this matter, the Claimant did not comply with the Rules and policies regarding theft, and he admitted that he knew that what he was doing was a serious offense. The Carrier emphasizes that the Claimant has destroyed the Carrier's trust, and he is not deserving of any more chances.

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

The Organization initially contends that the Carrier committed multiple flagrant procedural errors. These errors included the admission of a written statement from a Company witness who was not made available for questioning during the Hearing, failing to issue formal charges until about one month after the Carrier's witness knew that the Claimant had submitted a counterfeit receipt, and excessively delaying the scheduling of the Hearing. Pointing to a number of prior Awards, the Organization argues that the language of the governing Rules makes clear that their provisions are mandatory, not permissive, and the Rules must be upheld to ensure the integrity of the Agreement and to protect the rights of all the people covered by it. The Organization maintains that on numerous occasions, including cases on this property, the Board has held that when the time limit for holding a hearing has been breached, the Board need not consider the merits of the dispute and the decision must be set aside.

The Organization goes on to argue that the Carrier committed yet another procedural error when it failed to decline the initial claim in a timely manner. The initial claim was filed on October 6, but the Organization's Vice General Chairman did not receive the General Manager's letter declining the claim until December 20, although the letter was dated November 4, 2004.

The Organization points out that as a whole, these issues clearly demonstrate a pattern whereby the Carrier prejudged the Claimant. The Organization insists that there can be no question that the Claimant was denied his Agreement due process rights to a fair and impartial hearing, and he is entitled to the requested remedy.

The Organization then emphasizes that the Claimant was honest and forthright about his actions, freely admitting that another employee provided him with a receipt that subsequently was confirmed to have been counterfeited by that other employee. The Claimant also freely acknowledged that he mistakenly attached that counterfeit receipt to his Travel Home Allowance Log Sheet. The Organization contends that there is no dispute that the Claimant did travel between his work location in Louisiana and his residence in Casper, Wyoming, during the weekend of April 2-4, 2004, and therefore no dispute that the Claimant was entitled to the travel allowance that he claimed. The Organization insists that this is not a case in which an employee attempted to file for excessive mileage or expenses to which he was not otherwise entitled. There is no dispute that the Claimant applied for and was paid only travel allowance expenses to which he was contractually entitled. The Organization asserts that despite the Claimant's cooperative attitude and honest responses, the Carrier nevertheless callously and uncaringly chose to impose the ultimate penalty of discharge upon an employee with ten years of service and an exemplary service record.

The Organization further points out that all divisions of the Board repeatedly have held that the purpose of discipline is to rehabilitate, correct, and guide. The Organization maintains that instead of counseling the Claimant or utilizing any of the other numerous options available to it, the Carrier chose to schedule an investigation and permanently dismiss the Claimant. The Organization insists that there can be no doubt that the Carrier's "knee-jerk" reaction and subsequent decision to dismiss a veteran employee with more than ten years of service and an exemplary record is unjust, unwarranted, and excessive.

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

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit. The Claimant was guaranteed all of his Agreement due process rights throughout this proceeding and was not prejudiced in any way by any actions of the Carrier in the processing of his claim.

The Board reviewed the evidence and testimony and finds sufficient evidence in the record to support the finding that the Claimant was guilty of falsification of expense records by using a forged and counterfeit receipt concerning weekend travel between April 2 and 4, 2004. The Claimant admits that he obtained a receipt from a person by the name of Payton who was creating fraudulent receipts. The Claimant admits that he made a mistake.

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 was found guilty of dishonesty. It has been held in numerous cases that dishonesty is a type of offense for which termination is appropriate even when it is the first offense of that kind. When an employee is dishonest, the employer is concerned about what has been taken from the employer in the past and what may be taken by that employee in the future. The Claimant engaged in wrongdoing; and although the Claimant calls it a "mistake," it is clear that he was attempting to benefit from the falsification of expense reports.

Given the seriousness of the offense of which the Claimant was found guilty, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim must be denied.

AWARD

Claim denied.