

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39510
Docket No. MW-39053
09-3-NRAB-00003-050488
(05-3-488)

The Third Division consisted of the regular members and in addition Referee Danielle Hargrove when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [forty (40) hours’ actual suspension] imposed upon Mr. J. Jones under date of July 2, 2004 for alleged failure to comply with Safety Handbook Rule O, GCOR 1.6 Conduct and GCOR #1.13 Reporting and Complying with Instructions and other Company rules and policies was arbitrary, capricious, excessive and in violation of the Agreement (System File D-17-04-620-02/8-00464 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall now be cleared from Mr. J. Jones’ record and he shall be compensated ‘. . . for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, seniority and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline in suspending claimant for forty (40) hours.’”

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.

At the time of the incident that gives rise to this cause, the Claimant established and held seniority within the Maintenance of Way and Structures Department since June 1994. He was assigned and worked as a Machine Operator on Production Crew 4.¹ The Claimant had a separation of service with the Carrier due to furlough in the fall/winter of 2003 and had returned to the Carrier when permitted in late March 2004. Before this incident, the Claimant had no record of prior discipline.

The Carrier conducted a formal Investigation on June 21, 2004 to investigate the circumstances surrounding the Claimant's expense reports for April and May 2004. By letter dated July 2, 2004, the Carrier notified the Claimant that it had determined that he violated Safety Handbook Rule O, General Code of Operating Rule (GCOR) 1.6 Conduct and GCOR 1.13 Reporting and Complying with Instructions, and other company Rules and policies.² The Carrier assessed a 40 hour

¹Production Crew 4 is a heavily mechanized large mobile on-line rail relay steel gang consisting of approximately 50 employees. Mobile on-line gangs typically perform work requiring gang members to live away from their homes during the regular workweek. Under such conditions, the gang members receive lodging, meal and weekend travel allowances in accordance with applicable Agreement Rules governing reimbursement of personal expenses.

² We note that none of the Rules that the Carrier alleges was violated were a part of the record nor were they referenced in the official transcript. Therefore, although the Board has a general understanding of and familiarity with the Rules, their language is not known verbatim and it is, therefore, difficult for the Board to affirm that the Carrier met its burden to demonstrate a

suspension after considering the Claimant's admission of mistakenly claiming benefits he was not entitled to and his lack of a disciplinary record. There is no dispute that the Claimant improperly claimed meal expenses and over-claimed weekend travel allowance for April and May 2004. However, the Organization objects to the characterization of the Claimant's actions as "fraud" arguing that the Carrier did not present substantial evidence on the record that the Claimant's actions were intentional, willful, and premeditated to defraud the Carrier.

The Organization places great emphasis on the Carrier's training process and its alleged deficiencies. We agree that the record reflects that there could be process improvements to minimize an arguably onerous and confusing process. Nevertheless, we do not find this issue compelling enough to find that it influenced the Claimant's actions in this case. Rather, we find that the Claimant's actions were more led by the seemingly casual, informal practice of submission, review and approval/declination of monthly expense reports. That is, the Claimant would make an attempt to be accurate in his submission, yet he was not concerned about receiving anything he was not entitled to because it would be declined if he made a mistake. Such a laissez-faire attitude, coupled with his being rusty at filling out the Carrier's forms having recently come back from furlough, family medical distractions and a general aversion to "paperwork" are what led to the Claimant's mistakes in the Board's estimation.³ We do not find that the Carrier met its burden to demonstrate that the Claimant's actions were intentional, willful, and premeditated to defraud the Carrier as alleged.

The Board by no stretch of the imagination suggests that it is appropriate for employees to submit expense forms without making the effort to ensure they are as accurate as they can be to the best of the employee's knowledge. We do not take a position contrary to the Carrier that it has a right to discipline for theft of its resources. We are mindful of the certification signed by employees when they submit their expense reports; however, the facts of this case suggest the types of mistakes that,

violation of such Rules. Further, the Carrier did not elaborate on the record or in its Submission of the "other company rules and policies" the Claimant purportedly violated.

³ The Board notes that using Mapquest™ to substantiate a claim of fraud or dishonesty as presented in this case is arguably as arbitrary as the Claimant's estimation of mileage. The Board certainly believes questions should have been raised; however, the record does not clearly or substantially support the assertion that the Carrier's process more accurately reflects the miles the Claimant truly traveled.

on occasion have also benefited the Carrier, which, in our estimation, does not suggest intent to defraud the Carrier. We further are not persuaded that the Claimant's improper claim for expenses early in the month of May 2004 but a proper claim at the end of the same month suggests an intent to defraud but more so of sloppiness and carelessness. Again, we do not suggest that such conduct could not be characterized in some way to warrant discipline under other Rules; however, we do not find it rises to the level of dishonesty, falsification, or theft under GCOR Rules 1.6 and 1.13. As noted in Third Division Award 21122, a charge of dishonesty reflects upon a person's character and such evidence must be fully persuasive, i.e., truly substantial, of a deliberate intent to defraud rather than a mere oversight or lapse of memory. Third Division Award 16166 cautions the Carrier against conjecture, speculation, inference, and assuming facts not in the record. Without more, the Carrier failed to demonstrate the necessary intent to find that he was dishonest, and not merely negligent, in completing his expense reports.

The Carrier is to reimburse the Claimant for the 40 hours forfeited during his suspension.

AWARD

Claim sustained.

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 2nd day of February 2009.