

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40533
Docket No. SG-40366
10-3-NRAB-00003-080069

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of G. A. Martin, to be returned to service with payment for all time lost and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal and failed to allow him to return to the Signalmen’s craft without providing a fair and impartial investigation and without meeting its burden of proof in connection with an investigation held on October 24, 2006 and concluded on October 25, 2006. Carrier’s File No. 1459491. General Chairman’s File No. S-Investigation-805. BRS File Case No. 13820-UP.”

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 11, 2006, the Claimant was terminated by the Carrier for theft and destruction of Carrier property while holding the position of Signal Maintenance Manager in St. Louis, Missouri. Thereafter the Claimant attempted to exercise his seniority to return to an Agreement position.

The Carrier issued a Notice of Investigation dated October 17, 2006 “. . . to inquire into the allegations that, between on or about September 7, 2006 and on or about September 23, 2006, you stole two (2) reels of signal cable from Union Pacific Railroad and cut sections of said cable.” The Investigation was held on October 24, 2006 and concluded on October 25, 2006. By subsequent notification, the Claimant was found guilty and dismissed from service for theft (dishonesty) and destruction of Carrier property in violation of Rule 1.9, Respect of Railroad Property, Rule 1.19, Care of Property, and Rule 1.6, Conduct (Dishonest).

The Organization argued that the Claimant failed to receive a fair and impartial Investigation. It maintains that the Carrier intimidated witnesses to prevent their testimony and permitted false testimony from Agents. The Organization maintains that had proper witnesses been present, they would have substantiated the Claimant's position that it was common practice to take home scrapping reels of damaged cable, as the Claimant had done.

The Organization also argues that the testimony against the Claimant was not substantiated with facts. As an example, the Carrier never documented that the Claimant did not have permission to have the cable wire on his property. Nor did the Carrier ever bring to the Investigation the employees who were alleged to have had interaction over this incident.

The Board reviewed all issues related to the Investigation. While we are in agreement with the Organization that there are shortfalls, particularly when the Carrier failed to bring witnesses under its control, such actions do not rise to the level in this instance to find significant procedural violation to overturn merits. The

Investigation was adjourned when the Organization requested Stanek's testimony and was also moved at the Organization's request from Kansas City to Saint Louis. The Board is persuaded by the full testimony and evidence that the Investigation was adequate to protect the Claimant's rights.

The testimony and documentation indicates the following to the Board. A confidential informant came to the Carrier with a report that the Claimant was bringing Carrier owned wire to his home to sell for personal profit. The informant indicated that the Claimant was cutting the wire, burning off the insulation and thereafter preparing it for sale. The Carrier produced Special Agent Davis's testimony that he found a burnt area near the Claimant's home. Further, the Board also finds significant issues undermining the Claimant's arguments that he was storing the wire to protect the Carrier from theft.

While there is evidence that theft had been occurring, the testimony in the record provides many questionable statements and inconsistencies in the Claimant's account. Among these, the Claimant stated that he was not engaged in theft, that the reels on his property were there for protection from thieves, and that he was honest in his actions. Support from the letter presented by Manager Adams and other testimony was offered.

The Board finds more persuasive the continued inconsistencies. At no time did the Claimant notify his Supervisor that he was putting the cable on his property. When confronted by Investigators, he indicated that the signal cable was from Piedmont where a lot of theft had been occurring, that the saw used to cut the cable was his own, and that he brought the cable onto his property to protect it. When re-interviewed, the Claimant indicated the cable was from Bismark, the saw utilized to cut the cable belonged to the Carrier, and that some of the cable theft had occurred on his property. The Carrier maintains that this is illogical. Had the Claimant a concern for the Carrier's property, he would have notified his Supervisor immediately, and if not immediately, absolutely after theft had occurred on his own property. Further, the Carrier argues that had he wanted to secure the cable, the Claimant would have put it in a more secure place on his property before the indicated theft, or certainly moved it afterwards. Additionally, the Claimant would have notified his Supervisor or law enforcement of the theft.

The Board considered all of the testimony and facts. We are persuaded that the Carrier has sufficient probative evidence to support its conclusion of theft. The Claimant's admission of cutting cable from one of the reels does not fit the argument of his justification, due to the use of his own truck, failure to notify his Supervisor, or to request employee support for this work. The fact is that the Carrier had no knowledge whatsoever of the Claimant's actions and might never have learned of it had a confidential informant not come forward. The Board is persuaded by this full record that the Carrier's decision is based on sufficient proof.

The Board considered all arguments raised by the Organization on the Claimant's behalf. We find the conclusion of dishonesty proven. As for the numerous other issues raised by the Organization, such as no charge listed for theft, dismissal of a good long term employee or the required proof, the Board rejects them. The Carrier's determination and dismissal is supported by the record. The Board will not overturn the assessed penalty.

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 15th day of June 2010.