

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41224
Docket No. SG-40919
12-3-NRAB-00003-090099

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of H. Ramirez, for his personal record to be cleared of any mention of this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the excessive discipline of a Level S, 30-day record suspension without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on July 12, 2007. Carrier’s File No. 35-07-0021. General Chairman’s File No. 07-023-BNSF-188-SP. BRS File Case No. 14030-BNSF.”

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.

The Claimant was assigned to the Signal Department at the time this dispute arose. By letter dated July 5, 2007, the Carrier directed him to report for a formal Investigation to be held on July 12, 2007, "... for the purpose of ascertaining the facts and determining your responsibility, if any, for your alleged misrepresentation of facts and fraud claiming multiple expenses for June 4, 2007 to June 14, 2007 and time not actually worked on Wednesday, June 27, 2007 and Friday, June 29, 2007, while working as Assistant Signalman at Pasco, Washington. Our first knowledge of this was Tuesday, July 3, 2007. Effective immediately you are being withheld from service pending results of this investigation."

Following the Investigation, the Carrier concluded that the Claimant was guilty of misrepresentation of facts and fraud for claiming multiple expenses and time not actually worked. It imposed a 30-day Level S record suspension for his violation of BNSF Maintenance of Way Operating Rules 1.6, Conduct.

The Organization's position is that the level of discipline imposed was excessive when considered in light of the information provided during the Investigation. The Claimant made a mistake when he turned in duplicate expense reports, but he was not being dishonest. The Claimant had only two months of service with the Carrier. The Carrier failed to provide training to the Claimant on how to enter his expenses into the Travel eX system, and his unfamiliarity with the system is what led to his erroneously submitting duplicate expenses. The Claimant explained his mistake at the Investigation—he attempted to submit the expenses electronically when he had not heard back from anyone about the paper version he had submitted—and was clearly honest throughout his testimony. His supervisor praised his work ethic and testified that he did not see any dishonest traits in the Claimant when he was working under his supervision. The Claimant did not understand the Carrier's process for submitting expenses and made a mistake; he never tried to defraud anyone. In addition, the Carrier's conclusion that the Claimant had tried to claim pay for time not worked was incorrect. The Claimant did work on Wednesday, June 27, 2007, as instructed by his direct supervisor, Foreman Vogt. On Thursday, June 28, 2007, he informed Vogt that he would not be available for work the next day, Friday, June 29, 2007. At no time did the Claimant enter time for himself on any time record; the Foreman of the gang is the individual who enters time for gang members. Foreman Vogt entered the Claimant's time while entering the other gang members' time and mistakenly entered June 29 as a day worked for the Claimant. The Foreman subsequently called the Supervisor to notify him that he had made a mistake. The facts do not support the Carrier's decision to discipline the Claimant. He is not guilty

of the Carrier's alleged charges. The Carrier has the burden of proof, and in this case, no witnesses or any substantial evidence were provided to establish that the Claimant was guilty of fraud. The Carrier also committed a number of procedural errors that created a prejudicial situation that warrants voiding the discipline here. The Signals Manager had multiple roles in the disciplinary action, acting as the Charging Officer and assessing the level of discipline. The Claimant's right to a fair and impartial Investigation was violated when the same individual filed the charges and determined the discipline. Additionally, the Hearing Officer violated the Claimant's right to a fair and impartial Investigation when he called for a five-hour delay and met privately with Carrier witnesses prior to the Investigation. Such private meetings biased the witnesses. The facts produced the appearance of partiality on the part of the Hearing Officer, which is incompatible with fundamental concepts of Agreement due process. The Board has affirmed on numerous occasions that the Hearing Officer must be impartial and avoid giving the appearance of partiality. The Hearing Officer's actions showed a blatant disregard for observing the most basic principles of Agreement due process. The Carrier failed to comply with the due process rights of the Claimant as required by the Agreement. Because the Investigation and subsequent discipline were procedurally flawed, the discipline assessed should be removed. The Carrier failed to meet the standard of proof required to sustain its charges, and the discipline it imposed against the Claimant was excessive. The discipline should be overturned and the Claimant's personal record cleared of any mention of this matter.

According to the Carrier, it provided substantial evidence during the Investigation that the Claimant had been dishonest when he submitted two expense reports, one by hard copy to Signal Supervisor D. Haynes and the other through BNSF's electronic expense system, Travel eX, which reflected the same expenses and dates between June 4 and June 14, 2007, but differing amounts. If there were simply a mistake, the amounts claimed for each date would be the same, but they were not. In fact, a comparison of the two reimbursement requests reveals that none of the expense amounts match on any of the disputed dates. Hourly-rated employees are only permitted necessary actual expense reimbursement per the BRS Agreement. The Claimant's submission of differing amounts for the same meals on the same days does not support his reason for duplicate filing. When asked about the discrepancies, the Claimant testified, then changed his testimony, and ultimately could not answer. His written report contained expenses for dates in May that were missing from the Travel eX report, and the Claimant was unable to explain why. The Claimant's testimony about his call to Foreman Vogt's cell phone on the evening of June 28, 2007, does not square with what he told Supervisor St. Jean when questioned about whether he had

worked on June 29, 2007. The charge of fraud is a serious offense; dishonesty to the Carrier is not an action that is treated lightly. The Claimant's double-submission of both expenses and time claimed not actually worked constitutes fraud, regardless of the Organization's claim that it was "accidental," and the discipline issued was not excessive. The claim of ignorance about how to use the Travel eX system is not supported: training in the system is available on-line to all employees. The Claimant fraudulently misrepresented his actual expenses incurred by submitting duplicate expense reports with the same days and different amounts to two different supervisors. The Claimant's assertion that he had no culpability for the false entry of time because he did not physically enter the time into the timekeeping system is untrue—the Claimant provided information about the days he worked to his Foreman for entry. When questioned initially, the Claimant stated to his supervisor that he had worked unloading a truck on June 29, when in fact he was absent. The Organization's statement that these were inadvertent, erroneous mistakes is without merit. Moreover, arbitration Awards have long determined that Boards of Adjustment must defer to the on-property credibility decisions of Conducting Officers. The Board sits as an appellate forum. Its function is not to substitute its judgment for the Carrier's, but to determine whether there is substantial evidence to sustain a finding of guilty. Nor should the Board substitute its judgment for that of the Carrier over the quantum of discipline assessed. Rule 54 was not violated; the discipline assessed against the Claimant was arrived at through discussions between the Division Office and J. K. Ringstad, not the Hearing Officer, as alleged by the Organization. There has been no showing of prejudice to the Claimant's ability to prepare his defense or to the fairness of the Investigation. The Carrier is only required to provide substantial evidence, not proof beyond a reasonable doubt, in order to support disciplining an employee for a Rules violation. In this case, the Carrier provided such information. Submission of duplicate expense reimbursement forms and claiming time not actually worked is clearly dishonest, immoral, and a violation of Rule 1.6, Conduct. There were no procedural violations that would warrant overturning the discipline on that basis alone. Finally, the assessed discipline of a 30-day record suspension was not harsh, excessive, inappropriate, or wrongful, based upon the violation in this instance. The Carrier did not violate the Agreement when it assessed the Claimant a Level S, 30-day record suspension for his clear violation of the Carrier's Rules. The claim should be denied in its entirety.

The concept of just cause includes not only substantive principles of fairness, but procedural ones as well. Rule 54.A of the parties' Agreement states, "An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until

after a fair and impartial investigation has been held. . . .” Because the Hearing Officer is a Carrier official, it is especially important for the investigative Hearing to be conducted as fairly as possible. For the Hearing Officer, this includes avoiding not just the reality of partiality, but also the appearance of bias, either for or against any party or witness. The job of the Hearing Officer at the Investigation is to develop facts and to give both the accused employee and charging officials a fair opportunity to tell their version of events, in an effort to further all sides’ understanding of what happened, so that the Carrier can make an informed and reasoned decision whether the accused employee is guilty of misconduct and subject to discipline. Given that the Hearing Officer is a Carrier official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process. The Hearing Officer must have – and be seen as having – an open mind, one that is not made up in advance of the Investigation. Anything less would render the idea of a “fair and impartial investigation” a sham. In this case, the Hearing Officer conducted an extended private meeting with the Carrier’s witnesses immediately before the Hearing. The meeting led to concerns on the part of the Organization and the Claimant that the witnesses were being coached or, alternatively, that they were explaining what they would testify to without the knowledge of the opposing side or an opportunity for cross examination. In either case, it appeared that “the fix was in,” so to speak, even before the investigative Hearing started: if the witnesses were being coached by the Hearing Officer or in his presence, his ability to conduct a “fair and impartial” Hearing would be seriously open to question. The witnesses’ privately explaining their testimony could also compromise his ability to conduct a fair and impartial Hearing, as his perceptions of events and of the Claimant’s guilt or innocence would be compromised before the Hearing began. Even if such influence did not actually occur, the opposing side was reasonably left with the impression that it did, and the damage to the Hearing process is the same.

A review of the transcript of the Hearing does raise questions about the conduct of the Hearing and its outcome. For example, several Carrier witnesses testified that the fact that the two expense reimbursement requests filed by the Claimant had different dollar amounts on almost every line was enough to establish his guilt, without more. But the Claimant testified that he had not kept a copy of the paper expense report he gave to Signal Supervisor Haynes. Employees are not required to submit receipts for expenditures less than \$10.00, and all of the Claimant’s claimed meals were below that threshold. In filling out the electronic Travel eX form, then, the Claimant had to recreate a document that he no longer had access to for purposes of

comparison and corroboration, and he admitted that his receipts were in disorder. Under the circumstances, it is not at all surprising that the amounts claimed on the two requests for reimbursement were different. Investigations are designed to explore the facts of what happened, and new facts came out at the investigative Hearing here. But the Carrier appears to have ignored those facts, and their implications, altogether in concluding that the Claimant was guilty of deliberate fraud.

Moreover, the conclusion that the Claimant was guilty of claiming hours for time not worked on June 27 and June 29 is contrary to the weight of the evidence, which establishes that the Claimant's Foreman called him on June 27 to report to work, and June 27 was a legitimate paid travel day for him.¹ He worked as directed on June 28. As for June 29, the Claimant had reported off the night before and was not at work that day. His Foreman was well aware of that fact, because the Claimant called him Thursday night, June 28, to say he would not be at work the next day. The Foreman's cell phone records establish that the two men spoke for 12 minutes. The Foreman was present at the site where the gang was working and had personal knowledge that the Claimant was not there. More importantly, it was the Foreman who filled in the timekeeping records, and the transcript of the Hearing includes testimony from Carrier officials that the Foreman called to tell them that he had mistakenly included the Claimant as one of the gang members who was at work on June 29. There is absolutely no evidence whatsoever in the record that the Foreman and the Claimant were engaged in a plot to defraud the Carrier of a day's pay.² In addition, the mistake was caught before the Claimant was paid, so he did not benefit from it. In light of the evidence establishing the Foreman's role as the person filling out the time records, his specific knowledge that the Claimant was not at work on June 29, and his admission that he had made a mistake filling out the time records, it is difficult to understand how the Hearing Officer could reasonably conclude that the Claimant had committed time fraud.³

¹ There was testimony from Carrier witnesses about whether the Claimant, who had been held off work since June 14 pending medical documentation, should have been at work at all before July 2. But he was not charged with any misconduct relating to his reporting as instructed by his Foreman, so the issue is not before the Board.

² It is clear that the Carrier had – has – suspicions along those lines. But it is well-established in arbitration that suspicions are not valid evidence and are an inadequate basis for finding an employee guilty of misconduct.

³ The Board is not attempting to substitute its judgment here for that of the Hearing Officer; the point is more subtle than that: the result of the investigative Hearing is, in

Procedural errors are not a favored basis for overturning discipline, and frequently, minor procedural errors are overlooked in arbitration. But sometimes the errors are significant enough to warrant reversal of the employer's action. A "fair and impartial" investigative process is not just language in a Collective Bargaining Agreement. It is fundamental to industrial justice. The Board has affirmed that principle in the past. In Second Division Award 13426 (Referee Martin H. Malin, June 16, 1999), the Board held:

"The action of the hearing officers of having lunch during the middle of the hearing, behind closed doors and outside the presence of the Claimant and his representative, but with one witness who was in the middle of his testimony and another witness who had yet to testify was clearly improper. . . . There is no more fundamental component of a fair and impartial hearing than having the hearing conducted by a fair and impartial hearing officer. Not only must the hearing be impartial in fact, but he must avoid giving the appearance of partiality. See, e.g., Public Law Board No. 4554, Award No. 64.

We do not mean to suggest that during the luncheon the hearing officers and the witnesses actually discussed the case. Whether they did or not is immaterial. By engaging in an ex parte conversation and luncheon behind closed doors with one witness who was about to undergo cross-examination and a second witness who had yet to testify, the hearing officers gave an appearance of partiality that is incompatible with fundamental concepts of due process. Accordingly, we find that this action tainted the entire investigation and that the discipline cannot stand."

The factual circumstances are similar in this case, and the Board's reasoning is equally applicable. The Board finds that the Claimant was not afforded the fair and impartial Investigation that is guaranteed in Rule 54, and as a result, the discipline that was based on that Investigation must be set aside.

some regards, so contrary to the evidence that came out at the Hearing that it raises questions about the fundamental fairness of the Hearing.

The claim is sustained. The incident shall be removed from the Claimant's personnel record.

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 22nd day of February 2012.