

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41768
Docket No. SG-42132
13-3-NRAB-00003-130055

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of C. L. Rose, for reinstatement to his former position with all seniority and benefits unimpaired, compensation for all lost wages, including skill pay, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 35, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on January 12, 2012. Carrier’s File No. K0612-9953. General Chairman’s File No. 12-007-MSR 185. BRS File Case No. 14765-KCS.”

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 entered the Carrier's service on April 27, 1977. In 2011, he was a Signal Maintainer located in Bossier City, Louisiana, with 34 years of service. On November 14, 2011, the Carrier withheld the Claimant from service pending an Investigation called to "ascertain the facts and determine your responsibility, if any, for conduct unbecoming of an employee in connection with your alleged misappropriation of company funds. Carrier's first knowledge was on November 14, 2011."

Following several agreed-upon postponements, an investigative Hearing convened on January 12, 2012. "After careful and thorough review of the transcript" the Carrier determined that the Claimant "violated . . . General Code of Operating Rules 1.6 - Conduct" whereupon the Claimant was dismissed "effective immediately, January 20, 2012." Rule 1.6 states, in part, that an employee "must not be . . . [d]ishonest" and "[a]ny act of . . . misconduct . . . affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported."

The parties timely processed this claim in the usual and proper manner during on-property exchanges up to and including the highest designated officer of the Carrier. On July 25, 2012, the parties met in conference without resolution. This claim is before the Board for final adjudication.

The claim centers on the allegation that the Claimant misappropriated company funds on November 7, 2011, when he accessed the Carrier's credit card (designated for use in operating the Carrier's vehicle assigned to the Claimant) to purchase fuel for his personal vehicle (POV). A warrant for the Claimant's arrest issued on November 11, 2011, charging him with "Unauthorized Use Of 'Access Card' as Theft." On November 14, 2011, the Claimant was arrested, whereupon the Carrier removed him from service and issued a Notice of Investigation on November 17, 2011.

According to the Organization, the Investigation was "procedurally defective from the beginning" because the Notice of Investigation contains no description of an incident or identifiable Rule violation and the Hearing Officer precluded the Organization's representative from lodging objections at the Hearing until the conclusion of witness testimony. Thus, the Claimant was denied a fair and impartial Hearing.

Aside from the procedurally defective notice and unfair Hearing, the evidence relied upon by the Carrier is hearsay because the law enforcement officer did not testify

or sign the Incident Report. The only evidence is a receipt linked to the company credit card assigned to the Claimant showing the purchase of 22.147 gallons of fuel (\$72.18) at 7:18 A.M. on November 7, 2011. In the absence of other evidence, dismissal is a harsh and excessive penalty.

Instead of procedurally defective, the Carrier argues that the notice is “crystal clear” with the Claimant in absentia at the Hearing. There is substantial evidence of the Claimant’s wrongdoing because law enforcement observed the Claimant fueling his POV as well as the Carrier’s vehicle Unit No. 3613 at 7:18 A.M. on November 7, 2011. Unit No. 3613 was assigned to the Claimant and the credit card receipt identifies the Claimant’s use of it on the day and at the time in question. Law enforcement informed the Carrier’s railroad police that the Claimant acknowledged his wrongdoing. Dismissal is not excessive for a violation of Rule 1.6 - Conduct because it is a major infraction under the Carrier’s disciplinary matrix warranting dismissal notwithstanding the Claimant’s lengthy service (34 years).

After reviewing the record established by the parties, the Board finds substantial evidence in support of the Carrier’s decision to dismiss the Claimant. Undisputed is the issuance of a warrant for the Claimant’s arrest based on a charge of theft. A warrant issues when probable cause exists, that is, there is more evidence for than against that the person accused (the Claimant) committed the crime charged (theft). The receipt identifies the credit card designated for the Claimant’s use was accessed for a fuel purchase at 7:18 A.M. on November 7, 2011. A video recorded observation at the service station shows the Claimant’s POV receiving fuel on that date and at that time. This evidence is considered in the context presented by this claim where the record is void of any alternative explanation or mitigating circumstance. The Claimant’s misconduct – misappropriation of company funds – affects the Carrier’s interest and reflects a dishonest act or conduct unbecoming of an employee and a violation of Rule 1.6 - Conduct.

The Claimant’s disciplinary history dates to September 16, 2010, when he received a five-day actual suspension and a 25-day record suspension for violating Roadway Worker Rules 22.1 (Follow On-Track Safety Rules), 22.2 (Do Not Foul Tracks Except When Necessary) and 23 (Methods To Be Used To Protect Workers Fouling Any Track). Also assessed to the Claimant on September 16, 2010, was a dismissal for violating Rule 1.5 – Drugs and Alcohol. Given this disciplinary history coupled with the violation of Rule 1.6 – Conduct, the Claimant’s dismissal is not excessive and harsh.

Finally, there are no procedural defects in the Notice of Investigation. Even without citation or reference to any Rule, the Claimant knew that the subject matter of the Investigation was his “responsibility, if any, for conduct unbecoming of an employee in connection with your alleged misappropriation of company funds.” The notice issued on November 17, 2011, which was three days after the Claimant was removed from service following his arrest for unauthorized access of the credit card, e.g., theft of fuel. This time line is sufficient indication to the Claimant for ascertaining the incident resulting in his removal from service. The Hearing Officer’s conduct did not interfere with the Claimant receiving a fair and impartial Hearing on January 12, 2012.

Because the evidence does not support the Organization’s allegation that the Carrier violated Rule 35 – Disciplinary Procedures but there is substantial evidence showing that the Claimant engaged in a dishonest act that is a major infraction of a Rule, 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 25th day of November 2013.