Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41817
Docket No. MW-41856
14-3-NRAB-00003-120136

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes 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 (withheld from service by letter dated September 23, 2010 and subsequent dismissal by letter dated October 15, 2010) imposed upon Mr. S. Gnadt for alleged violation of MOWOR 1.1.3 Accidents, Injuries and Defects and MOWOR 1.6 Conduct in connection charges of dishonesty in reporting damage he caused to Vehicle 16520 by striking a pole in the North Fargo Yard at approximately 1030 hours on September 22, 2010 was arbitrary, capricious, excessive and in violation of the Agreement. (System File T-D-3784-W/11-10-0466 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Gnadt 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.

The events of this dispute began on September 22, 2010. On that date the Claimant, a Carrier employee who had been hired on April 21, 2008, was working as a Track Inspector. He had been in this position for some nine weeks. At about 10:30 A.M., he reported to his immediate Supervisor that the Carrier hy-rail vehicle that he was using had been damaged as a result of a hit and run collision that he had witnessed. Acting on the direction of the Supervisor, the Claimant contacted the Fargo, North Dakota, Police Department and made the same report. The details that he provided to both his Supervisor and the police were, as recorded in the police report:

> **"[The Claimant] . . . said he parked his company truck . . . making his way to work on the railway tracks. He said he was about 80 yards from his truck when he noticed a green tow truck pulling an old brown car do a U-turn in the parking lot . . . . [The Claimant] thought the tow truck had got very close to his truck so when he got back to his truck he checked for damage and noticed the left rear corner of his truck had been hit."**

The Claimant also provided the same explanation to the vehicle repair shop. At about 1:00 P.M., the Claimant told the same story to the Carrier's Manager.

Later that day, the two Supervisors and the Claimant were together as the Supervisors examined the damaged vehicle. As the Assistant Supervisor testified at the Investigation, the two Carrier Officials noticed that the damage "really didn't match the description he [Claimant] gave us to the damages and the things we noticed on the truck."

The Roadmaster testified, without contradiction, that at about 5:05 P.M. that afternoon, the Claimant called him and reported:

> **". . . [O]nce he started to think about statements that he got, well, when I questioned him about you know the damage not appearing to be the way he described and then he's also received the same comments from the repair shop saying that they didn't believe that's how it happened either . . . [the Claimant] said he started to question whether or not he may have backed into a pole or something else so he went back to retrace his steps that day and went back up to the location by Dakota Drive and found the cross buck tipped over and some pieces of the vehicle lying next to, on the ground next to it and he stated that he did not know that he hit it but he said he was sure that he did or must have hit it there."**

Shortly after the Claimant's start of work on September 23, 2010, the Claimant acknowledged to his Supervisor that he had lied:

> **"I told . . . [him] that after finding the post and after struggling with the decision I had made to lie to the police and fabricate the story, that I indeed believe that I hit the post and I told him that the story about the tow truck and the, my whereabouts on that day as far as location of me out of the truck and seeing a vehicle in that parking lot was, they were false."**

In his appearance at the Investigation, the Claimant reported:

> **"I hadn't noticed or did not know at the time that I had struck the post at the, the said cross buck and I thought that I had, that I had probably hit somebody and left the scene or at least that's what was, that's what I thought.**
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> *** * ***
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> **That is exactly what I thought I had, I had fabricated the story about the tow truck and the car to the police and to the company in fear of losing my job, I didn't, I didn't know I'd hit the post, I had, I had a, I don't know what you call it if you want to call it a mental**

> **breakdown of panic I don't know but judgment was not clear at the time and I, I fabricated the story to the police."**

As the Carrier argues:

> **"Numerous awards support the principle that where there is an admission of guilt there is no need for further proof . . . . (Citing Third Division Award No. 28484 and Fourth Division Award No. 4779.)**

There is no question that this oft-cited concept is correct and that it applies here, but – as noted in the citations offered by the Carrier – that is not the end of consideration. One must consider such things as whether the process was applied fairly and whether the penalty for the misconduct was not arbitrary, capricious or discriminatory.

The Organization presents the following argument with regard to the merits of the dispute:

> **". . . [I]t is the case that Claimant, even if technically in violation of the Carrier rules, was punished out of all due proportion to what he should have been given the mitigating circumstances at play in this case. Claimant had a spotless discipline record prior to this incident, was experiencing significant duress due to family problems he was then going through, and told the truth in this matter (concerning a decidedly minor accident) prior to anyone threatening Claimant with discipline, let alone actually moving to charge him and go forward with pursuit of the same. Under all of these circumstances, the Carrier's permanent dismissal of Claimant for such a first time lapse of judgment which was, immediately corrected on his own accord, is excessive and too harsh, amounting to an abuse of the Carrier's disciplinary discretion. Again, Claimant's dismissal must be removed as it exemplifies clear Carrier overreach and Claimant's claim must be sustained as presented.'**

While the Organization is correct in noting that the Claimant had no prior discipline, this point must be assessed bearing in mind the Claimant's short (two and one-half year) employment with the Carrier.

The Organization acknowledges that the Claimant was "technically in violation of the Carrier rules," but argues that this took place while he "was experiencing significant duress due to family problems . . . ." The Board notes that no evidence short of Claimant's assertion was offered to substantiate this argument.

Of most importance is that the Claimant's conduct as revealed in the record before the Board cannot be properly characterized as being "technically in violation of the Carrier rules." He lied to his Supervisors and he filed a false police report. The Carrier's Policy for Employee Accountability states, "The ultimate sanction of dismissal may be imposed in response to a single aggravated offense, as listed in Appendix C."

Among the items listed in Appendix C as "Dismissable Rule Violations" is:

> **"2) Gross dishonesty in communicating with officials of the company about any job related subject."**

"Dishonesty" is defined as:

> **"lack of honesty, probity, or integrity in principle: lack of fairness and straightforwardness: disposition to defraud, deceive, or betray: faithlessness" (Webster's Third New International Dictionary, Unabridged, 2013. Web. 24 Dec. 2013.)**

Webster's Third New International Dictionary, Unabridged tells us that an applicable meaning of the word "gross" is:

> **"a * * ***
>
> **b (1): * * ***
>
> **(2): out-and-out, complete, utter, unmitigated, rank"**

In assessing the Claimant's action in this regard, one should consider the following aspects of his direct input:

1. **On the day of the accident, the Claimant noted the Company vehicle he was operating had been damaged while he was driving and concluded that he had been involved in an accident (unknown to him at the time) and that he left the scene, thus being the one who did the "hit and run."**

2. **On that same day, the Claimant contacted his Supervisor and reported that his parked vehicle had been damaged when a green tow truck pulling a brown car did a U-turn during which the company vehicle was damaged. The Claimant made the same "fabricated" report – his characterization – to the police and to the garage to which he took the vehicle for repair.**

3. **The following action described by the Claimant took place on the day of the accident, but subsequent to input from persons who inspected the damage – his Supervisors and personnel in the repair shop – that the damage to the vehicle did not comport with his initial description of the collision. The Claimant retraced his steps and discovered a cross buck sign with a post that was leaning. According to the Claimant, it was only at this time that he realized that the accident had been caused by him.**

4. **Shortly after 5:00 P.M. on that day, the Claimant called his Supervisor and informed him of the discovery of the tilted post and of his conclusion that he had been the cause of the accident. He did not acknowledge that he had lied about the accident in his prior reports, but implied that that admission did not take place because his Supervisor – due to his own needs – put off a more complete conversation until the next day.**

5. **On September 23, shortly after the start of his shift, the Claimant acknowledged to his Supervisor:**

> **"I told Jason that after finding the post and after struggling with the decision I had made to lie to the police and fabricate the story, that I indeed believe that I hit the post and I told him that the story about the tow truck and the, my whereabouts on that day as far as location of me [being] out of the truck and seeing a vehicle in that parking lot was, they were false.**

Discipline and Discharge in Arbitration, a standard text in labor arbitration, states:

> **"Among the most serious forms of employee misconduct are acts of dishonesty. Intent is a critical component when employees are disciplined for such actions. When there is clear intent to steal or defraud, many arbitrators take an unwaveringly strict approach, concluding that if the employer-employee bond of trust has been breached, no mitigating factors can or should lessen the penalty. (Norman Brand and Melissa H. Biren, Editors-in-Chief.) Discipline and Discharge in Arbitration, 2d ed., Committee on ADR in Labor and Employment Law Section of Labor and Employment Law, American Bar Association; Washington: The Bureau of National Affairs, 2008, p. 294."**

The Carrier correctly notes that the Claimant acknowledged that he had lied "only after being told by the repair shop and by the Roadmaster and Assistant Roadmaster that the damage could not have occurred as the Claimant alleged," and contends:

> **"He did not confess because he had a 'change of heart' as the Organization argues; rather, he confessed because he had become trapped in his own web of lies and had no alternative strategy but to throw himself proverbially on the court's mercy."**

It is conceivable that the Claimant's account of his awareness of his responsibility for the accident developed as he contended. However, his account was supported solely by his own word while his credibility had been undermined by his

own conduct. Given this reality, it cannot be said that the Carrier was unreasonable in drawing the conclusions and in taking the action that it did.

The Board finds no merit to the Organization's argument that the Claimant was not afforded a fair Investigation. It is accepted in this industry for Investigations and/or Hearings to be conducted not by a neutral, but by an Official of the Carrier – one party to the dispute – who has the dual role of presiding and ensuring that the Carrier's evidence is presented. In short, the Conducting Officer often has to ask questions of witnesses so as to ensure as complete a record as possible. So long as this dual function is conducted without abuse of power or attempt to distort, the Board cannot agree that this accepted procedure creates an unfair Hearing.

The Board finds persuasive the following quotations from Second Division Award 6445 – one of the Awards submitted by the Organization for our review:

> **". . . [T]his Board is not a tribunal of original jurisdiction. Our function, particularly in discipline cases, as established by the Railway Labor Act, as amended, is to review the record; ascertain whether the Controlling Agreement had been complied with; the Claimants were afforded due process; there was substantial evidence to sustain a finding of just and sufficient cause for the discipline imposed; and that the action taken by the Carrier was not arbitrary, capricious or unreasonable. Award 6368.**
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> *** * ***
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> **This Board does not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion. A Carrier's disciplinary decision is unreasonable, arbitrary, capricious or discriminatory . . . when the degree of discipline is not reasonably related to the seriousness of the proven offense. Award 6198."**

Given the complete background of this matter, the Board cannot conclude that the Carrier's decision in this case was unreasonable, arbitrary, capricious or discriminatory, or that the degree of discipline imposed on the Claimant was unreasonable considering both the seriousness of the admitted offense and the Claimant's relatively short tenure with the Carrier. Accordingly, the claim must 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 27th day of February 2014.