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

Award No. 41870
Docket No. MW-41837
14-3-NRAB-00003-120112

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 (dismissal) imposed upon Mr. M. Koziara by letter dated November 9, 2010 for alleged violation of MOWOR 1.6 Conduct for alleged theft and dishonest conduct in connection with alleged unauthorized removal of BNSF property (used ties) and alleged misuse of company equipment for personal use while on duty in the morning of September 2 or 3, 2010 at Winona Junction, Wisconsin while assigned as foreman was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D070-2/10-11-0070 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant M. Koziara 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 Claimant has worked for the Carrier since August 22, 1978. At the time of this dispute, he was working as a Foreman under the supervision of Roadmaster Michael Veitz.

Although there was some misunderstanding about the date of the event – the Notice of Investigation stated that it occurred "in the morning of September 2 or September 3, 2010" – the Claimant asserted, and the record accepted, that it had taken place on August 30, 2010.[1]

On the day in question, the Claimant instructed a co-worker to load used railroad ties (about 20 in number) onto two privately owned trailers. This was done during work time for both employees. Carrier equipment was used to load the trailers. About this there is no dispute.

The dispute that does exist centers upon the conflict between the contention of the Claimant that Roadmaster Veitz gave him permission to take the ties and Veitz's denial of this assertion. It also centers upon the Organization's assertion that the Carrier violated Rule 40A of the September 1, 1982 Agreement as updated in December 2002, by holding the Investigation more than 15 days from the date information about the Claimant's alleged personal conduct was obtained by Roadmaster Veitz. The Organization argues that as a result, Rule 40J of the Agreement dictates, "the charges against the employee shall be considered as having been dismissed."

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[1] Because the Claimant acknowledged the actions, the misunderstanding has no significance. Whatever the date(s) stated in the Notice of Investigation, the Claimant had full knowledge of what the Investigation was to entail. His ability to present his case fully was not prejudiced.

The Organization also argues:

> **"The Carrier herein alleges malfeasance on the part of the Claimant, amounting to 'moral turpitude.' *** Such charges can also tar an employe so 'convicted' with a morally odious reputation going forward, affecting his or her greater employment and life opportunities thereafter. As such, boards of arbitration in this industry have required that charges alleging such moral turpitude be borne out by much more than the usual 'substantial evidence.'"**

In support of this contention, the Organization makes mention of three Third Division Awards: 16154 (Ives, 1968), 32707 (Gerstenberger, 1998), and 33396 (Wesman, 1999). While Awards can be found that state that allegations of moral turpitude, such as dishonesty, require a quantum of proof higher than "sufficient evidence," the overwhelming position of National Railroad Adjustment Board Awards appears to be that "sufficient evidence" is the single standard by which to determine whether a carrier has proven its charge(s) against an employee.

This case, however, does not turn on how much proof is required.

The Organization states:

> **"In the instant case, there is no dispute as to whether the Claimant took the ties, as alleged. The sole issue in dispute is the material one of whether he had permission from his Roadmaster to do so, or not. The Claimant adamantly asserts that he did, without question. The Roadmaster denies this. The only other party giving testimony at the Investigation, Machine Operator G. Zielke, cannot recall. No extrinsic, documentary evidence supports either side in this regard . . . .**
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> **. . . Under such circumstances, the Carrier's burden of proof is not carried, even if the applicable standard was only the ordinary 'substantial evidence' one, and not the heightened 'clear and convincing' one."**

This argument misses the point.

There is not a deadlock in testimony as would be the case if the charge that an employee removed company material was denied by the affected employee. The Organization acknowledges, "In the instant case, there is no dispute as to whether the Claimant took the ties, as alleged."

There is deadlock, however, between the Claimant's assertion that Roadmaster Veitz gave him permission to take the ties and Veitz's denial of this claim. As the Organization states, "The sole issue in dispute is the material one of whether he had permission from his Roadmaster to do so, or not."

Once the Claimant acknowledged the Carrier's allegation, the burden of proof fell to him to prove his assertion that Roadmaster Veitz gave permission for the removal to take place. The point is made in a helpful pamphlet, Evidence and Proof in Arbitration:

> **". . . [W]here the issue is the discharge of an employee for cause, the employer is said to have the ultimate burden of proving a legitimate severance. Once the company has established a prima facie case – one that will suffice until contradicted and overcome by other evidence – the burden shifts to the union, which must refute the legitimacy of the severance or show that there is not cause for discharge".[2]**

The Claimant failed to prove that Roadmaster Veitz gave him permission to remove the ties.[3]

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[2] **Martin F. Scheinman, *Evidence and Proof in Arbitration*, Cornell University, New York State School of Industrial Relations, 1977, p. 9.**

[3] **The several signed and unsigned testimonials presented by the Organization that describe the existence of a practice where ties were removed after permission was obtained are totally without relevance because the matter before the Board hinges on the Claimant's assertion that he was given permission and his inability to establish this assertion as fact.**

Rule 40 A states:

> **"An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule."**

This is a personal conduct case, and so the 15-day limit starts "from the date information is obtained by an officer of the Company (excluding employes of the Security Department)." Roadmaster Veitz testified that while he was looking into an injury suffered by the Claimant, "it was brought to my attention that . . . he was involved in removing company material . . . on personal trailers." Veitz continued:

> **". . . I needed to get . . . to the bottom of it, so I got a hold of the . . . Resource Protection Team out of Minneapolis and turned this investigation over to them."**

The following outline lists dates that have significance:

- **August 30, 2010: the Claimant took the ties.**
- **September 22, 2010: Roadmaster Veitz heard about the taking and turned the matter over to the Carrier's Resource Protection Team (CRPT).**
- **October 5, 2010: Date of letter summoning the Claimant to Investigation. That letter states that the "Resource Protection Department" reported the allegations to Roadmaster Veitz "on October 4, 2010." This assertion was not challenged.**
- **October 18, 2010: Investigation took place.**

The Board concurs with the reasoning in Third Division Award 36337 (Kenis, 2003) regarding a parallel situation:

> **"We find the Carrier did not have sufficient 'knowledge' until the police report was made available to the Carrier . . . . Prior to that time, it would have been premature to issue charges against the Claimant."**

Rule 40 was not violated. Accordingly, the instant 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 16th day of June 2014.