

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42100
Docket No. MW-42454
15-3-NRAB-00003-140068**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Terminal Railway Alabama State Docks

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. J. Gibbs by letter dated January 22, 2013 for alleged dishonesty in connection with his alleged submitting of ‘*** false time claims no less than eight times while temporarily reassigned to restricted duty during the past two pay periods (December 26, 27, and 28, 2012 and January 2, 3, 4, 7, and 8, 2013.’ was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File 130131).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Gibbs shall ‘*** be exonerated of all charges in accordance with Rule 19 and be reimbursed for all wage loss sustained as a result of the Carrier’s action or that it is within the best interest of both parties that a fair and impartial hearing be held at the mutually earliest convenience of the parties involved.’”**

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 employed for approximately three years and assigned to the Maintenance of Way Department when he was dismissed from service on January 22, 2013. The Claimant had entered the Carrier's Restricted Duty Program, due to a reported injury, and worked a temporary assignment until he could return to his regular position, when he was informed by letter dated January 22, 2013 that he was terminated for submitting false time claims, which constitutes dishonesty and theft while on restricted duty.

The relevant contract language provides that before an on-property Investigation is conducted, the employee must submit a written request for such a Hearing within 15 days of the letter of discipline. The applicable sections of Rule 19 - Discipline, read as follows:

- “(a) An employee disciplined, or who considers himself unjustly treated will be advised in writing of the reason for such action, provided written request is made therefor.**
- (b) Such employee shall have a fair and impartial hearing provided written request is presented to his immediate superiors within fifteen (15) days of the date of such discipline or unjust treatment, and hearing will be granted within ten (10) days thereafter.”**

The Claimant signed the discipline letter on January 22, 2013. The written request for a Hearing, therefore, should have been presented to the Carrier no later than February 6, 2013.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Here, however, both the Organization and the Carrier contend that a procedural error occurred and, therefore, the Board need not reach the merits of the claim.

The Carrier argues that the Claimant failed to make a timely request for a Hearing within 15 days of the written notice of discipline as required by Rule 19(b). The Carrier contends that the only correspondence it received from the Organization between the date of the disciplinary letter, January 22, 2013, and an email from the Organization on April 2, 2013, was an empty envelope delivered on or about February 11 or 12, 2013, which did not have a postmark from the U.S. Postal Service. Therefore, argues the Carrier, the matter must be dismissed on procedural grounds for failing to submit a timely request for a Hearing. The Carrier cites several Awards previously issued by the Board that have upheld dismissal of claims where a claimant has not adhered to the applicable time limits.

The Carrier also contends that the substantial documentary evidence established through the efforts of a Private Investigator and the Alabama State Docks Police clearly establishes that the Claimant submitted false time claims on eight different occasions. It argues that the discipline imposed is neither arbitrary nor capricious. The Carrier asserts that dismissals for such violations, even for employees with many more years of service than the Claimant has here, have been upheld by adjudicating Boards throughout the industry.

The Organization maintains that it made its written request for a Hearing by letter dated January 31, 2013, and that the Carrier, therefore, violated Rule 19(b) when it did not hold a Hearing within ten days of its letter. The Organization contends that efforts were made to have a Hearing scheduled and that on April 23, 2013, it wrote to the Carrier requesting that the Claimant be reinstated and exonerated of all charges. The Organization argues that the receipt of an empty envelope by the Carrier indicates a timely request for a Hearing. It asserts that there would be no reason to send an empty envelope and that the Board here should make a factual presumption that the January 31, 2013 letter was included.

The Board finds that the Parties attempted to resolve the dispute in the customary and usual manner and in accordance with the applicable Agreement. Having failed to do so, the matter is properly before the Board for adjudication.

The Board finds that the Organization has not sufficiently established that proper notice was provided to the Carrier as provided for in Rule 19 (b). There is no evidence that the January 31, 2013 letter was presented to the Carrier within the 15 days of the notice of discipline to the Claimant. The empty envelope received by the Carrier was not postmarked by the U.S. Postal Service, which is required to establish proper notice when service of process is conducted by mail. The only marking on the envelope was a Pitney-Bowes postage meter stamp, which does not verify an official mailing date. Therefore, there is no evidence that the letter the Organization claims it sent on January 31, 2013 was received by the U.S. Postal Service for delivery.

The Board has previously denied untimely requests for a hearing in matters of discipline. See Third Division Award 2166. Even where the outcome may seem harsh, the Board is obligated to apply the clear and unambiguous language of the Agreement as written and agreed to by the Parties. As stated in Fourth Division Award 4974, addressing a claim of a procedural violation, "If the relationship between the parties is to be maintained on a fair standard, it must be maintained on the basis of the Rules as negotiated and agreed to by the parties."

It is worth noting that based on the documentation submitted by the Carrier, it is more likely than not that had the matter been heard solely on the merits the outcome would be the same. The details and consistency of the reports from two investigative agencies provided the Carrier with grounds for dismissing the Claimant for dishonesty and theft of time. There are legions of cases that have refused to set aside a Carrier's penalty for dishonest acts. See, e.g., Third Division Awards 26920 and 24229. There is no reason to conclude that the Carrier was acting in an arbitrary or capricious manner when it issued its notice of discipline on January 22, 2013.

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AWARD

Claim dismissed.

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 13th day of July 2015.