

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42293  
Docket No. MW-42847  
16-3-NRAB-00003-150005**

**The Third Division consisted of the regular members and in addition Referee Louis V. Imundo, Jr. when award was rendered.**

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
(  
(BNSF Railway Company

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (dismissal) imposed upon Truck Driver C. Lee by letter dated August 15, 2013 for his alleged violation of ‘... EI G.5.4 Disposing of Ties, Creosote, and Creosote/Borate-Treated, MWOR 1.3.1 Rules, Regulations, and Instructions, MWOR 1.4 Carrying Out Rules and Reporting Violations, MWOR 1.6 Conduct, and MWOR 1.25 Credit or Property.’ in connection with his alleged ‘. . . theft; getting rid of railroad property without proper authority; dishonesty; failure to cooperate and assist in the carrying out of rules and instructions, including reporting violations to a supervisor; and failure to comply with Engineering Instructions regarding the disposal of treated materials on approximately July 9, 2013, at or near BNSF Skykomish Material Storage Area, 201 East Railroad Avenue, Skykomish, Washington 98288.’ was on the basis of unproven charges, without merit, excessive and in violation of the Agreement (System File C-13-D070-18/10-13-0607 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Lee shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated ‘. . . for all his lost wages, expenses, benefits and credit for lost time in relation to vacation or other benefits in accordance with Rule 40 of the current Agreement.’”**

**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 instant case is a companion to the Organization's claims on behalf of Foreman D. Maley and Claimant Truck Driver C. Lee, which were adjudicated by the Board in Third Division Awards 42292 and 42294, respectively.

The Carrier must prove two things in order to have discipline upheld by the Board. First, it must show that it had just cause or good and sufficient reason to take disciplinary or corrective action. Second, the assessed discipline must be appropriate given the facts and circumstances that were taken into consideration when the decision was being made. The Carrier's considered actions must be validly related to the employee and the entire matter at hand. The reason(s) for assessed discipline must be shared with the employee at the time the decision is rendered. Additionally, during the course of the Investigation process the accused must know all of the charges and the reason(s) for the charges.

The charges against the Claimant are most serious. The Claimant was charged with being a knowing accomplice to the theft of Carrier property. When an employee either steals from the Carrier or is an accomplice to theft, the employee can no longer be trusted. With rare exception, the appropriate discipline for theft is dismissal. The Board believes that a very high level of proof is required to uphold the dismissal of an employee who has been charged with theft or being a knowing accomplice to theft whether it be the Carrier's property or a coworkers' property. Whether the level required is "substantial," "clear and convincing," or "proof beyond a reasonable doubt" has been the subject of much controversy. Because of the seriousness of the charge and the impact of dismissal for such on the Claimant and his family, the Board must be fully convinced that the Carrier proved its case in order to uphold the dismissal.

In the instant case, the Board finds that the Carrier failed to conduct a fair and impartial Investigation when it disregarded the determinations made by its own Security

Officer and rushed to judgment. The Board finds no proof whatsoever in the record to support the charges.

In view of the foregoing, the Claimant's dismissal is hereby rescinded and any mention of it is to be expunged from his personnel records. The Claimant shall be reinstated without any loss of seniority or benefits and returned to service. The Claimant is entitled to be compensation for all lost wages including any overtime that he would have been offered and likely would have worked from the date of his improper dismissal to the date that he is returned to service. Any monies earned or paid to the Claimant, except earnings from investments and income streams that he was receiving before he was dismissed from other sources that continued after his dismissal, are to be deducted from the lost wages owed to him. In addition, the Claimant is entitled to be reimbursed for any and all out-of-pocket healthcare related expenses that he incurred during the aforementioned period, which would have been covered by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal.

The Claimant is hereby directed to fully cooperate with the Carrier in providing relevant requested information pertaining to monies paid or earned and out of pocket healthcare costs incurred during the aforementioned timeframe. Failure to fully cooperate in providing relevant requested information will nullify the claim for monies owed. Any proven withholding or falsification of relevant requested information will also nullify the claim for monies owed.

**AWARD**

Claim sustained in accordance with the Findings.

**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 21st day of April 2016.