

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42408  
Docket No. SG-42655  
16-3-NRAB-00003-140205**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Railroad Signalmen  
(BNSF Railway Company)

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:**

**Claim on behalf of A. W. Miller, for any mention of this matter to be removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level S (Serious), 30-day record suspension with a three-year review period to the Claimant, without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on October 5, 2012. Carrier's File No. 35-13-0013. General Chairman's File No. 12-055-BNSF-20-C. BRS File Case No. 14977-BNSF.”**

**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.

On September 18, 2012, Signal Manager Russell Sweet reviewed the Claimant's gas purchase records for June 2011. The review was prompted by a report from the Claimant's girlfriend detailing misconduct, including misuse of a company vehicle. At the time, the Claimant was headquartered in St. Joseph, Missouri with assigned territory on Chicago Seniority District 001. Sweet found that the Claimant had refueled a Company vehicle in Council Bluffs, Iowa on June 24, 2011. This is over 120 miles away and on Denver Seniority District 003.2. Sweet turned the matter over to Resource Protection. Special Agent Joe Marr investigated and reported findings to Sweet that prompted an investigation hearing.

Based on the evidence provided at the Investigation, the Carrier assessed the Claimant a Level S (Serious), 30-day Record Suspension with a three year review period under the Carrier's Policy for Employee Performance Accountability (PEPA). The Organization protested the discipline, which the Carrier rejected on appeal. The claim was duly processed without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Organization raises several procedural objections to the claim. It points out that under Rule 54, the Carrier had 15 days after first knowledge of the incident to schedule the investigation. It contends the Carrier had knowledge of the incident as of September 18, 2012, yet the investigation did not occur until October 5. In its view, turning the gas receipt from Council Bluffs over to Resource Protection did not alter the 15-day time limit; the rule starts the clock from first knowledge and that was September 18.

The Organization finds other procedural flaws in that the Carrier failed to give it the HLCS records 24 hours prior to hearing in violation of Modified Rule 54. The Carrier entered the HLCS logs into evidence during the investigation as Exhibit 9B. In addition, the Organization asserts the Carrier failed to offer a waiver, rendering the discipline here concerned invalid.

The Carrier maintains that none of the Organization's alleged procedural objections have merit. In its view, special agents in Resource Protection are not officers of the Carrier. As a result, time limits for conducting an investigation hearing were not triggered until Marr filed his report with an officer of the Carrier. This occurred on September 28, so the Carrier calculates that the October 5 hearing was well within the 15 day limit.

The Carrier argues that Rule 54 was not violated when it refused to provide the HLCS log prior to hearing. It contends the Rule only applies to evidence BNSF intends to rely upon and does not apply to any and all evidence the Organization is interested in. There is no right to discovery prior to an investigation hearing, the Carrier asserts. The HLCS log was evidence the Organization wanted to enter, not the Carrier, and the Organization did enter it during the investigation.

The Carrier maintains the Organization did not clearly request a waiver, but only asked what the conditions of a waiver would be. It notes a waiver is an admission of guilt, yet Claimant denied any wrongdoing. It concludes that there was no prejudice to the Claimant from the lack of a waiver offer.

The Board will address the Organization's procedural objections first. Prior awards have established that the 15-day time limit on holding an investigation begins when the Carrier has knowledge that an offense may have occurred, and, in cases where matters are referred to special agents or the police, the "knowledge" begins when the agency reports the results of its investigation. This Board agrees. When a Carrier official refers a question to an agency for investigation, it has no knowledge what the results of that investigation will be until they are received. It is not in a position to make allegations, specify charges or call witnesses when the matter is in the hands of special agents or the police. It is not until the special agents or police report on their work that the Carrier is in a position to determine what action, if any, should be taken. In this case, the Carrier conducted a hearing with 15 days of receiving a report from Resource Protection. Applicable time limits were observed.

Turning to Rule 54, the Board notes that the following modification has been negotiated:

**"In the course of a formal investigation, should BNSF intend to enter into evidence a log or similar recording of specialized technical, data which is solely in BNSF's possession and control (an example would be an HLCS log), then, in order for BNSF to rely on such data in the formal investigation, BNSF shall first have made available for review such specific data to the employee's BRS representative as soon as practical, but not later than twenty-four hours prior to the formal investigation."**

This language establishes a prerequisite to the obligation to provide the Organization with the HLCS records prior to hearing: BNSF must intend to enter the records into evidence. Because the HLCS records were not entered into the record by the Carrier, BNSF had no evident intent to do so and Rule 54 was not violated.

The Organization did not expressly request a waiver and the position of the Organization during the investigation was inconsistent with the admission of guilt implicit in a waiver. As a result, there was no procedural error in the Carrier's failure to offer a waiver.

Turning to the merits of the case, the Carrier argues that the Claimant admitted he was in Council Bluffs, while Sweet confirmed that the Claimant was assigned to the Signal Maintainer's job in St. Joe, Missouri with no business in Council Bluffs. The Carrier finds it telling that the Claimant's usage and hours of service do not show that he was working in Council Bluffs; it maintains this fact supports the reality that he had no business going there. The Claimant's supervisor was Matt Heiser. Sweet testified that he spoke with Heiser and Heiser confirmed that the Claimant was not authorized to work outside his seniority district. Sweet said gangs were used outside their seniority districts to deal with flooding, but contract employees did that; he did not remember sending any Signal Maintainers.

Hours of service (HOS) logs submitted by the Claimant establish that he went off-duty at 3:30 P.M. in St. Joseph, Missouri on June 24, 2011 and performed no other service or work for the Company that day. These logs show the Claimant's off-duty time in the Service Chart area highlighted in green, and identifies the location he went off-duty as "HQ," indicating his headquarters in St. Joseph, Missouri. Pay records substantiate the HOS logs, showing that the Claimant only worked eight hours with no overtime. In the Carrier's assessment, it is not credible to imagine that the Claimant "forgot" to pay himself for five hours overtime.

In the Organization's assessment, there was nothing improper about the fuel purchase on June 24. There is no requirement for prior authorization to purchase fuel for a Company vehicle with a Company credit card. The Organization states the Claimant went to Napier to help another Maintainer in a flood situation and had to go into Council Bluffs for fuel. It notes Sweet was not the Claimant's immediate supervisor and would not have known whether the Claimant was authorized to be in Council Bluffs. Indeed, the Organization points out that Sweet admitted he rarely interacts with the Claimant. (TR 39) The Organization argues the Carrier has

failed to show he did not receive instructions to go to Council Bluffs; it offered no evidence from Heiser to support its assertion that he was not authorized to be in Council Bluffs. The Organization concludes that the Claimant was authorized to work after his assigned shift and to work off his seniority district. In its view, his only mistake was his failure to properly record his time. It references the following testimony:

**“JOE BAKER: So on a normal basis, uh would you know exactly the duties that Mr. Miller is performing on any given day?**

**RUSSEL SWEET: Not exactly what he would perform on any given day. \* \* \***

**JOE BAKER: I mean that, that information would normally come from his immediate supervisor?**

**RUSSEL SWEET: That’s correct.”**

This testimony establishes that Sweet was not in a position to know whether the Claimant was authorized to go to Council Bluffs. Heiser did not testify and Sweet’s account of what Heiser told him was hearsay. This lack of proof regarding instructions is not dispositive, and must be considered in light of the other evidence available in the case.

The photographs submitted by the Organization show nothing other than that the Claimant was in an area of flooding at some point prior to the investigation. There is no evidence that the pictures were taken on June 24 after the Claimant’s assigned hours, and no indication that they were taken on or near Company property. They do not indicate that he was working.

The Claimant’s Service Record shows he was on duty at headquarters starting at 7:00 A.M. on June 24 until 3:30 P.M., again at headquarters. According to available records, he was not on duty later in the evening when he used the Carrier’s credit card. His assertion that he “forgot” four hours of overtime is troubling. Based on the preponderance of evidence submitted into the record, the Board finds that the Claimant was not on duty at the time of his credit card use in Council Bluffs.

As the Organization points out, the Carrier's case is weakened by the failure of Heiser to confirm that the Claimant was not authorized to be in Council Bluffs. Sweet's testimony was hearsay and therefore of little value. That said, the Board finds that the Claimant's failure to record time worked on either of the relevant records deserves greater weight. Not only is it unlikely that an employee would work without requesting pay, but the failure to request pay is consistent with and corroborative of the conclusion that such work was not authorized in the first place. In the assessment of the Board, this evidence provides a sufficient basis to support the Carrier's decision.

**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 31st day of October 2016.