

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 42462
Docket No. SG-42656
16-3-NRAB-00003-140262

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
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(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 18, 2012. Carrier’s File No. 35-13-0018. General Chairman’s File No. 12-059-BNSF-20-C. BRS File Case No. 14978-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.

The Claimant submitted an Hours of Service (HOS) log for June 24, 2012, which reported eight hours of straight time and 30 minutes for a meal, but no overtime. He submitted identical hours for his pay, yet Claimant purchased fuel at 7:05 P.M. on the day in question, about three and a half hours after completion of his work day. An investigation hearing was conducted on October 5, during which the Conducting Officer questioned Claimant about his claimed error in submitting his Hours of Service. The Organization objected on the grounds that the questioning fell outside the scope of the Investigation. Accordingly, a separate Investigation took place on October 18.

Based on the evidence submitted at the October 18 Investigation, the Carrier assessed 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 Carrier asserts that Claimant's memory is selective, indicating his testimony lacks credibility. It references his statement: "I'd forgotten the hours that I worked that day" as unbelievable since he paid himself the same number of hours as reflected on his HOS. If he was working, the Carrier contends he failed to properly record his time, which is a serious offense. Claimant testified he took a second meal period, but the Carrier maintains this cannot be credited since he did not work the overtime that would qualify him for a second meal. Equally telling in the Carrier's assessment is Claimant's failure to put in for his travel time to and from Napier Center. In the Carrier's view, Claimant did not comply with the federal mandate to accurately report his Hours of Service, and the discipline was an appropriate consequence.

The Organization describes a litany of what it deems to be fatal procedural errors by the Carrier. It first asserts procedural error in that Jim Matthews was called as a witness for the October 18 hearing after serving as Hearing Officer for the October 5 hearing. It next protests that Claimant requested but was not offered a waiver. The Organization also contends that Claimant's investigation was untimely. It references Rule 54(B) which states: "In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules, the investigation shall be held within ten calendar days after date withheld from service." Claimant was withheld from service starting September 28. The Organization points out that his Investigation in this matter was not until October 18, well outside the ten-day limitation. In addition, the Organization alleges the Carrier is wrongfully investigating Claimant a second time for the same violation.

The Carrier has found two different rules violations stemming from Claimant's activities on June 24, and has separated them for processing and disciplinary assessment. The first alleged offense was using a Carrier credit card without authorization Third Division Award 42408. In that case, the Board found that the employee had indeed committed the alleged offense and upheld the discipline. Part of the reasoning behind the Board's decision in that case was the fact that Claimant's Hours of Service records and pay records did not reflect that he was working at the time or at the location of the fuel purchase.

The instant case involves an alleged rules violation in that Claimant failed to properly record his worked time. Claimant was withheld from service due to his activities on September 28. On the day he was withheld from service, the ten-day limit under Rule 54 kicked in. The Carrier maintains it did not discover the failure to properly record time until the October 5 investigation took place. This assertion is not credited. The Carrier had Claimant's service logs and time records as of September 28. It knew or should have known that Claimant's right to use the credit card was tied to the question of whether or not he was working. Claimant's failure to record time worked after 3:30 P.M. was not a newly discovered fact on October 5. Therefore, this allegation must fall within the 10-day rule. Claimant was withheld from service on Sept 28 and the investigation was held on October 18, well outside 10 days.

In view of the procedural violation found, the Board does not reach the merits of this case.

AWARD

Claim sustained.

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 28th day of November 2016.