

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42613
Docket No. MW-42880
17-3-NRAB-00003-150072**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Operator J. Lehr by letter dated August 20, 2013 for alleged violation of MWOR 1.6 Conduct, MWOR 1.19 Care of Property and 10.A Fuel-Purchasing Company Vehicle Policy and Procedure Manual in connection with her alleged misuse of BNSF fuel purchase card on April 9, 2013, May 23, 2013 and June 13, 2013 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4282-M/11-13-0355 BNR).**
- (2) As a consequence of the violations referred to in Part (1) above, Claimant J. Lehr shall ‘... be immediately paid for her lost time and days withheld from service, including any and all overtime paid to the position she was assigned to work, any expenses lost and we also request that Miss Lehr be made whole for any and all benefits, and his (sic) record cleared of any reference to any of the discipline set forth in the letter received by the Organization on August 23, 2013 letter from Deborah Smith.’”**

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 Carrier asserts that substantial evidence shows the Claimant's use of the Carrier fuel card, for diesel fuel only, to purchase non-diesel fuel on the dates in question. The Claimant has no explanation for the use of her PIN and fuel card. Dismissal is appropriate for this dishonest act. If the claim is sustained, Claimant Lehr should receive only her lost seniority and wages less outside earnings.

The Organization finds the investigation faulty because it was untimely, involved pyramided offenses and pyramided progressive discipline. Specific knowledge was not given to the Organization prior to the hearing. The Carrier cannot show if the fuel went into other than a Carrier vehicle, but the Organization has shown widespread access to PINs and fuel cards. The Claimant should be reinstated with seniority and wages and benefits intact, with no offset for outside earnings.

The Organization's procedural contentions are unpersuasive. The Board is satisfied that the Carrier's first knowledge of Claimant's alleged misuse of the fuel card on the three dates in question came on July 12, 2013. The Board is also satisfied that the Claimant received sufficient, albeit less than fully detailed information, about the allegations. These allegations are that on the dates in question the Claimant used the Carrier fuel card, which was to be used only to purchase the diesel fuel necessary for her Company-assigned truck, No. 22024, to purchase unleaded or super unleaded fuel for her personal vehicle. Each purchase alleged, if proven by substantial evidence, constituted dishonesty, whether that is characterized as theft or fraud, and is a stand-alone, dismissible offense. As such,

this is a case where the concept of progressive discipline is irrelevant. There may be scenarios where the pyramiding of charges eliminates the possibility of what might otherwise be progressive discipline, so that the pyramiding creates an unfair situation, but this is not the situation herein.

The evidence establishes that on April 9, 2013 in Early, TX, May 23, 2013 in Fargo, ND and June 13, 2013 in Fargo, ND unleaded or super unleaded fuel was purchased with the Claimant's Carrier fuel card, Claimant's employee number and an odometer reading consistent with odometer readings from her assigned Carrier vehicle . The evidence establishes the Carrier's *prima facie* case, thus requiring the Claimant to explain why, in fact, there is another explanation—one that exonerates her. The Organization contends that employee numbers are easily obtainable and that fuel cards are kept in unlocked vehicles and thus readily available to other than simply the individual to whom the card was issued. The obvious suggestion is that an employee other than the Claimant was responsible. If the fuel card was taken with some regularity the Board would expect the Claimant to have reported the missing card to an appropriate manager. There is no evidence that such a report was ever made, nor is there any indication that prior to the dates in question stolen fuel cards were a problem for the Claimant or other employees.

The Claimant has suggested that she was not always in the location where the fuel card was used for other than diesel fuel, but the evidence tells a different tale. Carrier records show that diesel fuel was purchased in Lampasas, TX at 7:35 AM on April 9 and unleaded fuel was purchased in Early, TX at 7:39 that evening. The Claimant purchased diesel fuel twice on May 23, 201, in Hawood, ND at 8:13 AM and in Fargo, ND at 12:12 PM, before the same-day 6:47 PM purchase of unleaded fuel in Fargo, ND. Claimant again bought diesel fuel in Fargo, ND on June 12, 2013 with unleaded fuel purchased in Fargo the following day. Thus, the Claimant was in the area each time the fuel card was inappropriately used. Moreover, Carrier records show odometer readings attached to non-diesel purchases that are consistent with odometer readings attached to diesel purchases. That could have happened only if the user of the fuel card made a note of the odometer readings in vehicle 22024 assigned to the Claimant. The evidence of her misuse of the Carrier fuel card is both circumstantial and exceedingly strong. Claimant's various explanations—stolen or borrowed fuel card, computer error, not in the area, did not make the purchase—crumble under close scrutiny.

The Claimant had to have known what she was doing; the purchases were intentional. She has not begun to explain away the record evidence. In an industry where supervision is likely to be from a distance, employee honesty is more critical than ever and employees must be trusted to safeguard Carrier property and their own integrity. The Claimant has failed on both counts and thus has shattered the trust the Carrier had placed in her. The dismissal is consistent with discipline within the industry for dishonesty and can in no way be viewed as arbitrary and capricious.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of June 2017.