

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 42700  
Docket No. MW-43144  
17-3-NRAB-00003-150388

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

(Brotherhood of Maintenance of 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 Sectionman C. Beasor by letter dated March 14, 2014 for alleged violation of ‘... MWOR 1.6 Conduct.’ in conjunction with his alleged ‘...theft of non-fuel purchases using the BNSF company fuel card while operating Vehicle 21458 and “Vehicle A8342 during October 2013 through December 18, 2013, while assigned as a sectionman working on the Glasgow Subdivision.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4359-E/11-14-0187 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Beasor shall be reinstated to service with seniority and he shall “\*\*\*be immediately paid for his lost time and days withheld from service, including any and all overtime paid to the position he was assigned to work, any expenses lost and we also request that Mr. Beasor be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on March 14, 2014....”

**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 Claimant was negligent and dishonest, with Claimant's admission of guilt providing sufficient evidence. The Organization's procedural objections, including an alleged violation of time limits, were not prejudicial and have no contractual support.

The Organization insists that even considering the latest date on which the Carrier could have had knowledge of alleged misuse of the Carrier's fuel card, the Investigation was untimely. Moreover, the Investigation was rendered deficient when MOWOR 1.6 Conduct was not made a part of the Investigation. The Carrier has not shown intent on Claimant's part. Even if a violation is found, procedural defects should cause the dismissal to be set aside and allow Claimant to recover lost seniority and wages without consideration of outside earnings.

Two procedural issues require consideration. First, the Board finds the Investigation timely. Richard Huff, Fuel Cost Reduction Program Coordinator, ARI, clearly expressed concern about the Claimant's charges to the fuel card as early as November 27, 2013. His November 27, 2013 e-mail and subsequent e-mails simply highlighted lists of purchases that Mr. Huff believed violated the policy on fuel card usage. However, copies of the lists submitted as part of the Carrier's submission show Product Name blacked out rather than highlighted, with the illegible product names of no use to the Board. The extent of knowledge provided to Carrier officers thus remains a mystery. The parties cannot expect the Board to act on supposed evidence that cannot be deciphered.

There is no question that, based on legible receipts provided to the Carrier on January 20, 2014 the Board could conclude that the Claimant appeared to have charged a series of unauthorized purchases over several months. Claimant's case can be distinguished from that on-property case, Third Division Award No. 41708 in which the Carrier had unambiguous knowledge of a fraudulent entry of time worked. Moreover, in on-property Third Division Award No. 32485, Referee Perkovich wrote responding to a Claimant's having charged personal items to the Carrier, "Although . . . there is no requirement that the Carrier complete its internal Investigation before commencing its Rule 40 action, they (sic) can be little doubt that such caution works to the advantage of both the Carrier and the Claimant." Thus, Referee Perkovich approved of the Carrier's delaying the notice of Investigation until the internal Investigation was complete.

Second, with no intent to set precedent, the Board does not find the absence from the record of Investigation of MOWOR 1.6 Conduct to be fatal to the Carrier's case in this particular instance. Both the notice of Investigation and the dismissal letter alleged theft. Thus, the Carrier has been consistent in its concerns, so that the Claimant and his representative knew the charge that had to be defended against and the nature of the appeals that had to be formulated. This is not a case where the MOWOR that had to be defended against was a mystery, nor is it a case where the Carrier could be accused of "bait and switch" by alleging a violation of one rule and, failing to prove the allegation, disciplined on the basis of a different rule that was not made a part of the evidentiary package. The absence of MOWOR 1.6 Conduct from the record evidence adduced at the Investigation is a significant shortcoming, but not a shortcoming that in this case prejudiced the Claimant's due process rights.

The Carrier's case, however, suffers from two other significant defects. One is that there is no substantial evidence of intended dishonesty. Rule 1.6 allows for consideration of intent, as it includes the following: "Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or the performance of duty, will not be tolerated." In addition, PEPA, Appendix B.1, which sets forth the first standalone dismissible violation, states, "Theft or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by the taking of BNSF monies or property not due." Clearly the Board has the latitude to consider intent.

The Claimant testified, credibly in the Board's view, that “. . . I made fuel purchases as needed for the fueling vehicles and was unaware of the items that are listed that are not approved purchases on the fuel card at the time. I, the time I made the purchases I was unaware that I'm not allowed to do that.” The Claimant apologized to Mr. Huff and offered to reimburse the Carrier for the unauthorized charges. The case before this Board can be distinguished from Second Division Award No. 12895 in which Referee Yost wrote that the Carrier was not obligated to prove intent. However, Award No. 12895 involved a case in which the claimant acknowledged intentionally falsifying payroll information knowing discovery would bring discipline. Moreover, in the aforementioned case, the exact rule violated and any PEPA equivalent are unknown so that any mention of intent also is unknown.

The second significant defect in the Carrier's case involves a failure to make the fuel card policy explicit. While Roadmaster Wines testified that the policy was available on line, he could not give assurances that the policy was in all of the vehicles and he was certain that he had not briefed the current crew, which included the Claimant, on the fuel card policy, although he had briefed previous crews. The absences of a readily available copy of the fuel card policy and of a briefing on the policy are consistent with the Claimant's insistence that his unauthorized purchases stemmed from ignorance and not from malicious or dishonest intent.

Moreover, while the Claimant must be considered negligent to a degree by not attempting to inform himself of the limits on the use of the fuel card, some negligence must also be attributed to the Carrier for failing to ensure that the fuel card policy was made known to the Claimant. A basic principle of just cause is that, with some exceptions, rules that guide employee conduct must be reasonable and made known to affected employees, along with the possible consequences of a violation of those rules. The fuel card policy, obviously reasonable, is not seen as an exception to the principle that rules and consequences of violations must be made known.

The case now before the Board can be distinguished from that on-property case involved in Third Division Award No. 41708. In that case, it was clear that Carrier officials had unambiguous knowledge of a fraudulent time card entry. We do not find the same unambiguous evidence in this case. The Claimant's possible negligence must be tempered by the Carrier's failure to make the fuel card policy explicit. We do not find substantial evidence of intentional theft. Rule 40.G applies.

The remedy is intended to be consistent with that provided in recent on-property cases. The Claimant's dismissal is hereby rescinded and must be expunged from his records. He shall be returned to service without loss of seniority or benefits. In addition, the Claimant is entitled to compensation for all lost wages including overtime he would have been offered and likely would have worked from the date of his dismissal to the actual date he is returned to service. Any monies earned or paid to the Claimant, except all monies that he was receiving before being dismissed and that continued after dismissal, are to be deducted from lost wages owed to him. The Claimant is further entitled to be reimbursed for any and all out-of-pocket healthcare expenses that he incurred as a consequence of his dismissal which would have been covered by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal.

**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 12th day of July 2017.