

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42985  
Docket No. MW-43916  
18-3-NRAB-00003-160693**

**The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (former Burlington Northern  
(Railroad Company**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Foreman J. Bolte by letter dated October 1, 2015 for alleged violation of MWOR 1.6 Conduct and MWOR 1.6.2 Notification of Felony Conviction in connection with his alleged conduct leading to a felony conviction was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-15-D070-11/10-15-0366 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Bolte shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered at his applicable foreman rate of pay.”**

**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 has established and holds seniority within the Carrier's Maintenance of Way Department with approximately ten years of seniority. At all times relevant to this case, the Claimant was assigned as a Foreman.

The Claimant was under Investigation by federal authorities for alleged misappropriation of Union funds. On October 29, 2014, the Claimant entered into a Plea Agreement with federal prosecutors under which he pleaded guilty to a felony. The Organization alleges that the Claimant informed his supervisor of this plea arrangement on October 29, 2014. The Claimant remained in active duty for over ten months, until the Carrier notified him on September 4, 2015, that he was under investigation for his conduct leading to a felony conviction and possible violations of Maintenance of Way Operating Rules ("MWOR"). The Carrier alleged that it learned of the Claimant's conduct leading to a felony conviction on September 3, 2015, when it received a written copy of the Claimant's Plea Agreement, and it then scheduled the Claimant's disciplinary Investigation for September 11, 2015.

The Organization argues that the Carrier violated the Claimant's due process rights by failing to hold a timely Investigation and therefore not affording the Claimant a fair and impartial Investigation. In addition, the Organization argues that the Carrier did not meet its burden of proof, and even if it had done so, the discipline imposed was excessive and unwarranted.

The Organization's due process argument rests on the requirement in Rule 40(A) that personal conduct cases will be investigated within fifteen days. Rule 40(A) states:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company

(excluding employees of the Security Department) and except as provided in Section B of this rule.”

Procedural issues involving contractual time limits are in the nature of an affirmative defense, and as such, the party raising them – in this case the Organization – bears the burden of proof.

To prevail on this defense, the Organization must establish that an officer of the Carrier had information about the Claimant’s felony conviction or the occurrence of misappropriation of Union funds more than 15 days before September 11, 2015, the date the investigation was scheduled to be held. In this case, the Organization claims that the Carrier knew of the Claimant’s conviction on October 29, 2014, when the Claimant allegedly informed his supervisor, or at the latest, in May or June of 2015, when an Assistant Division Engineer was allegedly informed of the conviction. Because there is insufficient evidence in the record to establish that an officer of the Carrier knew of Claimant’s conviction or the reasons for it prior to September 3, 2015, the Organization has not met its burden to establish that Claimant’s due process rights were violated.

On the merits, the Carrier has the burden to prove that there is substantial evidence that the Claimant engaged in the alleged misconduct and that the penalty of dismissal was reasonable under the circumstances. The Claimant was alleged to have violated MWOR 1.6 Conduct and MWOR 1.6.2 Notification of Felony Conviction. The Maintenance of Way Operating Rules state in relevant part, as follows:

**“1.6 Conduct**

Employees must not be:

- ....
- 4. Dishonest
- 5. Immoral
- ....

**1.6.2 Notification of Felony Conviction**

The conduct of any employee leading to conviction of any felony is prohibited. Any employee convicted of a

**felony must notify the proper authorities of that fact within 48 hours after the employee receives notice of the conviction.”**

**There does not appear to be any dispute about the underlying facts concerning the conduct violations. The Claimant agreed to plead guilty in federal court to the charge of embezzlement by a union officer, and he did not contest the facts supporting that plea during the on-property Investigation. Thus, there is substantial evidence to prove the charge that the Claimant embezzled Organization funds.**

**The bulk of the on-property Investigation was devoted to the issue of whether the Claimant gave 48-hour notice of his felony conviction required under Conduct Rule 1.6.2. The evidence shows that the Claimant agreed to plead guilty on October 29, 2014, when he entered into a written Plea Agreement. But the Claimant never provided a copy of the Plea Agreement to the Carrier, and it is not clear when, if ever, the Claimant notified the Carrier of his felony conviction. Thus, there is substantial evidence that the Claimant did not properly notify the Carrier of his felony conviction as required by Conduct Rule 1.6.2.**

**Finally, there is the issue of whether the Claimant’s dismissal is reasonable under the circumstances, including the nature and severity of the offense, and mitigating factors, such as the employee’s prior record and length of service. Embezzlement is a serious offense, but somewhat less severe for the Carrier because Carrier funds were not embezzled. The Claimant’s failure to notify the Carrier of a felony conviction is also a serious offense, which again was mitigated because Claimant did provide oral notification to his supervisor that he was facing criminal charges.**

**The seriousness of the charges must be weighed against any other mitigating factors. The Organization was the victim of the Claimant’s misconduct, and it is seeking to have the Claimant reinstated. The Claimant also cooperated with authorities by agreeing to a guilty plea, and he made a sincere and remorseful plea to keep his job in these proceedings. Finally, the Claimant has an established record of good prior service. Taking these factors into consideration, the penalty of dismissal was excessive. The Claimant shall be reinstated without back pay or benefits.**

**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 14th day of February 2018.**