

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43056
Docket No. SG-43939
18-3-NRAB-00003-160691**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific (formerly Soo Line)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific (formerly Dakota, Minnesota & Eastern Railroad):

Claim on behalf of J. Arens, for reinstatement to service with any mention of this matter removed from his personal record, compensation for all time lost, including overtime, and payment for any loss of benefits account Carrier violated the current Signalmen’s Agreement, particularly Rule 28, when it issued the harsh and excessive discipline of dismissal 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 April 8, 2015. Carrier’s File No. Arens 828446. General Chairman’s File No. Arens DM&E 828446. BRS File Case No. 15428-DM&E.”

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.

At the outset the Organization raises the procedural issue that Carrier failed to comply with Rule 28 – Discipline and Investigation of the August 1, 2011 Controlling Agreement by not providing the Claimant sufficient information to adequately defend against charges set forth in a notice of formal Investigation. The Organization submits this procedural failure by Carrier prevents the Board from reaching the merits of the case resulting in a finding by the Board favorable to the Claimant, specifically, a ruling by the Board to reinstate the Claimant to service. Most pertinent to the instant claim is paragraph (b) of Rule 28 which reads in whole as follows:

“(b) Written notice of hearing will be transmitted to the involved employee(s) no later than thirty (30) days following the date of occurrence or following first knowledge by the employee(s) supervising officer of the alleged incident/offense(s) to be investigated. The notice of the hearing will contain sufficient information to apprise the employee of the act or occurrence to be Investigated as well as the date, time, and place of Investigation.”

The Notice of Formal Investigation by letter dated March 30, 2015, directed the Claimant to attend a formal Investigation to be conducted in Waseca, MN at Canadian Pacific’s office located at 308 South State ST at 10:00 on April 3, 2015.

The Notice apprised the Claimant the purpose of the Investigation/hearing will be to determine all of the facts and circumstances and to place responsibility, if any, in connection with:

- 1) “Your alleged miss-use of a company vehicle and resources on February 9 / 10 / 16, 2015.
- 2) Your alleged miss-use of a company vehicle and resources on March 2, 2015.”

The Notice further apprised the Claimant of Carrier’s request of the Claimant’s supervisor, Perry Louwagie to attend the Investigation.

The formal Investigation of April 3, 2015 was postponed and convened five (5) days later on April 8, 2015.

By letter dated April 30, 2015 Carrier apprised the Claimant that based on its review of the whole of the Investigation record, it found him to be responsible for:

- 1) "Violation of Canadian Pacific Policy and Procedure # COR 5135.

On the basis of this violation, Carrier dismissed the Claimant from service.

The circumstances that culminated in Carrier convening the Formal Investigation are as follows:

"The Claimant, an employee with near eleven (11) years of service was employed as Signal Maintainer, New Ulm, IA. In the course of investigating a call out of the Claimant, Supervisor Perry Louwagie, Assistant Director S&C Construction found from an analysis of the Claimant's Fuel Transaction report covering the period beginning February 10, 2015 and ending March 19, 2015 four (4) discrepancies involving fueling times and locations where his Company vehicle should not have been. The four (4) locations noted by Louwagie were:

- Lake Benton,
- Balaton
- Marshall
- Tyler at 5:45 am

All four (4) locations were off Company property and according to Louwagie there was no reason to be at three (3) of the locations and a reason to possibly be at Marshall."

A reading of the Investigation transcript reveals that Louwagie never confronted the Claimant as to the reasons why he was at these four (4) locations prior to the convening of the Formal Investigation. The Organization notes that the Notice of Investigation never referenced Carrier's COR 5135 as the policy it believed the Claimant had violated and too, this policy was never referred to or even mentioned at

any time during the Investigation proceedings. While Carrier acknowledges this might be the case, nevertheless, this does not negate the fact that the Claimant knew he was not permitted to use the Company vehicle for other than work reasons and away from regular work locations while off duty. At the hearing the Claimant acknowledged he was qualified on the rules and also acknowledged his understanding that using the Company vehicle for non-Company related work is a violation of Company rules (emphasis the Neutral Member of the Board). The first time the Claimant was aware of the basis for his dismissal was the letter apprising him of his dismissal from service. It is noted from a reading of the Investigation transcript that during his testimony, the Claimant was vague about the reasons for having been at any one of the four (4) locations and merely speculated as to the reasons why he was there operating a Company vehicle off Company property. The Claimant acknowledged in his testimony at the hearing that he was not aware of having asked Supervisor Louwagie for permission to travel to any of the subject four (4) locations. Carrier asserted that all four (4) locations were 30 to 40 miles away from the work locations where he should not have been. In his testimony however, Louwagie acknowledged the Carrier has no rule or policy that governs how far in distance (miles) Company vehicles can be driven off Company property. Louwagie further testified that the Company policy does state that Company vehicles are to be used to perform Company work and if driven off Company property authorization needs to be obtained.

The key question pertaining to the procedural issue is whether Carrier complied with the provisions set forth in Rule 28 (b) by providing the Claimant “sufficient information” apprising him of the act or occurrence to be the subject of the Formal Investigation. The Board is of the view that it would have been helpful to specify that his miss-use of a Company vehicle on the four (4) dates in question constituted alleged violations of its COR 5135 policy but is not persuaded that not citing this policy violated the sufficient information obligation as provided for in Rule 28(b). The notice did inform the Claimant that the miss-use of his Company vehicle would be the focus of the Formal Investigation and that further, said miss-use of his Company vehicle would be associated with the identified four (4) dates in question. We are persuaded the Claimant’s acknowledgement it was his understanding that using the Company vehicle for non-Company related work was a violation of Company rules. We emphasized the word work both above and here because this was the way in which the question was put to him at the hearing but what was really meant is what the Policy, COR 5135 states in Section 2.5 Operation of Vehicles, to wit: “Use

of a company vehicle (during personal or business hours) for personal reasons (not, non-Company related work which is less restrictive than reasons) is not permitted. In any event, we are persuaded that the Claimant's understanding of the prohibition pertaining to the personal use of a Company vehicle coupled with the charges of misuse of his Company vehicle on the dates specified in the Notice of Formal Investigation met the requirement and Carrier's obligation pursuant to Rule 28(b) to provide the Claimant with "sufficient information" of what was to be the focus of the Investigation.

Having so ruled on the procedural issue, the Board now addresses the merits of the case. The critical question to be answered is, does the Claimant's Fueling Report, the one and only piece of evidence proffered by the Carrier rise to the level of "substantial evidence" the necessary requirement to substantiate assessing the Claimant the quantum of discipline of dismissal from service. Carrier submits the Fueling Report does meet the test of substantial evidence whereas, the Organization posits it does not and therefore requires the Board to sustain the claim. While it might have been helpful for Supervisor Louwagie to have confronted the Claimant after serendipitously finding the four (4) discrepancies in his Fueling Report placing him at non-Company property locations many miles away from work locations to inquire as to his reasons for being at such locations on the specified dates in question, nevertheless, the Claimant's answers to such inquiry at the hearing were vague and evasive as to give the Board the impression he knew very well he had, in fact, misused the Company vehicle on those four (4) occasions as charged. Additionally, the Claimant admitted in his testimony at hearing he did not comply with the requirement to obtain authorization from Supervisor Louwagie in advance to drive his Company vehicle off Company property. Absent the Claimant's ability to establish he was engaged in work related activity on the four (4) dates in question to overcome Carrier's allegation he used the Company vehicle for personal reasons, the Board is compelled to deny the instant claim in its entirety.

AWARD

Claim denied.

**Form 1
Page 6**

**Award No. 43056
Docket No. SG-43939
18-3-NRAB-00003-160691**

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 2nd day of May 2018.