

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43602  
Docket No. MW-44422  
19-3-NRAB-00003-170546**

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

(Brotherhood of Maintenance of Way Employes Division -  
(IBT Rail Conference

**PARTIES TO DISPUTE:** (   
(National Railroad Passenger Corporation (AMTRAK)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Hurd by letter dated December 13, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File BMWWE-608D NRP).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant J. Hurd shall be reinstated to service immediately with full seniority unimpaired and compensated for all lost wages and benefits resulting from his improper termination.”

**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, James Hurd, Sr., has been employed by the Carrier since August 21, 1981 and held the position of Equipment Repairman Foreman when he was dismissed from service. On September 30, 2016, the Claimant was notified that a hearing and investigation was to be held on October 7, 2016 for violating the Carrier's Standards of Excellence, sections entitled Values, Integrity, Trust and Honesty, Attending to Duties and Professional and Personal Conduct, including the following Specification:**

**"On September 11, 2016, Amtrak Engineering Department was informed by the OIG that during the Investigation of case #OIG-1-2016-525, it was discovered that Equipment Repairman Foreman James Hurd Sr. participated in the following activities:**

- 1. On June 1, 2016, while being interviewed by Special Agent(s), conducted himself dishonestly when he provided false, incomplete and or misleading information to a Federal Agent during the course of the investigation regarding the performance of personal work at Deputy Division Engineer Rodney Pena's residence, for Pena's personal benefit.**
- 2. He engaged in Unprofessional Conduct when he performed work at the residence of Deputy Division Engineer Rodney Pena during company time and utilized company equipment."**

**After two postponements the hearing was held on December 6, 2016. On December 13, 2016, the Claimant was notified that he was dismissed from service. The Carrier denied subsequent appeals by the Organization and issued a final written decision sustaining the dismissal on February 15, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division on May 15, 2017. The claim is now properly before the Board for adjudication.**

**The Carrier maintains that the Claimant improperly performed personal services for Deputy Division Engineer Rodney Pena. It argues that the Claimant, when initially questioned by a Special Agent from the Office of the Inspector General ("OIG"), provided misleading information about his performance of personal services while on duty. The Carrier avers that during the hearing and investigation the Claimant admitted to moving a gun safe and doing concrete work at Pena's residence.**

The Organization maintains that the Carrier failed to provide the Claimant with a fair and impartial hearing and did not meet its burden of proof in support of the charges. The Organization argues that the work performed by the Claimant and other employees was conducted at the direction of a Carrier official more than seven years before the OIG's investigation. It contends that the Claimant had no choice but to follow the instructions of a supervisor or face charges of insubordination. Further, the Organization avers that the record does not conclusively establish that the Claimant knew he was on the clock when he performed the work for Pena and that the gap in time between the alleged event and the OIG investigation undermines the reliability of the evidence.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. The Board does not find any procedural errors that nullify the need to review the merits of the dispute. Our review of the evidence and testimony finds that there is substantial evidence in the record that the Claimant violated the Carrier's rules and applicable regulations when he performed personal services while on duty.

The record supports the Carrier's decision to impose severe discipline for the Claimant's misconduct. The evidence sufficiently establishes that in 2009 the Claimant did work for Pena at his residence using company equipment and while on duty. Arbitral awards have consistently upheld dismissals for serious misconduct involving the misuse of company time.

Once the Board has determined that there is substantial evidence in the record to support the charges, we must decide if the discipline imposed is unreasonable, arbitrary, or capricious. We recognize that leniency is reserved to the Carrier, except where we find an abuse of discretion or that the discipline is excessive. A review of the record indicates that the dismissal from service is unwarranted when considering the specific circumstances involving the Claimant. The Board takes into consideration that the Claimant at the time of his dismissal had 36 years of service with no record of previous discipline. We also recognize that being directed by a superior to perform a task that does not fit within the normal scope of regular duties can create a difficult situation for the subordinate employee. While the Claimant exercised poor judgment in not reporting Pena to other Carrier officials, his overall performance for the Carrier over the many years of service before 2009 and his lack of any additional discipline since then, does provide a basis to find that the discipline imposed is excessive. Our decision here does not alter the Board's previous holdings that dismissal for conducting personal business on company time is appropriate.

However, the specifics in this matter, as they relate exclusively to the good conduct between 2009 and the time of the charges and the Claimant's length of service should be considered.

Based on the foregoing, the Claimant is reinstated with no back pay and his seniority unimpaired. His record shall reflect that this is his last chance to keep his job. Any future violations of the Carrier's rules shall be grounds for immediate dismissal.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that while the Carrier has established with substantial evidence that the Claimant engaged in gross misconduct and violated the Carrier's rules and policies, the penalty of dismissal, given the facts and circumstances described herein, is excessive.

### **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 17th day of May 2019.