

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43897
Docket No. SG-45207
20-3-NRAB-00003-180644**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp. (Amtrak):

Claim on behalf of J. J. Haber, for reinstatement to his former position with all seniority and benefits unimpaired, compensation for all time lost, including overtime, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 57, when it issued the harsh and excessive discipline of dismissal to the Claimant without providing him with a fair and impartial investigation and without meeting its burden of proving the charges in connection with an Investigation held on May 17, 2017. Carrier's File No. BRS-SD-1214D. General Chairman's File No. AEGC #2017-102-2. BRS File Case No. 15857-NRPC(S). NMB Code No. 173.”

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 relevant facts giving rise to this dispute are as follows:

By letter dated March 28, 2017, the Carrier issued a Notice of Investigation for April 7, 2017 to review the following Charge and Specification:

Charges:

1. Violation of Amtrak's "Standards of Excellence" pertaining to the sections entitled Trust and Honesty, Professional and Personal Conduct and Attending to Duties, which read in pertinent parts:

“Trust and Honesty: *“Because honesty is so important to trust and our ability to work together as a team, Amtrak has no tolerance for employees who are dishonest.”*

Professional and Personal Conduct: Teamwork- . . .Part of teamwork is properly performing your duties. Mother part is following instructions. Therefore, you must comply with all company and departmental policies, procedures and rules as well as all instructions, directions, and orders from supervisors and managers.”

Attending to Duties: “. . .As an Amtrak employee and, therefore, the company's most important resource, you have an obligation to perform your duties properly and in accordance with the standards set for your particular job. That requires that you remain alert to your duties at all times. Any activity or behavior that distracts or prevents you or others from attending to duties is unacceptable.” ”

2. Violation (TED) Time Entrance Reporting Policy.

Specification(s):

After concluding its investigation, the Amtrak Engineering Department was advised on March 9, 2017 by Amtrak's Office of Inspector General that Amtrak Signal Maintainer Justin Haber, had engaged in the following:

1. On July 19, 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 his leaving of work early before the end of his shift.
2. From August 2, 2013 to September 28, 2013 Mr. Haber was observed on Video Surveillance arriving late and or departing his work shift early on 7 days. Mr. Haber was paid 16.0 hours overtime for a total of \$528 for time he did not work during this time.
3. Between August 2014 and June, 2016, Mr. Haber failed to utilize the Time Entry Device System (TED) for weekend overtime shifts on 20 occasions as required by Amtrak's Engineering Department.

The formal investigation took place on May 17, 2017 at which time the Claimant attended with his BRS representative. The Claimant was offered full and fair the opportunity to question witnesses, examine evidence, and submit evidence on their own behalf.

By Decision dated May 26, 2017, Hearing Officer Francis Krische found the Claimant partially guilty, concluding there was substantial evidence presented at trial that he was dishonest and was paid for time that he did not work. In addition, the Hearing Officer determined that substantial evidence presented proved that the Claimant did not swipe in and out as required by the Carrier's TED policy. The Claimant's employment was terminated on May 30, 2017.

A timely appeal by the Organization followed. Unresolved, the Organization filed a notice of intent to file a submission with the NRAB Third Division dated July 2, 2018.

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on November 19, 2019.

The Carrier and Organization are parties to a Collective Bargaining Agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Claimant's craft. The instant appeal has been handled in the usual manner up to and including the highest officer designated by the Carrier to handle such disputes, and has been discussed with and denied by that officer. Therefore, the dispute is properly referable to this Board in accordance with Section 3, First (i) and (h) of the Railway Labor Act.

This is a claim for rescinding J. J. Haber's (Claimant's) termination together with a make-whole remedy. The circumstances giving rise to the Claimant's termination and the resulting claim are detailed below.

As a result of an anonymous tip received by the OIG's office, an investigation was conducted which focused on C&S Gang Q062 headquartered near Newark, NJ and supervised by Donald Harper and Richard Vogel, both of whom pled guilty to criminal charges of payroll fraud. The OIG investigation regarding the allegations in this case was conducted by OIG Investigator Wendi Grant who issued her report on March 9, 2017 which detailed its findings that several members of Gang Q062, including the Claimant, had violated Amtrak policy and committed payroll fraud by claiming and receiving pay for unworked regular and overtime hours and failing to follow the Carrier's TED policy. In addition, video surveillance documented the Claimant's late arrivals and early departures in his personal vehicle for several overtime shifts between August 2, 2013 to September 28, 2013 wherein the Claimant falsely claimed 16 hours of overtime amounting to \$528. Evidence presented at the hearing also included a Surveillance Log spreadsheet which included information gathered from the photographs compared with information gathered from the MAXIMO regarding what he was paid.

In addition to the foregoing, the records reflected that the Claimant failed to utilize the TED system on 20 out of 101 weekend overtime shifts. It is significant that during the trial, the Claimant admitted that he was aware that he was required to use the TED system. This point notwithstanding, the Claimant's excuse that his failure to

use the system resulted from the Claimant by claiming following the orders of Mr. Harper, his supervisor, an excuse quickly dismissed by the Hearing Officer.

The Hearing Officer found the testimony of Agent Grant to be credible and that of the Claimant to not be credible. On cross examination, the Claimant could not explain why he was seen leaving early or where he was going on the dates in question. The Hearing Officer noted that the testimony and a review of the surveillance materials indicated a pattern of the Claimant leaving work early at around 3:50 p.m. Based on her review of the record, the Hearing Officer concluded that there was substantial evidence that evidence that the Claimant left work early and failed to swipe in and out on TED as required by Amtrak policy. Such evidence includes the Claimant's admission that he failed to use the TED system to swipe in and out notwithstanding that he knew he was required to do so.

While the Claimant offered excuses for his behavior, the Hearing Officer was quick to determine that the Claimant's testimony was simply not credible.

As part of the Claimant's defense, the Organization suggested that at times, the Claimant reported somewhere other than his assigned headquarters. While interesting, the Organization failed to provide any support for its suggested defense.

In the end, the Hearing Officer carefully weighed and reviewed the evidence and concluded that while the Claimant was not proven guilty for the Charge of providing false information to a Federal Agent, the Claimant was guilty of putting in for and receiving pay for time not worked and failing to utilize the TED system to swipe in and out as alleged in the Charge. While the Organization has taken issue with the Hearing Officer's decision and conclusion, it is clear to this Board that the Hearing Officer observed the testimony and received the evidence first hand. Finding no basis upon which to discount the Hearing Officer's weighing of the conflicting evidence and inferences, this Board is bound to accept her conclusions, particularly as to the determinations made regarding witness credibility. In this regard, the Hearing Officer determined that the Claimant's testimony was not convincing or credible. Given the record as a whole, this Board finds and concludes that the Hearing Officer's credibility determinations were sound and should not be disturbed.

Having concluded that there is substantial evidence in the record to support the allegations, there remains a question as to the appropriate discipline. The Board initially notes that the Claimant is a relatively short-term employee and there are no

mitigating factors that would serve to reduce the penalty. Accordingly, the Board concludes that the penalty issued by the Carrier will stand unmodified.

AWARD

Claim denied.

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 28th day of January 2020.