

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44279
Docket No. MW-45771
20-3-NRAB-00003-200028**

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
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. M. Smith, by letter dated July 20, 2018, for violation of MWOR 1.6 – Conduct in connection with his alleged conduct at a convenience store on March 9, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-19/10-18-0353 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Smith shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

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.

On March 9, 2018, Gang TRGX0406 that included the Claimant, a Trackman, stopped at a convenience store to buy food and snacks for the evening because the Gang's tour began in the afternoon. As the Claimant acknowledged, Foreman Prickett observed him either inside at the door (Claimant's version) or outside the store (Foreman's version), whereupon the Foreman told the Claimant to pay for the items he had taken, which the Claimant did. On March 14, 2018, Foreman Prickett reported the matter to Roadmaster Serpas, who in turn reported the incident to his supervisor and to Human Resources. By letter dated March 20, 2018, the Claimant was informed that:

"An investigation has been scheduled at 1500 hours, Wednesday, March 28, 2018, at the West Conference Room, 11 West 1st Street, Alliance, NE, 69301, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged conduct at a convenience store on March 9, 2018, at/or near Scottsbluff, NE, while assigned as a Sectionman on GangTRGX0406. The date BNSF received first knowledge of this alleged violation is March 14, 2018."

After two (2) mutually agreed to postponements, the investigation was held at the original location at 1000 hours on June 28, 2018. By letter dated July 20, received ten (10) days later, the Claimant was informed of his dismissal for violating MWOR 1.6 Conduct. The Organization filed a timely claim on the Claimant's behalf on September 11, 2018. The Claim was properly progressed on the property without resolution and thereafter referred to the National Railroad Adjustment Board for final adjudication.

The Carrier asserts that the claim should be denied because the testimony of Foreman Prickett provides the required substantial evidence that proves the violation of MWOR 1.6. The Claimant's testimony was not credible and it is the practice within the industry for Boards to accept a Conducting Officer's credibility determination. The discipline was appropriate as theft, a form of dishonesty, is a stand-alone dismissible violation within the Policy on Employee Performance Accountability (PEPA). The amount of the theft, even if minimal, is not

determinant, as other Boards have observed. While the Claimant did not steal from the Carrier, his action, taken while on the clock, reflected poorly on his employer and rendered him untrustworthy.

Even if the Board were to consider the infraction as a Serious Violation, it would be the second Level S violation within a thirty-six (36) month review period; therefore, dismissal would still be appropriate. Moreover, leniency comes at the discretion of the Carrier, not the Board. The Claimant's long tenure cannot justify less than dismissal. The discipline was timely "rendered" in accordance with Rule 40.D, as "rendered" refers to a mailing date and not to a receipt date. The Claimant received a fair and impartial hearing with allegations of collusion unproven. If the dismissal were to be set aside, the Award should include an offset for outside earnings but should exclude compensation for out-of-pocket medical expenses.

The Organization insists that the claim should be sustained without consideration of the merits because the Carrier violated Rule 40.D by not providing written notice of the disciplinary decision within the required thirty (30) days following the investigation. The decision was received thirty-four (34) days after the investigation. Regarding the merits, the Carrier has not met its burden of proof as the Claimant had no intent to leave and did not leave the store without paying for the selected items. Assistant Roadmaster Serpas, who had not spoken to the Claimant, provided inconsistent testimony. The dismissal was excessive and unwarranted; punitive rather than corrective. The Claimant had thirty-eight (38) years with the Carrier and was honest and forthright throughout this process. The remedy should include overtime pay and reimbursement for medical expenses.

This claim will be decided on the merits. The Organization alleges a violation of Rule 40.D, which requires that "a decision shall be rendered within thirty (30) days following the investigation . . . "Rendered" has been interpreted in accordance with the "mailbox rule," meaning that placing the decision in the mail fulfills the requirement to "render." See Third division Award 10254, PLB 7020, Award 12, Third Division Award 30601. Included in the Organization's submission were awards that involved consideration of Rule 42, which requires that notice be given within sixty days when a claim is disallowed. There is a series of on-property awards that have found that this language requires receipt within sixty (60) days. However, this is not a Rule 42 case and the Organization has not alleged a violation of Rule 42.

The case on the merits involves a determination of credibility of Foreman Prickett and the Claimant. The Board is aware of and accepts, with rare exceptions, the industry practice that the credibility determinations of Conducting Officers are to be accepted. We follow that practice herein, but in light of the dismissal of an employee with thirty-eight (38) years' tenure, the Board believes an explanation of why we accept the Conducting Officer's determination is appropriate. First, the Claimant testified inconsistently. During the investigation, on direct examination he testified that he went outside the store to take his daughter's cell phone call (TR-12, ll. 1-2). At one point during cross examination the Claimant stated that he never made it outside the door (TR-16, ll. 23-25). Consistency is one of the hallmarks of credibility. Second, Foreman Prickett said that there was no phone call, but the Claimant said that there was the call. Where is the statement from the daughter or, far better, the phone records to establish that there was a call? The Claimant has not provided supporting evidence. Third, Foreman Prickett testified that the Claimant put the candy bars in his pocket, while the Claimant stated that he placed the candy bars under his arm and then simply forgot about them when the call came. Candy bars cannot be held under one's arm without pressure applied to keep them from falling, and this would be particularly true if the Claimant used the other arm to grasp the cell phone and/or to open the store door to go outside. The Claimant's "under the arm" version of the events inside the store is illogical and therefore not believable.

For all of the reasons noted above, the Board accepts the Conducting Officer's credibility determination. With that comes the conclusion that the Claimant did attempt to take the candy without paying for it and in so doing violated Rule 1.6 Conduct particularly as the Rule applies to honesty. Whether the Board treats the infraction as a stand-alone dismissal offense or finds it simply a Level S violation is moot. Because this would be the second Level S violation within an active review period, the result is the same.

AWARD

Claim denied.

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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 23rd day of October 2020.