

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44363
Docket No. MW-45775
21-3-NRAB-00003-200093**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK) –
(Other than Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. S. Barrientos, by letter dated February 26 2019, for alleged violation of Amtrak’s Standards of Excellence in connection with an incident that occurred on October 18, 2017 was arbitrary, capricious and constituted a violation of the Agreement (System File M-1915A-501/BMWE-153856-D NRP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Barrientos shall be:**

‘* immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of Amtrak and a member of the Brotherhood of Maintenance of Way Employees Division of the International**

Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.

In short, we herein make the demand that the Claimant be made “whole” for any and all losses related to his dismissal from service.”

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 had held the position of Truck Driver under the Carrier's Maintenance of Way Agreement for 18 years at the time of the events herein. On October 18, 2017, the Claimant told Manager Cassim Mamoon that he suspected his co-worker was damaging his property so the Claimant had placed a recording device in a locker room to record him. When he reviewed the recording, he saw the co-worker stealing supplies from the locker room. When Mamoon asked about the videotape, the Claimant said that he had deleted it.

In December of 2017, the Claimant signed a waiver and accepted a ten-day suspension for secretly videotaping his co-worker in the locker room.

On February 1, 2019, the Carrier received an Office of the Inspector General (“OIG”) report related to the earlier theft. Upon reading the report, the Carrier's management learned that the Claimant had not deleted the video, but had turned it over to the OIG.

On February 12, 2019, the Claimant was given notice of an investigation in connection with the following charge:

“On Wednesday, October 18, 2017, you spoke with Division Engineer, Cassim Mamoon and informed him that you set up a camera in your locker and saw a recording of Reginald Hawkins taking company property, for example: toilet paper, paper towels, foam cleanser and trash bags. You went on to say, you realized putting a camera was inappropriate, therefore you decided to erase the recording. You also told Senior Engineer, Eric Ngolle that you deleted the video in your interview with him regarding the above mentioned matter. Then at a later date supplied the video to the Office of Inspector General.”

After a formal investigation on February 19, 2019, the Claimant was found in violation of Amtrak’s Standards of Excellence - (Amtrak Values: Integrity, Trust, and Honesty) and was dismissed from the Carrier’s service.

By letter dated March 25, 2019, the Organization appealed the assessed discipline. By letter dated May 3, 2019, the Carrier denied the Organization’s appeal. The parties were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Carrier contends that it has provided substantial evidence that the Claimant was dishonest when he repeatedly told management that he had deleted the video recording of his co-worker stealing the Carrier’s property. The Carrier contends that its first knowledge that the Claimant had lied when he signed the waiver in December 2017 occurred when it received the OIG report in February 2019. The Carrier contends that during the investigation hearing, the Claimant admitted he had lied to management because he did not trust them. The Carrier contends that the Claimant’s statement that he told Ngolle about the video when he was signing the waiver was disputed by Ngolle.

The Carrier contends that the Organization’s procedural arguments hold no weight and should be dismissed. The Carrier contends that the Claimant was not subject to double jeopardy when he was charged with dishonesty after signing a waiver accepting a ten-day suspension for improperly recording his co-worker. The Carrier contends that the two charges are distinct and that at the time of the waiver, the Carrier was unaware of the Claimant’s dishonesty.

The Carrier also contends that the Organization's claim that the time limits were violated should be dismissed. The Carrier contends that prior to February 2019, when it received the OIG report, it had no reason to know or believe that the Claimant had been dishonest when he said he had deleted the video. Furthermore, the Carrier contends that knowledge to OIG cannot be imputed to the Carrier's officials, because the Carrier does not control OIG.

Finally, the Carrier contends that the discipline of dismissal for dishonesty is fully warranted, as a dishonest employee betrays the trust that is inherent in the employer-employee relationship. The Carrier points out that numerous Boards have upheld dismissal for dishonesty.

The Organization contends that the charges against the Claimant were not timely filed as required by Rule 15 of the parties' agreement and thus, his claim must be sustained. The Organization contends that the Claimant testified that he disclosed to management at the time he signed his waiver that he had actually turned over the video to OIG, and thus, the Carrier's first knowledge was in December 2017. Therefore, the Organization contends, charges not filed until February 2019 were clearly untimely.

Furthermore, the Organization contends that the Claimant was subjected to double jeopardy as he had already been disciplined in 2017 in connection with the video recording and then was dismissed in 2019 for the same misconduct. The Organization claims that the Claimant has been wrongly subjected to discipline twice over the same set of circumstances, contrary to the fundamental "fairness and impartiality" guaranteed by Rule 15.1 of the parties' Agreement.

The Organization contends that the Carrier has failed to sustain its burden of proving with substantial evidence that the Claimant has been dishonest. The Organization contends that the Claimant meant only that the video no longer existed on his computer's hard drive, but he never meant to deny that he had supplied a copy to OIG, or to imply that he had not retained a copy of it. The Organization contends that at most, the Carrier has shown a miscommunication, and has not proved that the Claimant was dishonest.

Finally, the Organization contends that the Claimant's dismissal was arbitrary and excessive. The Organization contends that as an 18-year employee with a clean disciplinary record for the last 17 years, and in light of the Carrier's failure to prove his dishonesty, the Claimant should not have been subjected to such a harsh penalty.

The Organization raises several procedural issues, the first being that the charges were untimely under Rule 15 of the parties' Agreement, which provides,

"RULE 15 - DISCIPLINE

No charge shall be made that involves any offense of which the Company has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results from the offense, in which event the charge may be made within thirty (30) days of the final judgement."

The Organization contends that the Carrier knew of the events surrounding the video in December 2017, when the Claimant signed a waiver, but did not charge him until February 2019, clearly more than 30 days after the Carrier's managers were aware of the video. The Carrier concedes that it was aware in 2017 that the Claimant had recorded the video, but contends that it did not know until 2019 when it received the OIG report which referred to the video, that the Claimant had lied when he said that he had deleted it.

The Carrier contends that it cannot be charged with the knowledge of the OIG, because it does not control the OIG and its knowledge cannot be imputed to the Carrier. Therefore, the timelines did not begin to run until the OIG report was presented to the Carrier's officials. The Carrier presented prior awards which seem to resolve this question. In Award No. 476 of Special Board of Adjustment 928, an on-property award with another craft, the Board wrote,

"Prior awards are clear, and not belabored here, that the Office of the Inspector General is independent of the Carrier. Regardless of whether the Carrier is aware of an OIG investigation, the Carrier has no control over those OIG investigations. In the instant matter, the OIG turned over their findings to the Carrier and the Carrier subsequently sent Claimant a Notice of Investigation within the proper timeframe. The Agreement timeframe was implicated when the OIG turned over the findings to the Carrier and not at a prior time. The clock was not running beforehand."

In addition, in Award 2 of Public Law Board 6807, in another on-property award with yet another craft, that Board wrote,

“First, with respect to the threshold issue of the timeliness of the charges, we find that the mere fact that an investigation had been ongoing did not constitute “actual knowledge” by the Carrier, as comprehended by Rule 24(b). Thus, we agree with the Carrier’s position, as supported by the existing arbitral precedent, that the Special Agents who had conducted the investigation as employees of the Inspector General’s Office had no contractual authority to issue an investigation notice to the Claimant, under Rule 24(b.... See, Award 19 of Public Law Board No. 6615.”

This Board is persuaded that the reasoning of the precedent is sound, and we do not see a reason to depart from it. Without evidence that the Carrier’s officials were actually aware in December 2017 that the Claimant had turned over a copy of the video to OIG while asserting that it had been deleted, there is no basis on which to transfer the OIG’s knowledge to the Carrier.

The Organization argues that the Investigation showed that the Claimant did make the Carrier’s managers aware of the video copy at the time he signed the waiver in December 2017. He testified that he specifically told Ngolle that he had turned over a copy to OIG. However, Ngolle rebutted this testimony, denying that any such disclosure had occurred. Resolution of credibility questions and conflicting testimony is the province of the Hearing Officer, who has heard the testimony and observed the witnesses first-hand. As an appellate tribunal, the Board must defer to such judgments so long as there is substantial evidence to support the Hearing Officer’s findings. We find that Ngolle’s denial and the Claimant’s admission that he lied to management because he didn’t trust them was substantial evidence. This Board will not overturn the Hearing Officer’s determination that the Carrier’s first knowledge that a copy of the video still existed was when it received the OIG report in February 2019. Thus, the charges were not untimely.

The Organization also contends that the Claimant was disciplined twice for the same misconduct, and so was improperly placed in double jeopardy. The principle of double jeopardy, although arising out of a Constitutional protection, is well-accepted in labor relations. There is no question that it would be improper for the Carrier to investigate a matter, assess a penalty, and then later increase that penalty on the same underlying facts. But here, the initial discipline was meted because of the secret recording that the Claimant made. As found above, the Carrier did not know for some time that the Claimant lied when he said that the video had been deleted. Therefore, the second penalty was not based on the same underlying facts and does not give rise to double jeopardy.

Turning to the merits of the claim, the Carrier has provided substantial evidence that the Claimant was dishonest when he told Carrier officials that he had deleted the video and did not disclose that a copy had been turned over to OIG. Additionally, the Carrier contended that it was unable to charge the Claimant's coworker with theft without that evidence and the alleged thief remained in the Carrier's service. Dishonesty is a serious charge that can warrant dismissal, so the penalty is neither harsh nor excessive. This Board finds no reason to disturb the Carrier's judgment.

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 6th day of January 2021.