

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44661
Docket No. SG-46264
22-3-NRAB-00003-200823**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J.L. Orr, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on April 22, 2019.” Carrier's File No. 35-19-0025. General Chairman's File No. 19-039-BNSF-121-T. BRS File Case No. 16259-BNSF. NMB Code No. 106.”

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 time this dispute developed, the Claimant was assigned to a Safety Assistant position in the Carrier's Signal Department. He was assigned to Mobile Gang SSCX0149 and Headquartered Gang SSAX0101. The Claimant's assignment required extensive travel. Pursuant to Rule 46 D-1,

Employees assigned to mobile crews working away from their homes will be reimbursed for their necessary actual expenses for meals and for necessary actual expenses for lodging, if lodging is not provided by the Carrier.

After some expenses were flagged, Project Manager I Compliance, Courtney Austin, conducted a review of the gangs' expenses. She concluded that the Claimant had expensed meals unrelated to his travel on several occasions. She created a 24-page document which identified the date and the nature of each flagged expense.

On April 10, 2019, the Claimant was given notice of an investigation in connection with the following charge:

An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged theft and dishonesty when you submitted fraudulent personal charges as company expenses between January 9, 2018, through December 7, 2018, while assigned to Mobile Gang SSCX 0149 and Headquartered Gang SSAX 0101. The date BNSF received first knowledge of this alleged violation is April 8, 2019.

After a formal investigation on April 22, 2019, the Claimant was found in violation of MWOR 1.6, Conduct, and was dismissed from the Carrier's service.

By letter dated July 13, 2019, the Organization presented a claim to the Carrier which was denied by letter dated September 11, 2019. 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 presented substantial evidence showing the Claimant's violation of MWOR 1.6, Conduct-Dishonesty. The Carrier contends that the record shows that the Claimant expensed meals in his hometown after arriving

from out of town and charged multiple meals for multiple guests at one time. The Carrier contends that there is no dispute that the Claimant admitted to charging the expenses, calling his actions a mistake. The Carrier contends that the Claimant's failure to understand the rules does not excuse his conduct.

The Carrier contends that the Claimant was provided a fair and impartial Investigation. The Carrier contends that the Notice of Investigation was timely, as the timeline did not begin to run until the internal investigation was completed. Further, the Carrier contends that the Notice was sufficient, as it informed the Claimant and his Organization that his company expenses between January 9 and December 7, 2018, were being investigated. The Carrier contends that the Organization had sufficient time to defend the charges.

The Carrier contends that the parties' Agreement does not require it to provide expenses prior to the investigation, as they are not listed among the things that must be shared 24 hours prior to the investigation in the 2014 Rules Update Agreement.

The Carrier contends that BNSF's Policy for Employee Performance Accountability ("PEPA") classifies this type of violation as Stand Alone Dismissible. The Carrier contends that the assessed discipline was not excessive, arbitrary, or unwarranted.

The Organization contends that the Carrier failed to provide a fair and impartial investigation. Specifically, it charges the Carrier with failing to specify actual charges against the Claimant in the Investigation Notice. According to the Organization the broad date range of an entire year lacked the necessary specificity.

The Organization also contends that the Carrier's first knowledge of the alleged misconduct occurred on March 5, 2019, but it did not schedule the initial Investigation until April 22, 2019, well outside the Agreement-mandated 15 days. The Organization contends that the Carrier's case and resulting discipline is therefore *void ab initio*.

The Organization further contends that the Investigation was neither fair nor impartial. The Organization further contends that the Hearing Officer denied the Organization's request to review the Carrier's exhibits, which had not been identified in the Notice of Investigation or made available to the Organization prior to the hearing.

With respect to the merits, the Organization contends that the Carrier has failed to provide substantial evidence in support of its charges. The Organization contends that the Claimant's expenses were approved by his supervisor, so the Claimant was unaware that his submissions were improper. The Organization further contends that the Claimant and his supervisor were in the process of fixing the discrepancies when the Compliance Department's investigation was started. After the Claimant's supervisor explained why his expenses were improper, the Claimant was addressing them. Finally, the Organization contends that the Claimant has reimbursed the Carrier for any approved expenses that were later deemed improper.

Rule 54 of the parties' Agreement provides, in part,

A. An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) calendar days from the date of the occurrence except that personal conduct cases will be subject to the fifteen (15) calendar day limit from the date information is obtained by an officer of the Carrier and except as provided in paragraph B of this rule.

C. At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire.

G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired with pay for time lost, but any earnings in other employment.

The Organization contends that the Carrier's notice to the Claimant and his representatives failed to satisfy its obligation to provide "advance written notice...outlining specific offense." It objected to the broad scope of the Notice of Investigation at the outset of the Investigation Hearing. Where the parties have

agreed that an employee is entitled to notice which outlines the *specific* offense, there can be no doubt that they mean something more than a general outline of the charges.

Numerous prior awards have made clear that this type of language in the Agreement serves the purpose of apprising the accused of the charges against him so that he can prepare a defense. *E.g.*, Third Division Award 13447; Third Division Award 15855. In Third Division Award 14778, the Board wrote,

No man can defend himself against a charge to him unknown. Certainly, it is not due process to shovel anything and everything into a record and leave to the uninhibited hearing officer finding what misconduct he feels the employee has committed. Issue must be joined before hearing.

Here, the Carrier identified nearly a year's span of expenses that it thought improper. This charge lacked specificity, particularly as the Carrier knew the 29 specific dates and expenses it considered to be improper when it drafted the Notice but failed to so apprise the Claimant. The Carrier denied the Claimant his contractually guaranteed due process when it kept from him information necessary to mount a defense. The Claimant was left to guess which of his submitted expenses in the span of nearly a year that the Carrier considered to be fraudulent. It has failed to offer any good explanation as to why it did not share the specific offense with the Claimant as required by the parties' Agreement.

The Carrier's denial of the Claimant's due process rights was continued at the hearing. When the Carrier's witness sought to testify regarding the 24-page document outlining the allegedly fraudulent charges not previously shared with the Organization, the Organization asked for a recess to review the document. The request was denied on the basis that the Organization would have previously had access to the Claimant's expense records. But without knowledge of which expenses to review, the Claimant would not have known which of nearly 365 days to review. The Notice did not even clarify that there were 29 flagged expenses. The Claimant's ability to defend himself was severely hampered by the Carrier's Notice which failed to outline the specific offense that the Claimant was charged with.

Having found that the Claimant was denied his right to a fair and impartial investigation, we must grant the contractual remedy agreed to by the parties. As a result, we find it unnecessary to reach the Organization's remaining arguments.

AWARD

Claim sustained.

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 15th day of December 2021.