

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44676
Docket No. MW-46445
22-3-NRAB-00003-200641**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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. J. Williams, by letter dated February 5, 2019, for violation of MWOR 1.6 Conduct for alleged dishonesty when interviewed by HR Director Hannah Stadheim on November 8, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D070-2/10-19-0153 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Williams shall be ‘... reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant [sic] at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service; 3)**

overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the Claimant not been removed from service; 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service. All notations of this dismissal should be removed from all carrier records, due to the Carrier's arbitrary, capricious, and excessive discipline leading to the Claimant being improperly dismissed."

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, Jeffrey Williams, is a Machine Operator employed by the Carrier since March 19, 2012. On November 19, 2018, the Claimant was notified of a hearing and investigation to be held on November 28, 2018, alleging misconduct toward another employee, and making dishonest statements during an interview with the Human Resources Director on November 8, 2018. After a postponement the hearing was held on January 8, 2019. On February 5, 2019, the Claimant was notified that he was dismissed from service after the Carrier found him guilty of the charges. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on July 25, 2019. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

In discipline cases, as the one before the Board here, 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. Upon review of all evidence adduced during the on-property investigation, the Board finds that the Carrier has met its burden of proof that the Claimant made statements that were misleading and contradictory. We do not find that the evidence conclusively renders his statements dishonest and therefore, the Board finds that the basis for the conflicting statements renders the penalty of dismissal arbitrary.

The Board find's the Organization's numerous procedural objections without merit. Here, we specifically address only its claim that the Carrier violated Rule 40, Investigations and Appeals, paragraph A, alleging that the Investigation was not held within 15 days of the occurrence. The record sufficiently establishes that first knowledge of the Claimant's contradictory statement was conclusively reached on November 13, 2018, when Human Resources ("HR") Director Hannah Stadheim reviewed her investigative findings with the Claimant's supervisor Roadmaster Donald Jones. The charges were issued on November 19, 2018, scheduling the Investigation for November 28, 2018, which is within 15-day period proscribed by Rule 40A. Arbitral precedent supports the conclusion that results of a fact-finding investigation conducted by other than the accused's departmental authorities do not constitute first knowledge within the meaning of Rule 40A until those findings are presented and reviewed by a supervising officer empowered to initiate a disciplinary investigation. No other procedural claims are supported by the record.

The documentary evidence and testimony of HR Director Stadheim and Roadmaster Jones confirms that the Claimant provided contradictory statements. A meeting was held with the Claimant, Mr. Jones, and other department supervisors on July 27, 2018, regarding an allegation that the Claimant drove a company truck past co-worker John Walker's house which was located outside of his work-related driving route. Mr. Jones testified that the Claimant stated he did so because he did not see Mr. Walker at work. During the interview with Ms. Stadheim on November 8, 2018, regarding the same allegation reported to Human Resources, the Claimant stated he drove past Walker's home because it was on his route. On November 13, 2018, Ms. Stadheim shared her findings with Mr. Jones where it was concluded that the Claimant made two different statements and was dishonest. The Claimant testified that he did not consider the two statements contradictory.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Upon our review of the record, the Board finds the Claimant's contradictory statements do not rise to level of dishonesty that arbitral precedent has consistently found to be a dismissible offense. As such, we find the penalty of dismissal here to be excessive.

The Claimant's discrepancy when comparing his two statements regarding his driving by Mr. Walker's house provided a sufficient basis for the Carrier to consider him dishonest. However, we find no discernable purpose for the Claimant's conflicting statement or evidence that he was attempting to deceive the Carrier for some gainful benefit by driving approximately five minutes off his work-related route. Nor does the record provide any evidence that the Claimant engaged in "misconduct toward a fellow employee" as charged in the notice of Investigation. The Claimant's misleading statement to Ms. Stadheim does not provide a basis to conclude his driving past his co-worker's house was an attempt to derive an ill-gotten benefit nor does he deny passing Mr. Walker's house and pointing it out to his co-worker Zach Staggman who was with him in the truck.

A review of the awards cited by the Carrier involved theft which when proven has consistently been found to be grounds for dismissal. Here, however, we have no such pernicious conduct. Instead, the Claimant provides conflicting statements as to how or why he decided to drive past Mr. Walker's house.

The Claimant's disciplinary record during his seven years of service contains no similar misconduct and only one operational violation. The Carrier here did not charge the Claimant with using a company vehicle improperly. While the Claimant's conduct is egregious, we find that discipline here, given the facts and circumstances in the record, should be rehabilitative and a deterrent and therefore, he should be afforded an opportunity to correct his behavior. The Claimant shall be reinstated with his seniority unimpaired and without back pay, whereby the time out of service constitutes an appropriate penalty. Any charges of a similar nature in the future shall be grounds for 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 the Carrier has provided substantial evidence that the Claimant violated its rules, but the discipline imposed 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 28th day of January 2022.