

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44774
Docket No. MS-46625
22-3-NRAB-00003-210420**

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

(D. PALMER

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“I, Donald J Palmer is disputing the discipline and charge of trust and honesty. The discipline was not only Excessive but Unreasonable. The charge was False, it was all through the carriers or hearing officers perception. I am requesting Reinstatement and to gain all losses associated with the dismissal which include time, all benefit rights, and all seniority restored. Even assuming some rules was violated the discipline was clearly excessive and must be Reduced to Final Disciplinary Action with Foreman Rights Suspended Indefinitely. I will present mitigating evidence when the time comes which should serve to overturn the dismissal.”

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 held the position of Track Foreman in the Carrier's service. On February 3, 2020, the Claimant was working as a Foreman entering Elizabeth Station

while there was a NJ Transit train occupying the station platform. This led to an investigation, including the examination of his Physical Characteristics (“PC”) qualification. The Carrier learned that the Claimant’s PC for the territory had expired on January 1, 2019, and as a result he had been working as a Foreman when not qualified to do so. The Claimant said that he believed he was qualified but did not produce a record of his then-current Physical Characteristics. The Claimant attempted to confirm his qualifications on February 20, 2020, but was unable to do so.

On March 2, 2020, the Claimant was given notice of an investigation in connection with the following specification of charges:

As a result of an investigation related to a NORAC Rule Violation from February 3, 2020 (ODI 014.20 BM) involving Track Foreman Donald Palmer, it was discovered on Friday February 21, 2020 that at the time of that incident (2/3/20) Foreman Palmer had allowed his Physical Characteristics (PC’s) to expire and was not a qualified Foreman able to perform service in all capacities as a Foreman in the territory where that violation took place. In addition, Mr. Palmer was dishonest with his manager during the investigation into that incident, when he told his manager he was in fact qualified and would provide proof of his PC qualifications. Mr. Palmer attempted to cover his false statement by going to the training department in New York and requesting to be tested on 2/20/20 (well after the 2/3/20 violation) on the PC’s for the territory that he knew he had let expire and where the violation took place “A to Elmora”. The Training Dept could not accommodate Mr. Palmer’s request to be tested that day and later they discovered that Mr. Palmer was not qualified “A to Elmora”. To date Mr. Palmer has not provided proof that he is PC qualified; therefore, he was unable to perform service as a Foreman.

After a formal investigation on June 16, 2020, the Hearing Officer found that the Claimant was guilty of all charges and thereafter, the Claimant was dismissed from the Carrier’s service.

In a letter dated July 7, 2020, the Organization appealed the Carrier’s discipline. The Carrier denied the appeal in a letter dated November 4, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that there is substantial evidence in the record showing that the Claimant worked while lacking the required qualifications and was dishonest when confronted about it. The Carrier contends that the Hearing Officer found the Carrier's witnesses and documentation to be credible and that this Board should not disturb those findings so long as they are supported by the record.

The Carrier contends that the testimony established that the Claimant was not forthcoming when he was confronted about his lack of qualification. Instead of admitting his error, he attempted to get qualified without alerting management.

The Carrier contends that the Claimant was provided a fair and impartial hearing. The Carrier contends that the charges were clear and precise and that the discipline was imposed for the same incident identified in the charges. The charges were sufficient under the Agreement.

The Carrier contends that the penalty was not excessive and that the Board should not substitute its judgment for that of management without evidence that the discipline was arbitrary, capricious, or unreasonable. The Carrier contends that the Claimant's rule violations alone warrant dismissal due to their severity, as dishonesty has traditionally been viewed by this Board as a very serious violation, meriting dismissal. In addition, the Claimant's prior discipline record is not unblemished, and he previously received discipline, including a Final Warning, for similar infractions.

The Claimant asserts that he was not dishonest and that the lack of qualifications was merely an oversight. The Claimant contends that he went to the rules department to confirm his qualifications. When that couldn't be done, he asked to sit for the exam but was refused. The Claimant asserts that when the rules department determined that his qualification had expired, they contacted his supervisor rather than him, making him look dishonest. The Claimant contends that he believes he is certified but doesn't have his books due to an unrelated incident.

The Claimant contends that he would never have moved equipment if he had known that his PC qualifications were not in order. He points out that when his supervisor asked if he was PC qualified, he said "yes" right away and wanted to check his books. The Claimant asks that the discipline be reduced so that he can be reinstated.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

Here, the record clearly demonstrates that the Claimant was lacking the requisite qualification when he was working in the Carrier's service. When confronted, the Claimant said he had his PC qualification, but he did not. It is the responsibility of the employee to ensure that he is qualified to perform his assigned duties. The Claimant failed in this responsibility. Even the Claimant admits that he was unable to show that he was qualified on the physical characteristics of the territory on which he was to operate.

With respect to the charge of dishonesty, this Board is constrained to defer to the credibility determinations made by the Hearing Officer. Such decisions are respected by this Board unless they are substantively unreasonable. Here, there is insufficient evidence to contradict the Hearing Officer's determination that the Claimant was dishonest when he told his manager he was qualified and then attempted to cover his false statement by requesting to be tested for the territory. The Claimant was never able to provide proof that he was PC qualified on the territory on the day in question.

The Carrier is not obligated to keep a dishonest employee on its payroll. The Claimant's disciplinary record was far from exemplary. Under the circumstances, we cannot say that the penalty of dismissal was arbitrary, capricious, or excessive.

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 29th day of July 2022.