

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44810
Docket No. SG-46681
23-3-NRAB-00003-210210**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of M.T. Mangrum, for any mention of this matter to be removed from his personal record and reimbursement of the monies improperly collected by Carrier, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level S, 30-day record suspension with a 1-year review period to the Claimant, without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on November 5, 2019. Carrier’s File No. 35-20-0009. General Chairman’s File No. 19-096-BNSF-173-CA. BRS File Case No. 16351-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.

The Claimant began in the Carrier's service on January 9, 2012. At the time of the incident in question, the Claimant was working as a Signaller on Gang SSCX0798 on the California Division in Fargo, North Dakota. As such, he travelled extensively, and the Carrier provided him with a corporate credit card to pay associated expenses.

An anonymous complaint to the Carrier's hotline accused the Claimant of making unauthorized purchases on his corporate credit card, including first class or preferred seats on flights. The Carrier's Compliance Manager, Amy Castro, investigated the complaint and determined that the Claimant had made improper expenditures.

On September 25, 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 dishonesty and failure to comply with the Travel and Entertainment Expense Corporate Rule regarding charging first class and premium seat upgrades to your corporate travel card while flying for company business on gang SSCX0798 beginning January 2019 and continuing forward. The date BNSF received first knowledge of this alleged violation is September 23, 2019.

After a formal investigation on November 5, 2019, the Claimant was found in violation of MWOR 1.6, Conduct, and Corporate Rule and Policy - Travel and Entertainment Expense, and was assessed a Level S 30 Day Record Suspension.

In a letter dated January 27, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated March 27, 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 it has presented substantial evidence that the Claimant violated the Carrier's trust by submitting inaccurate expense reports after making unauthorized purchases associated with his duty travel. The Carrier contends that the Claimant failed to obtain proper authority to make these purchases and improperly labeled them on his expense reports. The Carrier contends that a manager's approval of the Claimant's expense account does not excuse the Claimant's violations.

The Carrier contends that the Claimant received a fair and impartial hearing and that there is no evidence of prejudice to the Claimant in the investigation transcript. The Hearing Officer's determination that telephonic testimony would be permitted was not unfair to the Claimant. Further, there is no evidence that the Hearing Officer made improper rulings on objections raised by the Organization.

The Carrier contends that it properly imposed the penalty of a Level S 30 Day Record Suspension based on the evidence of the Claimant's violations. The Carrier contends that numerous boards have found that dishonesty is a dismissible offense, even for a first violation, so the Carrier has already shown leniency.

The Organization contends that the procedural errors and infractions denied the Claimant's due process rights and deprived him of a fair and impartial hearing, as guaranteed by the parties' Agreement. The Organization contends that the Carrier's first witness, called via telephone conference, was not listed on the Notice of Investigation. The reason for the substitution of witnesses was not explained.

The Organization further contends that the Claimant's right to a fair and impartial hearing was infringed by the Hearing Officer's failure to sequester witnesses, allowing multiple witnesses to participate on the same telephone line from the same location. These witnesses heard and commented on each other's testimony. The Organization contends that the Hearing Officer's failure to ensure that the witnesses were not coordinating their testimony contravened a widely accepted tenet of due process.

The Organization contends that the Carrier perfunctorily reviewed the record and then assessed arbitrary and capricious discipline. The Organization contends that the Carrier has attempted to justify its decision with hearsay testimony. The Organization contends that these procedural violations are fatal to the Carrier's case.

With respect to the merits, the Organization contends that the Carrier reviewed and approved all expenditures submitted by the Claimant, and thus, it cannot show with substantial proof that any rules were violated. The Organization contends that the Carrier has failed to show that the Claimant was dishonest in any regard. Finally, the Organization charges that the penalty was excessive.

The Organization has raised several procedural arguments which we find to have merit. The most egregious failure to protect the Claimant's due process rights occurred

when the Hearing Officer permitted three witnesses to listen to each other's testimony via a telephone conference call, one of whom had been sequestered from the hearing room. In Award 34 of Public Law Board 6402, the board explained why such a practice would be inconsistent with the Carrier's obligation to provide a fair and impartial hearing. "The purpose of sequestration is to protect against the testimony of one witness influencing, deliberately or subliminally, the testimony of another." In addition, at several points during the testimony, one or more of the witnesses was speaking at the same time, making the transcript nearly incomprehensible at points. The Investigation Transcript reveals that each of these witnesses was present for the others' testimony and that they were permitted to comment on each other's testimony. The failure to protect the sequestration order was catastrophic. This alone was sufficient reason to find that the Carrier's case was fatally flawed.

However, we find it necessary to also comment on the Hearing Officer's ruling that the Carrier's witnesses could testify by telephone over the Organization's objections. While telephone testimony does not *per se* deny an employee a fair hearing, the individual facts and circumstances of the case will determine whether a fair and impartial hearing took place. Among the factors to consider are the nature of the testimony and the circumstances that necessitated telephonic testimony. For instance, where the testimony is merely background information or to authenticate a document, such testimony may be permissible.

The failure to call these witnesses in person was not adequately explained. Even more shockingly, one witness was excused from the hearing room only to join on the telephone conference call. The Hearing Officer has an obligation to develop facts while giving both parties a fair opportunity to present their case. Given the Hearing Officer's role, it is critical not only that the hearing be conducted fairly, but that it is perceived to be fair. When the Hearing Officer overrules the Organization's objection because he believes the witness' testimony to be "extremely helpful" before it has been heard, he gives the appearance of partiality.

It is not the preference of this Board to make rulings based on procedural grounds, but when the conduct of the Investigation Hearing fails to protect a Claimant's due process rights, the contractual guarantee of a fair and impartial hearing is denied. These actions tainted the investigative process to such a degree that the discipline cannot stand.

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 28th day of October 2022.