

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44840
Docket No. MW-47136
23-3-NRAB-00003-210695**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. B. Dillon, by letter dated June 12, 2020, for alleged theft of time was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-070-6/10-20-0186 BNR).**
- (2) The claim* shall be allowed as presented because the appeal was not disallowed in accordance with Rule 42 upon cancellation of the Electronic Claims Handling Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant B. Dillon shall now ‘*** 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 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 (sic) 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.'

*The initial letter of claim will be reproduced within our initial submission."

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.

Factual Background:

On April 28 and 29, 2020, the Claimant failed to attend the morning briefings, but claimed he had worked the time. On April 30, 2020, Roadmaster N. Freeman reviewed the Claimant's payroll submissions and discovered his claim for time not worked. Following investigation, the Claimant was found to have been dishonest; he was and dismissed from service.

Rule 40 of the Agreement, in pertinent part, reads:

A. An employee in service sixty (60) 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) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date of information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule. * * *

- D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled. * * *
- J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

Rule 42 states as follows in pertinent part:

- A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

In the time following the November 7, 2022 hearing, the parties have resolved between themselves a procedural dispute about the timing and manner of transmission of the Carrier's declination letter.

Position of Organization:

The Organization rejects the Carrier's contention that the first date of knowledge of the incident was April 30, 2020. In its view, testimony provided by Roadmaster Freeman established that he actually had first knowledge of the incident on April 28, 2020 and April 29, 2020 (Tr.PP.23&24), when the Claimant was absent from the norming briefings. In its view, the original investigation scheduled for May 15, 2020 was therefore outside of the fifteen-day time limit.

The Organization also protests the timing of the Carrier's June 12, 2020 dismissal letter. This letter was not emailed, but sent by regular mail on June 12, 2020. It was not received by the Organization until June 17, three days after the deadline. The Organization deems this a breach of applicable time limits, making dismissal of the charges mandatory under Rule 40J.

As the Organization sees it, another glaring failure of due process occurred when the Carrier's declination letter, dated November 22, 2020, was not received by the Organization within the sixty-day time limit provided under Rule 42. Though the Carrier claimed it had technical difficulty with sending the email, the Organization maintains this argument cannot be credited because the clerk changed her story several times and cannot be relied upon to establish facts. In its view, this failure alone requires that the claim be granted.

The Organization argues that the Carrier failed to take into account a multitude of mitigating factors which clearly contributed to the incidents on the dates in question. In this regard, the Claimant's testimony revealed that: (1) the Claimant had performed hours of work for the Carrier on his vacation day, showing that the Carrier is willing to accept favors but quickly dismiss an employee for a miniscule error regarding their hours; (2) Roadmaster Freeman never called the Claimant after discovering the issue to discuss it with him; and (3) the Claimant made it clear he never intended to defraud the company; it was an oversight because he was rushed and was dealing with two autistic children at home.

Position of Carrier:

While Freeman admits knowing the Claimant was late to the briefings on the days in question, the Carrier points out that he did not look into the Claimant's payroll records at the time. It asserts it was not until April 30 that Freeman discovered the Claimant had submitted for time not worked on both April 28 and 29.

A decision letter was composed and mailed out on Friday, June 12, 2020. Copies of the letter's dated, stamped envelopes with certified mail tracking information were provided. Once the letter leaves the Carrier's facility, BNSF has no control of it as it is then in the hands of the United States Postal Service. The Carrier maintains the tardy arrival of the letter cannot be blamed on BNSF.

As to the Carrier's letter dated July 29, 2020 disallowing the Claimant's appeal, the Carrier alleged technological difficulty, citing Section III of the Electronic Exchange Agreement between the parties, which states as follows:

The parties recognize that issues may arise when using electronic mail as outlined in Sections I and II, above, that are both foreseen and unforeseen. Should such issues arise, the parties shall work together to find a mutually agreeable resolution. But, technological failures shall not be used by either party in arguing that a fatal procedural flaw occurred if it is proven the electronic mail was used consistent with the spirit and intent of this Agreement.

Analysis:

We find the Carrier's position about the timeliness of the investigation to be persuasive. Freeman did not review the Claimant payroll records until April 30, and therefore was not on notice that the Claimant had submitted for time not worked until that date. It follows that the investigation was timely.

The investigation took place on May 15, 2020. The Carrier's decision letter was written and posted on June 12, 2020. The contract language does not require that the letter be received within 30 days; it requires that the decision be "rendered." Insofar as the decision was made, written and mailed on June 12, 2020, it must be deemed "rendered," and there was no breach of the contractual time limits under Rule 40(D).

As to the failure to timely get the decision on the claim into the hands of the Organization and the Claimant, the Carrier alleged there was technical difficulty in electronically transmitting the declination letter. The Organization argues that it is the Carrier's burden to establish technical difficulty.

The clerk involved had a trouble ticket, which substantiates her assertion that she was having technical difficulty in sending out the letter. Though this clerk may have made statements regarding the failed transmission which are difficult to harmonize, we find greater persuasive reliability in the documentation of technical difficulty. The Carrier has provided adequate substantiation of computer dysfunction, and should therefore prevail on the procedural issue. This determination is limited to the unique facts of this case and is not intended to serve as precedent.

As to the charge of theft of time, the Carrier properly issued discipline for this offense. It is the responsibility of the employee to carefully, honestly and accurately submit claims of time worked. The Carrier relies on the honesty of its employees in managing their own submissions, and is within its rights to expect employees to be attentive when making such submissions. The Claimant knew full well whether or not he had attended briefings, and his claim of payable time for being present when he was not even on the Carrier's premises was fraudulent. Dishonesty is an extremely grave offense which ruptures the bond of trust between an employee and employer. It follows that the Carrier's actions did not breach its contractual disciplinary responsibilities.

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 10th day of March 2023.