

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45159
Docket No. MW-47570
24-3-NRAB-00003-220639**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.

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

PARTIES TO DISPUTE:

(BNSF Railway Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. A. Johnson, by letter dated March 11, 2021, for violation of MWOR 1.6 and MWOR 1.25 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3499-S/11-21-0238 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Johnson shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated 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 service;

- 4) health, dental and vision care insurance premiums, deductibles and co-pays than he would not have paid had he not been unjustly removed from service.**
- 5) Any 401K he had to use and the payment for match and match that he would have been making during this time.””**

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.

Claimant A. Johnson had established and held seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute, the Claimant was assigned and working as a truck driver. The Claimant had approximately thirty (30) years of employment with the Carrier at the time of the incidents leading to his dismissal.

By letter dated February 10, 2021 the Carrier notified the Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with the Claimant's alleged use of a BNSF vehicle to load a machine bucket into his personal vehicle and then to drive off property with it on January 29, 2021. A formal investigation was held on February 15, 2021. By letter dated March 11, 2021 the Carrier found the Claimant guilty of violating MWOR 1.6 Conduct and MWOR 1.25 Credit or Property and he was dismissed from service with the Carrier effective immediately.

MWOR 1.25 states, in relevant part, that “Employees may not sell or in any way get rid of Company property without proper authority.” The Carrier presented evidence that with regard to MWOR 1.6 it was relying upon the portion that bans “immoral” conduct, on the basis that Claimant was guilty of stealing the bucket.

The parties agree that the Claimant used the Carrier’s loader to load a skid steer bucket into his personal truck and transported it off the Carrier’s property. The Claimant testified that he found the skid steer bucket in the Carrier’s material yard in Glen Ullen, ND. The Organization argues that the bucket had been unused for at least ten years and the Claimant thought that it was abandoned worthless scrap left over by a contractor. The Organization also argues that the Carrier did not show that the bucket had a part number on it, identifying it as Carrier property. The Claimant was cooperative and returned the item immediately, once the Carrier confronted him with taking the bucket. The Organization also argues that the Claimant had been given authority to decide what to do with items on Carrier property when doing cleanup. Finally, the Organization argues that the Claimant’s thirty years of service were not considered in imposing dismissal.

The Organization also made a series of procedural objections, claiming that the investigation was not fair and impartial. The Organization argues that its representative never received notice of the investigation from the Carrier, or a timely copy of the hearing transcript after the investigation. The Organization argues further that the Carrier failed to provide notice of the dismissal to the Organization within 30 days of the investigation, as required by Rule 40D. In addition, the Organization argues that the Carrier allowed a witness to testify by telephone during the hearing.

The Carrier argues that the bucket was on Carrier property, and the rule requires that employees seek proper authorization before getting rid of Company property. The Claimant took the item without obtaining proper authorization from the Carrier, and it is worth over \$2,000 to replace. In addition, during the investigation the Claimant was not immediately truthful about taking the item, saying that he was just testing the Carrier’s grapple truck on that date, until the investigator told him that she had a video recording of him using the Carrier’s truck to load the bucket into his personal truck. The Carrier argues that the Claimant clearly admitted his guilt, no further proof is needed, and the Organization’s procedural arguments do not rise to the level that the Claimant’s defense was impaired.

In addressing the Organization’s procedural arguments, the Board concludes that the investigation was not conducted unfairly because a witness testified by

telephone. This Board has established that a witness testifying by telephone does not prohibit the Claimant from obtaining a fundamentally fair hearing. NRAB Third Division Award 42463. In addition, the Organization has not established on this record that any failure by the Organization to receive timely notice of the investigation or the dismissal were the fault of the Carrier, as there is evidence in the record that the Organization representative was having his mail held at a Post Office. Furthermore, the Organization did receive actual notice of the investigation and the dismissal, and a copy of the transcript in order to present the Claimant's defense and file a timely claim. The Organization's procedural objections do not demonstrate that the Claimant's defense was impaired. NRAB Third Division, Award 41884. The Claimant was not denied due process, and accordingly the claim will be addressed on its merits.

The Claimant stated during the investigation that he did not know whether the bucket was Carrier property, but that, in any case, he thought it had been abandoned. He also said he did not think the bucket was Carrier property, because he did not believe it fit Carrier equipment. He testified in the investigation that he removed the bucket because he thought he could modify it for his own use on his own skid steer. The Claimant stated further that when he does clean-up on Carrier property, he has the authority to determine whether an item should be scrapped or should be saved for further use by the Carrier. There were other items he found with the bucket which he returned to Carrier use. He denied that he told a Carrier official that he had intended to sell the bucket for scrap – he testified that what he had said was that he did not think it would be worth much as scrap, because scrap prices were so low.

There is no dispute between the parties that the Claimant removed the skid steer bucket from Carrier property without prior authorization. The rule is very clear that "employees may not sell or in any way get rid of Company property without prior authorization." Before removing an item from the Carrier's property, the Claimant had an obligation to make sure that he had authorization to remove it. If he was not sure whether the piece of equipment he found on Carrier property belonged to the Carrier he had an obligation to ask before taking it off the Carrier's property for his own personal use.

Even if the Claimant, when cleaning up a material yard, had authority to determine that some items should be scrapped, the authority he describes was to decide whether certain items would be reused or would be placed in the Carrier's scrap pile. There is no evidence that he had been given the authority to take items, even if they were to be scrapped, either for his own personal use or to sell them for scrap himself. The purpose of the rule is to ensure that employees do not remove any equipment or other

items from Company property and convert it to their own use, or sell it, without first seeking Company approval. The Claimant's shifting answers about what he was doing with the Carrier's loader; whether he believed the bucket was Carrier property; and his plans for the bucket are unconvincing rationalizations to explain his taking the bucket without authorization.

On this record, Carrier has provided substantial evidence that the Claimant violated MWOR Rule 1.25. The Board concludes that the Claimant removed property from the Carrier's property for his own personal use or resale, without authorization. Taking items from the Carrier's property without authorization destroys the trust that must exist in the employment relationship and therefore, there is substantial evidence that the Claimant committed a violation of MWOR Rule 1.6's prohibition against immoral conduct. Under the Carrier's discipline system, dishonest conduct is dismissible, even without a record of prior discipline. Even considering the Claimant's long seniority, the Board cannot conclude that the penalty of dismissal imposed by the Carrier is arbitrary or overly harsh when the Carrier clearly established that the Claimant took an item off Carrier property for his own use, without authorization.

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 22nd day of February 2024.