

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45370
Docket No. MW-47979
25-3-NRAB-00003-230438**

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: (
(Port Terminal Railroad Association

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissed from service as an employee of the Association effective May 10, 2022) imposed upon Mr. J. Jack for alleged violation of Port Terminal Railroad Association’s General Code of Operating Rules - Rule 1.15: Duty – Reporting or Absence, Rule 1.18: Unauthorized Employment, Rule 1.6: Conduct, as well as Maintenance of Way Special Instruction #9 and Policy on Ethics and Business Conduct, in connection with his utilizing a “company computer and network to conduct personal business while on-duty and failing to perform his assigned job as MO54 Heavy Equipment Operator at North Yard from approximately 10:50 A.M. to 2:40 P.M. on April 18, 2022 was unjustified, harsh and overly excessive (System File PTR403RR22 PTR).

(2) As a consequence of the violation referred to in Part (1) above:

‘* We would specifically request these charges be removed from Mr. J.M. Jack Personal Record. Also, to be paid and compensated for any and all time at the Claimant’s respective straight time rate of pay, and all overtime to be paid at his respective overtime rate of pay that the gang he was assigned to was afforded and the employee performing the claimant’s work had he not been unjustly and excessively disciplined. Also, to include any and all holidays and all lost time to be credited to Railroad Retirement, hospitalization to ‘included physician office visits etc. dental, prescriptions and vision**

beginning on May 10, 2022 through and including on a continuous basis until this matter is settled. Also, to include any and all expenses the Claimant may have acquired to include meals, lodging. And mileage at the negotiated rate of 58.5 cents a mile from Mr. Jack [sic] place of residence at J.M. Jack at 9112 Yellow Rose Dr. Texas City, Texas 77591 to Houston, Texas return to Mr. Jack place of residence for his attendance at this Formal Investigation on May 4, 2022....

* * *

The Organization request that in [sic] such time in which Mr. J.M, Jack (sic) be reinstated to service that he would not be subjected to any additional probation under the Specifically Rule 3.7 Arbitration decision in which the carrier can revert employee status to a second triggering/training event with a 36-month retention period.

As a remedy for this violation, the suspension should be set aside, and the claimant shall be made whole for all financial and benefit losses because of the violation. Any benefit lost including vacation and health insurance benefits shall be restored. Restitution for financial losses because of the violation shall include all straight time pay, overtime pay, and loss of holiday pay for time Mr. Jermaine [sic] Jack was held out of service and that Mr. Jack be returned to service.”

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, Heavy Equipment Operator Jamaine Jack, has been employed by the Carrier for approximately 14 years. He was dismissed on May 10, 2022, for violating the Carrier's General Code of Operating Rules Nos. 1.15, 1.18, 1.6, the Policy on Ethics and Business Conduct, and Special Instruction No. 9. The Carrier concluded that the Claimant engaged in misconduct and indifference to duty when he used the Carrier's computer for personal business while on duty.

Before reaching the merits of the dispute, the Board addresses the procedural objections from both parties. A review of the record does not support the Organization's allegations that the hearing officer failed to ensure the Claimant was afforded a fair and impartial hearing. We also reject the Organization's claim that the notice of investigation was defective in that it did not contain details of the rules allegedly violated and presented during the hearing on May 4, 2022. The notice of investigation contained sufficient details to apprise the Claimant of the specific allegations.

The record does not conclusively support the Carrier's assertion that the Organization did not progress the claim to the Board within nine months of the highest designated officer's decision as provided for in Rule 22. The record contains conflicting information as to when the Carrier rendered its final decision. The written decision by the highest designated officer, dated July 6, 2022, led to a conference between the parties regarding the Claimant on July 26, 2022. The highest designated officer sent an email on August 2, 2022, confirming his decision to dismiss the Claimant. The Organization's Notice of Intent was filed on April 6, 2023, which is within nine months from August 2, 2022. The apparent ambiguity created by the procedural on-property handling of the dispute must be found in favor of the Organization where the filing of the Notice of Intent did not prejudice the Carrier's ability to address the claim.

In disciplinary matters the burden of proof is upon the Carrier to produce substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence presented, the Board here finds that the Claimant violated the applicable rules when he left his work location and entered the mechanic shop to conduct personal business on the Carrier's computer for more than three hours without authorization.

Superintendent Darrell Himel provides credible testimony that the Claimant did not perform his assigned duties as a ballast operator for his entire tour on April 18, 2022. He was found to be conducting affairs related to a private business enterprise and using the Carrier's property to print documents related to his personal business. Such

conduct violates the Carrier's rules; specifically Rule 1.15 which requires employees to "spend their time on duty working only for the railroad."

The Claimant admitted he used the Carrier's computer for personal reasons. Where an admission is evident the Board need not go further to find that the Carrier has met its burden of proof. Such misconduct constitutes theft of service. The Claimant violated the Carrier's rules, and the basic tenet of trust required in the employment relationship.

There are no mitigating circumstances or affirmative defenses that alter a finding of dishonest conduct. The Organization's assertion that the Claimant was not given an assignment on April 18, 2022 is contradicted by the record. The Claimant testified he began working by fueling his machine after his daily job briefing. Special Instruction No. 9, dated February 16, 2021, requires employees to contact supervision once they complete their task. The record confirms that the Claimant did not contact his supervisors.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Legions of arbitral awards issued by this Division have held that dismissal is appropriate discipline for theft of service violations regardless of length of service or prior disciplinary record. The Carrier here correctly relies on a long-held standard in the industry that such factors do not provide protection to an employee who acts dishonestly.

The Board here finds that the Carrier has met its burden of proof with substantial evidence and, therefore, its decision to dismiss the Claimant is upheld.

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 19th day of December 2024.