

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 31916  
Docket No. MW-32300  
97-3-95-3-130

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:(

(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of employe C. D. Wood for alleged violation of Rules 530(B), 532(B) and 535 of the Maintenance of Way Rules '...for failure to stay at designated lodging site, staying at a motel after gang was abolished, and failure to comply with instructions from proper authority, while working as sectionman on TP08, on September 27, 28, 29, 30, and October 1, 2, 3, 4, 5, 6, 7 and 8, while not performing service on October 9, 10, 11, 12, and 13, and RP08 on October 14, 15, 16, 17, 18, 19, 20, 21, and 22, 1993...' and '...for failure to stay at designated lodging site, staying at two lodging sites the same day, and failure to comply with instructions from proper authority, while working as sectionman on RP08 on November 5, 1993...' was arbitrary, without just and sufficient cause and in violation of the Agreement (System File T-D-737-H/MWB 94-05-06AA).
- (2) The dismissal of employe C. D. Wood for alleged violation of Rules 530(B), 532(B) and 535 of the Maintenance of Way Rules for '... failure to stay at designated lodging site, charging personal telephone charges to Burlington Northern Railroad lodging card, and failure to comply with written instructions from proper authority, while working as sectionman on TP08 on September 26, 1993...' was arbitrary, without just and sufficient cause and in violation of the Agreement (System File T-D-736-H/MWB 94-05-06AN).

- "(3) As a consequence of the violations referred to in Parts (1) and (2) above, Claimant C. D. Wood shall be reinstated to service with seniority and all other rights unimpaired. His record shall also be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

**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 appearance at hearing thereon.

At the time of the incidents in question, Claimant was assigned to regional gang TP08 on which he worked from September until October 8, 1993, and regional Gang RP08 on which he worked from October 14, 1993, until early November. Assignment to both gangs required Claimant to live away from home.

Using the Corporate Lodging Card (CLC) that was issued to him, the Claimant checked into the Travel Host Motel at Williston, North Dakota. Other gang members were lodging at the International Inn at Minot, North Dakota.

On November 10, 1993, the Claimant was issued a letter advising him to attend an Investigation on the charges of allegedly failing to stay at the designated lodging site, allegedly misusing the Carrier lodging card, and failing to comply with instructions from proper authority on October 23, 24, 25, 26, 27, 28, 29, 30, 31, and November 1, 2, and 3.

On November 18, 1993, the Claimant signed a waiver of Investigation admitting guilt to all charges and accepting a 30 day suspension as discipline.

On November 24, 1993, the Claimant was issued another Notice of Investigation on the charges of allegedly failing to stay at the designated lodging site, allegedly misusing the Carrier lodging card and failing to comply with instructions from authority on November 5, 1993.

In addition, the Claimant received another Notice of Investigation under the same date on the charges of allegedly failing to stay at the designated lodging site, allegedly misusing the Carrier lodging card, and failing to comply with instructions from proper authority on September 27, 28, 29, 30, October 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22.

The Claimant was found guilty of the charges against him and on January 10, 1994, the Claimant was dismissed from the Carrier's service.

On January 28, 1994, the Claimant was issued another Notice of Investigation on the charges of failing to stay at the designated lodging site, allegedly misusing the Carrier lodging card, and failing to comply with instruction from proper authority on September 26 and 27, 1993.

The Claimant was again found guilty of the charges against him and on March 25, 1994, was again dismissed from the Carrier's service.

The Organization filed the instant claim on behalf of the Claimant combining all charges under one claim. The Organization argues that the Carrier issued its employees the new lodging cards and a letter explaining the newly implemented program in January of 1993. The Claimant, however, was not hired until April 1993 and never received a copy of said letter. Furthermore, the Claimant believed it was allowable to stay at various lodgings which accepted his lodging card. In addition, the Organization argues that no one questioned the Claimant's lodging during the dates in question even though the Roadmaster received weekly reports of the gangs' lodging arrangement. Finally, the Organization argues that the Claimant believed that his waiver of Investigation and accepting the 30 day suspension "would encompass all aspects of his inappropriate use" of the Carrier lodging card.

The Carrier denied the claim contending that instructions on proper use of the lodging card are printed on its reverse side. Furthermore, the Carrier points out that the Claimant admitted in his written statement that he was present at the meeting where

the gang members were instructed on where to stay. The Claimant admitted to staying at lodging other than where the other gang members were, and the Claimant admitted to charging lodging on the CLC on dates that he was not working.

The parties being unable to resolve the issue at hand, this matter now comes before this Board.

This Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence that the Claimant violated the Rules on numerous occasions by failing to stay at the designated lodging site, staying at the motel after the gang was abolished, and failing to comply with a variety of instructions. The Claimant also engaged in a great deal of other wrongdoing including charging personal telephone calls to the Carrier. The Claimant has admitted his wrongdoing and actually signed a statement indicating that he had stayed at other than the designated motel with his girlfriend and charged it to the Carrier.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

This case is extremely unusual. It is important to recite the various facts to in order to reach a determination as to whether or not the punishment fits the crime in this case. The Claimant in this case was hired in April 1993. On November 8, 1993, the Claimant gave two statements to the Carrier admitting that he had stayed at other than the designated motel and he had his girlfriend with him. Two days later, on November 10, 1993, the Carrier issued a notice to the Claimant covering the period of October 23 through November 3, 1993, charging him with failing to stay at the designated lodging site and misusing his identification card, as well as failing to comply with various instructions. On November 19, 1993, the Claimant signed a waiver and accepted a 30 day suspension relating to the notice that had been to him on November 10, 1993.

Five days after the Claimant had accepted the suspension for the wrongdoing for the period October 23 through November 3, 1993, the Carrier issued a new notice to him covering similar violations for the period September 27 through October 22, 1993. The Claimant was subsequently dismissed as a result of that second set of charges covering a period of time before the period for which the Claimant had already been suspended.

The problem that this Board has is that the Claimant had already been warned and suspended for the period October 23 through November 3, 1993. The Carrier then issues a new notice to cover the period prior to October 23 and terminates the Claimant as a result of those proven charges. Although that wrongdoing was serious and involved dishonesty on the part of the Claimant, it is apparent from the original 30-day suspension issued to the Claimant on November 19, 1993, the Carrier was disciplining him for the wrongdoing that he had engaged in prior to that and the Carrier was attempting to reform the Claimant's behavior with that discipline. Although the earlier incidents were not listed in the first notice, it is really improper for the Carrier to then subsequently issue a new notice for a previous wrongdoing and base a termination upon that previous wrongdoing which occurred prior to the suspension. Progressive discipline encompasses a goal of rehabilitation. When the Claimant was forced to admit his wrongdoing in mid-November 1993 and voluntarily accepted the 30 day suspension, this Board must presume that the Carrier meant to punish the Claimant and then put him on notice that similar wrongdoing in the future would lead to his dismissal. The Carrier found similar wrongdoing, but it had happened previous to the original wrongdoing for which the Claimant had already been suspended. This Board finds that the Carrier did not have a sufficient basis to terminate the Claimant based upon that previous wrongdoing.

As stated above, this Claimant had a very short service with the Carrier having begun his employment in April 1993. Consequently, it would not be appropriate to issue the Claimant three years of backpay after he had only worked for the Carrier for five months. However, this Board must order that the Claimant be reinstated, but without backpay and the period of time that he was off shall be considered a lengthy suspension for his later wrongdoing. The Claimant should be put on notice that any future wrongdoing of a similar type will most assuredly lead to his discharge.

#### AWARD

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made in part. 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 4th day of March 1997.