

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32485
Docket No. MW-32885
98-3-96-3-233

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of B&B Truck Driver M. L. Bourgeois for alleged violation of Rule 1.25 of the Maintenance of Way Operating Rules, for misuse of a Burlington Northern charge account at Metro Welding Supply, Minneapolis, Minnesota on November 4, 1994 was arbitrary, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File T-D-891-B/MWB 95-05-23AA).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. L. Bourgeois shall:

‘. . . be reinstated to his position, paid for all time lost (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the January 19, 1995 letter from Mr. J. A. Hovland, General Roadmaster.’”

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.

On November 4, 1994 the Claimant, a R&B Truck Driver with almost 17 years of service and holder of an employment record free of any discipline, went to Metro Welding Supply to purchase grinding wheels for his own personal use. Once there he talked to the proprietor of Metro Welding Supply, William Wojick, discussing subjects relating to his employment with the Carrier. As their conversation ended with the completion of the transaction, the Claimant asked Wojick to "write up" the purchase adding that "he would cover it later." Wojick subsequently prepared an invoice for the purchase and, presuming that the Claimant purchased them for the Carrier, charged the purchase to the Carrier's account.

Subsequently the Carrier discovered that the Claimant had made the purchase in question without authorization and that the purchase had been charged to its account. The Carrier then commenced an investigation during which the Claimant, among others, was questioned. Moreover, during the course of the investigation the Claimant contacted Wojick and had the purchase taken off the Carrier's account and charged to himself. As a result, no charge was made to the Carrier nor did it disburse any funds for the purchase. Ultimately, the Carrier charged the Claimant with misusing Carrier credit for his personal use and removed him from service.

The Organization contests the Claimant's removal from service on both procedural grounds as well as attacking the merits of the charges made against him. With regard to procedure, the Organization contends that the notice of the charges to the Claimant was not specific as required by Rule 40(c), that the Carrier's investigation was untimely, and that the transcript of the Hearing on the property was inaccurate. We do not agree with the Organization on any of these points. First, the notice is attacked by the Organization because it informed the Claimant that he was being investigated regarding "...an item for your personal use *on or about* November 4, 1994." (Emphasis Supplied). Thus, the Organization contends the Claimant was unable to

mount any defense to the charge. We disagree. Perhaps if the record showed that the Claimant had made many purchases at Metro Welding during the period in question, there might be a basis for concluding that he could not know which purchase was the subject of the investigation. However, the record contains no such evidence and indeed appears to include evidence of only *one* such purchase during the period in question.

The Organization next argues that the Carrier's investigation was not timely because it was not undertaken within 15 days of the alleged offense. The record shows however that the notice of the Investigation was within 15 days of the completion of the Carrier's internal investigation by Special Agent Novak. Although the Organization is correct that there is no requirement that the Carrier complete its internal investigation before commencing its Rule 40 action, there can be little doubt that such caution works to the advantage of both the Carrier and the Claimant. Indeed, it is not unheard of that Carrier's action in holding an employee out of service is often challenged on the basis that the Carrier acted before getting the facts. Thus, the Carrier's actions here did not serve to invalidate the discharge.

The final procedural attack by the Organization turns on a portion of the transcript. More specifically, the Organization correctly points out that the portion of the transcript setting forth the recitation of the written statement of Wojick is not consistent with the written statement itself. However, it is undisputed that the statement itself is a part of the record as an attachment to the transcript. Thus, any inconsistency is cured. Moreover, this inconsistency, standing alone as it does, is not sufficient evidence of tampering, as alleged by the Organization. Rather, it rises, at best, to the level of inadvertent error resulting in no prejudice to the Claimant.

On the merits the Organization contends that the Carrier has failed to carry its burden of proof, which is higher than that ordinarily imposed on the Carrier because the allegation is one of theft, because the Claimant did not intend to use Carrier credit for a personal purchase and because the Carrier was never charged for the purchase nor did it disburse funds to pay the debt. Finally, the Organization relies on the Claimant's long record of unblemished service. In response, the Carrier asserts that the record clearly shows that the Claimant admitted to two Supervisors that he used Carrier credit to purchase the grinding wheels for personal use and that in the face of such an admission the Carrier has met its burden of proof. With regard to the propriety of discharge under such circumstances, dishonesty is a dischargeable offense without

regard to years of service and moreover, asserts that this Board does not have the authority to mete out justice based on leniency.

We begin our analysis of this matter with the observation that we agree with the Organization, as we must, that the burden of proof lies on the Carrier and that in a case of this nature the burden is a heavy one. We next consider the record evidence surrounding the transaction in nature to determine if the Claimant did in fact intentionally use Carrier credit for personal gain. On this note, the only record evidence is the testimony of the Claimant and the written statement of Wojick. A close review of that evidence reveals that the Claimant did not assert in any way, shape or form the purpose of the purchase. At best the only possible evidence on this point is the Claimant's statement that "he" would cover the purchase later. In our view this statement, to the extent that it is conclusive at all, leans toward a conclusion that the purchase was indeed for personal use and that the Claimant would use his personal funds for payment. Similarly, we note that the Claimant did not follow the ordinary process used at Metro when one purchases material on Carrier credit. Again, another factor leading to a conclusion that Carrier credit was not to be used. In fact, a close review of the record shows that the *only* evidence from the point of transaction that the purchase was to be placed on Carrier credit was the fact that the purchase was made by a person known to Wojick to be an employee of the Carrier and in the course of a discussion between the two of them relating to Carrier business. In light of the heavy burden that the Carrier carries on this matter we do not believe that evidence to be sufficient to justify the Claimant's discharge.

We are mindful that the competing credibility of the two Supervisors who testified that the Claimant admitted using Carrier credit for the purchase was apparently deemed more persuasive than the Claimant's denial that he made those statements. We are also mindful that the credibility assessments made on the property are not to be lightly disturbed. However, as noted above, the burden of proof in this case is not that which is ordinarily applicable. Accordingly, we believe that it is inherently incredible that the Claimant, having made a purchase under the circumstances described above which do not lead to the conclusion that he intentionally use Carrier credit for personal gain, would admit doing so. Rather, it strikes us under the circumstances to be more likely that he would deny making any such admission.

In light of the foregoing we find that the Carrier has failed to meet its burden of proving the charges assessed against the Claimant.

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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 23rd day of February 1998.