

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41225
Docket No. SG-40951
12-3-NRAB-00003-090208

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of T. S. Humble, for his personal record to be cleared of any mention of this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the excessive discipline of a 10-day record suspension without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on August 24, 2007. Carrier’s File No. 35-08-0007, General Chairman’s File No. 07-027-BNSF-161-NM. BRS File Case No. 14095-BNSF.”

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 federal Department of Transportation requires that certain of the Carrier's employees undergo a physical examination every year. The Claimant, who was at the time a Foreman on a mobile Signal Gang, was originally scheduled for a required DOT physical on June 20, 2007, in Clovis, New Mexico. However, when the gang was moved on June 18 from Clovis to Kayser, some miles away, that date was no longer feasible. According to the Claimant, he notified his supervisor that he would not be able to make the appointment and she instructed him to reschedule. The Claimant made a new appointment for July 6, 2007, one of his rest days. Rule 18 of the parties' Agreement states:

"An employee called upon by proper authority to report for regular periodic rules examinations, visual or physical re-examinations, will be paid for time necessarily lost in taking such re-examinations. When such an employee takes such examinations outside of assigned working hours, on rest days, or holidays or while on leave of absence, he will be paid for all time consumed in excess of two (2) hours, at the pro rata rate with a maximum of eight (8) hours. If required to leave his home station actual necessary travel time will be included as time consumed in taking such examinations, and he will be paid for actual necessary expense."

The Claimant had the physical examination on July 6, 2007. Subsequently, he filled in his time sheet, claiming six hours' overtime pay for that date, which was paid to him. The Claimant testified that he tried to enter the time as Code 01 (straight time) but the computer would not let him enter it except as "overtime, working outside of assigned working hours." Sometime after July 15, 2007, the Claimant's supervisor was reviewing time sheets when she saw the overtime that had been paid to the Claimant for July 6, 2007. She also saw that he had not worked on that date. She did not at any time contact the Claimant to ask for his explanation of the claimed hours. A Notice of Investigation was issued and, following an investigative Hearing, the Claimant was assessed a record suspension of ten days for his violation of Maintenance of Way Operating Rule 1.6 by "your inappropriate and dishonest conduct by claiming pay for time not worked on July 6, 2007."

The charge against the Claimant was for "inappropriate and dishonest conduct" for "claiming pay for time not worked." The record establishes that the

Claimant had a DOT physical examination on July 6, 2007, which was one of his rest days, and that he had rescheduled the exam from June 20, a work day, because the mobile gang over which he was the Foreman was moved on June 18 from Clovis, New Mexico, to Kayser, New Mexico, some miles away. The Claimant's testimony was that he did not want to leave his gang, all of whom were apprentices, for almost an entire day while he went to get his required DOT physical. The record establishes that employees may schedule required physical examinations on their rest days. Moreover, pursuant to Rule 18 of the Agreement, employees are entitled to be paid for undergoing required physicals on their rest days "for all time consumed in excess of two (2) hours, at the pro rata rate with a maximum of eight (8) hours." The Claimant's Hours of Service Log for the relevant time period clearly notes that he had his DOT physical in Clovis on his July 6 rest day. While the Claimant did not actually perform any work for the Carrier on July 6, 2007, he was clearly entitled under the Agreement to be paid for his time traveling to and undergoing the physical. So far, there is no basis on which to conclude that his conduct was "inappropriate and dishonest." Instead, it appears that the Claimant's Supervisor looked only at his computerized time log and, because he was not scheduled to work that day, concluded that he had made a fraudulent pay claim. For reasons unknown and unexplained, she never, at any point before or after lodging charges against the Claimant, took the simple and obvious step of contacting him to ask what was going on. Given the fact that the two of them work together in a direct supervisory relationship, such conduct on the Supervisor's part is inexplicable. The matter could have been easily cleared up at that stage. As it is, even though he was not in fact strictly "working" that day, the Claimant was entitled to be paid six hours for July 6, 2007, and he was not guilty of any dishonesty in seeking to be paid pursuant to the terms of the Agreement.

The Carrier is left with the argument that the Claimant was dishonest in claiming overtime for the time spent getting his required physical; it cites the language in Rule 18 that employees "will be paid . . . at the pro rata rate," or straight time. The Carrier also contends that the Claimant improperly failed to obtain authority in advance from his Supervisor to be paid overtime for getting the physical. The record, however, contains credible and un-rebutted testimony from the Claimant that he tried to enter his hours for July 6 as straight time, but the computerized system would only let him enter the hours as "overtime, working outside of assigned hours." The Claimant is not responsible for how the Carrier's computerized time system is set up. Nor does his accepting what the system tells him he is entitled to be paid demonstrate dishonest intent on his part. The problem with the computerized time system also explains why the Claimant did not seek overtime authorization in advance from his

Supervisor—he intended to claim, and thought he would be paid, straight time. Considering all facts and circumstances set out in the record, the Carrier failed to carry its burden to prove that the Claimant had any dishonest intent. As a result, it has not established that he was guilty of the charge lodged against him, i.e., “inappropriate and dishonest conduct by claiming pay for time not worked.” Accordingly, the claim is sustained.

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 22nd day of February 2012.