

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41401
Docket No. MW-41653
12-3-NRAB-00003-100292**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The discipline (removed and withheld from service by letter dated June 22, 2009 and subsequent dismissal by letter dated August 4, 2009) imposed upon Mr. C. Schlader on charges of alleged theft and dishonesty in connection with entering eight (8) hours' straight time and one and one-half (1.5) hours' overtime on June 18, 2009 and alleged violation of Maintenance of Way Operating Rules 1.13 and 1.6 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3541-W/11-09-0574 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant C. Schlader shall now ‘. . . be paid for his lost time served, including any and all overtime paid on the position he was assigned to, any expenses lost and we also request the Mr. Schlader be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the August 4, 2009 letter issued by David Douglas, Division Engineer.”**

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 June 22, 2009, the Carrier directed the Claimant to report for a formal Investigation on June 29, which was mutually postponed until July 7, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged theft and dishonesty when you falsified your time on June 18, 2009, when you entered 8 hours straight time and 1.5 hours overtime. Carrier's date of first knowledge of this alleged theft and dishonesty is June 19, 2009.”

On August 4, 2009, the Claimant was found guilty as charged and was immediately dismissed from service.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation account of the conduct of the Hearing Officer and, on that basis, it asserts that the discipline should be set aside and the claim sustained without even reviewing the merits. However, if the merits are examined it argued that the transcript shows that the Claimant did not intentionally attempt to defraud the Carrier of monies. The Organization asserted that on Thursday, June 18, 2009, the Claimant notified his Supervisors that due to personal problems involving his family he had to leave work early. It stated that he did not sneak away, but rather informed his Supervisors of his absence prior to his departure. On Friday, June 19,

the Claimant mistakenly entered time on his computerized payroll, showing completion of a full day's work, along with overtime. The record also reveals that upon reporting for work on Monday, June 22, he realized his mistake and made numerous attempts to gain access to the payroll to correct his error. The records further reveal conversations between the Claimant and the Carrier's department controlling access to the payroll and, contrary to General Manager Ebel's perception of the circumstances, all of the Claimant's attempts to correct the payroll occurred hours prior to the Claimant's receipt of the Investigation Notice. The Organization suggested that the Claimant's actions are indicative of a computer input error and was not an attempt to steal Carrier monies. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record shows that the Claimant received a "fair and impartial" Investigation and he was guilty as charged. It argued that the Claimant falsely claimed eight hours' straight time pay and 1.5 hours' overtime for work performed on June 18, 2009, when, in fact, the Claimant performed no more than one hour of service on that date. While the Claimant offered various excuses for his Rules violations, the reality is he attempted to steal time. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record, including the Investigation transcript, and is not persuaded that the Claimant was denied his Agreement "due process" rights. Therefore, the claim will be resolved on its merits.

The Claimant testified that he worked approximately 40 minutes on June 18, 2009, and then had to leave work to take care of a family matter. He explained that he returned on June 19 and input his payroll time into the computer. He was questioned about putting his time in as follows:

"Craig Kemmet: So on June 19th did you put time into the computer program of PARS for June 18th of 2009?

Christopher A. Schlader: Yes and June 17th and June 19th. I did three days time on that day that morning.

Craig Kemmet: On the, this is June 19th of 2009 did you in fact enter in for pay the amount of 8 hours of straight time equivalent to the cash amount of \$186.27 and overtime for the amount of 1.5 hours to include a dollar value of \$52.38?

Christopher A. Schlader: Yes, but I didn't realize my mistake until later."

The record is clear that the Claimant admitted to claiming pay for time not worked on June 18, and he was aware of that fact on Friday, June 19, 2009. The Claimant made no effort on that date to correct the error and instead testified that he decided to wait until Monday, June 22 to correct the payroll. The Organization argued that the Claimant attempted to correct his mistake before he was aware that the Carrier intended to file charges against him which, according to the Organization, demonstrated that there was no intent to defraud. In its letter of October 23, 2009, the Organization stated:

"First, the Claimant had attempted to change his time prior to him knowing anything about an investigation.

Second, there can be no doubt that the Claimant told Roadmaster Randash about the time prior to knowing anything about the investigation.

Three, there is no doubt, according to the transcript and testimony from the tape of the Manpower Planner, that the Claimant attempted twice to correct the issue about not being able to get on the computer prior to knowing anything about the investigation." (Emphasis added)

In its response letter dated December 23, 2009, the Carrier stated:

"Therefore, it is clearly not the obligation of the Carrier to prove intent in this case. The only obligation of the Carrier was to present substantial evidence that the claimant was dishonest on June 19,

2009, when the Claimant entered 8 hours straight time and 1.5 hours overtime.” (Emphasis added)

Dishonest is partially defined in Webster's Dictionary as follows: “. . . implies a willful perversion of truth in order to deceive or cheat, or defraud. . . .” The Organization's argument is well reasoned that there was an obligation in this instance for the Carrier to show intent to defraud. The question before the Board is was the Claimant dishonest and did he willfully attempt to cheat the Carrier out of monies. The Organization made a vigorous argument on behalf of the Claimant that he did not purposely attempt to defraud the Carrier. However, the Claimant never credibly explained why he would put in for 1.5 hours’ overtime for the preceding day when he only worked 40 minutes and then subsequently remove the overtime, but leave the eight hours intact. The Claimant suggested that he did not change the eight hours because he did not know how much money he was entitled to. That explanation lacks credibility because it overlooks the fact that the Claimant had significant service time during which he had been entering his payroll and was aware that he should have reported actual time worked. Furthermore, the Claimant admitted during the Investigation that he was the responsible person for making sure that he was paid correctly. Specifically, the Claimant was questioned as follows:

“Craig Kemmet: You have testified that you had tried to correct and take out the time. What time did you actually take out on the date of the 18th of 2009?

Christopher A. Schlader: 1827

Craig Kemmet: What, no excuse me, what time of. Was it the overtime, straight time, what time was actually removed from the 18th of June on the 22nd of June 2009.

Christopher A. Schlader: The overtime.

Craig Kemmet: The overtime, the 1.5 hours of overtime?

Christopher A. Schlader: Right, yes.

Craig Kemmet: Was removed?

Christopher A. Schlader: Correct.

Craig Kemmet: So you had opportunity there to also remove the straight time hours of eight and change it to the 40 minutes or the approximate hour that you had worked?

Christopher A. Schlader: I.

Craig Kemmet: You had ample opportunity then to make that change at that time to reflect accuracy of your time spent at work that day. Is that correct?

Christopher A. Schlader: Yeah, I had opportunity at that time, correct. (Emphasis added)

As stated before, the Claimant never offered a satisfactory reason as to why he elected not to change the request for eight hours pay to 40 minutes. The Board also notes the Carrier's assertion, as set forth in its final declination letter of December 23, 2008, wherein it stated:

"The Carrier would like to point to Roadmaster Randash's testimony on page 44 Lines 23-26 and Page 45 Line 1. Mr. Randash recalls the meeting he had with the Claimant on June 22, 2009 and informs him of the investigation. The Claimant, according to Mr. Randash, acted surprised and said he couldn't believe he (Mr. Randash) was getting him for this with all the time everybody deleted expletive him (Mr. Randash) out of this winter. This could be taken as a tacit admission of guilt."

Roadmaster J. Randash's testimony, reiterated above was verified by the Claimant in his very own testimony. Consequently, it is clear that substantial evidence was adduced at the Investigation to demonstrate that the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. Our review of the discipline reveals that it was assessed in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds that the Claimant's termination will not be set aside because it was not excessive, arbitrary, or capricious. The claim will remain denied.

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 25th day of July 2012.