

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41437  
Docket No. MW-41641  
12-3-NRAB-00003-110171**

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 Atchison, Topeka**  
**( and Santa Fe Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The discipline (removed and withheld from service by letter dated February 17, 2010 and subsequent dismissal by letter dated March 18, 2010) imposed upon Mr. B. Andras for alleged violation of MOWOR 1.15 Duty-Reporting or Absence and MOWOR 1.6 - Conduct in connection with charges of allegedly claiming and being paid for time not worked and mileage on December 30, 2009 and January 20, 2010 was arbitrary, excessive, on the basis of unproven charges and in violation of the Agreement (System File BNSF-504-JF-10/15-10-0001 ATS).**
- 2. The claim\* as presented by Vice Chairman J. T. Finch to Mr. S. Curtwright - Engineer Gulf Division on April 1, 2010 shall be allowed as presented because said claim was not disallowed in accordance with Rule 14(a)(1).**
- 3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimant B. Andras shall now be allowed '...the removal of the charges of the alleged violation of MOWOR Rules 1.15 Duty-Reporting or Absence and 1.6 Conduct and the removal of the Claimant's unjust and unwarranted discipline of dismissal from active service from the BNSF Railway, and the removal from his Personnel Record and the reinstatement of the**

Claimant to active service with all seniority unimpaired, to be paid for all time lost at his respective straight time rate of pay beginning on February 17, 2010, through and including on a continuous basis until this matter is settled. All lost time to be credited towards Railroad Retirement, vacation, hospitalization and all expenses to be paid, to include any meals, lodging and mileage at the rate of \$.50 a mile acquired by the Claimant attending the Formal Investigation, held on February 23, 2010, 9:00 A.M., held in the Maintenance of Way Building, conference room, 110 Sunbeam Lane, Lafayette, Louisiana 70506. Mileage to be paid from the Claimant's place of residence . . . to the BNSF Maintenance of Way Building, 110 Sunbeam Lane, Lafayette, Louisiana 70506 and return to the Claimant's place of residence. . . .”

**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 February 17, 2010, the Carrier directed the Claimant to report for a formal Investigation on February 22, which was mutually postponed until February 23, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your allegedly claiming and being paid for time not worked and mileage on December 30, 2009 and January 20, 2010. Carrier's first knowledge was January 27, 2010.”

On March 18, 2010, the Claimant was found guilty as charged and was immediately dismissed from service.

It is the position of the Organization that the claim must be sustained without even reviewing the merits because Division Engineer S. Curtwright did not answer the initial claim within the 60-day time limit prescribed by Rule 14(a). Procedurally, the Organization argued that not only was the Notice of Investigation vague and impossible to defend against, telephonic testimony was allowed and that was improper. Because of those various errors, the Claimant was denied a "fair and impartial" Investigation. Based upon the aforementioned alleged violations it asserted that the claim should be sustained. However, if the merits are examined it argued that the Carrier did not meet its burden of proof and the Claimant did nothing to merit dismissal. The Organization 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. In regards to the Organization's assertion that it violated the time limits for responding to the initial claim, it argued that the appeal was improperly submitted in that it was not received in Curtwright's office. Moreover, the Organization provided no evidence to prove different receipt, such as a U. S. Postal Service certified receipt, a fact that it addressed in its declination of August 13, 2010 stating that Division Engineer Curtwright did not receive a copy of the Organization's appeal until the highest designated officer faxed him a copy on June 16, 2010. Therefore, the first knowledge Curtwright had that the Organization had submitted a claim was on June 16, and following receipt of the faxed copy, he declined the claim on June 23, 2010, which was within the time limits of the Agreement. It further argued that even assuming arguendo, that an error occurred, any such error should not be considered fatal to the Carrier's position because many Awards have been rendered by various Divisions of the Board involving late denials wherein it was determined that a late denial effectively tolls the Carrier's liability for the procedural violation as of that date.

Turning to the merits, the Carrier argued that the Claimant falsely claimed eight hours' straight time pay on December 30, 2009 and on January 20, 2010, when, in fact, the Claimant performed no service for the Carrier on those dates. Moreover, he falsely claimed personal vehicle mileage reimbursement for January 20, 2010, which he would only have been entitled to if he had actually worked on

that date. The Carrier stated that a reading of the transcript reveals that the Claimant offered various excuses for his Rules violations, however his testimony and that of his co-workers and Supervisors verify that he did not report to work on either date, but still falsely claimed compensation for both days. The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and transcript and will first address the Organization's procedural argument that the Carrier failed to respond to the initial claim in a timely manner. The record indicates that a claim was filed on behalf of the Claimant on April 1, and on June 14, 2010, the Organization advised the Carrier's highest designated officer that it had not received a response to its initial claim. According to the Carrier, the first level Officer to handle the claim, Division Engineer S. Curtwright, did not receive the appeal. The Carrier asserted in its declination of August 13 that the Organization contacted the Labor Relations Department on June 16, 2010, to advise that it had not received a response, after which it emailed the Labor Relations Department a copy of its appeal. At that point, a copy was forwarded to Curtwright, following which Curtwright responded on June 23, 2010, via certified mail denying the claim. The Carrier further argued that there was no proof of delivery of the Organization's original claim, but assuming it had any liability, it was limited pursuant to Decision No. 16 of the National Disputes Committee to a maximum of 23 days when the late denial effectively tolled the Carrier's liability for the procedural violation as of that date.

Rule 14 - Time Limit on Claims and Grievances, requires that all claims or grievances must be presented in writing, but there is no requirement that they must be sent via certified mail. Arbitral Boards have repeatedly reasoned that the parties are assumed to have dealt with one another in a forthright manner, and unless one party can show that another has not dealt in that manner, the Board will not question either parties' handling of a claim. In this instance, the Board has determined that the claim was filed in a timely manner and the Carrier's initial declination was untimely. While the claim was being handled between the parties, the Carrier cited property precedent involving the same parties to this dispute, specifically, Third Division Award 32889 and Public Law Board No. 4370, Award 63, each of which determined that NDC Decision 16 works in a manner so as to limit the Carrier's liability for an untimely response where the claim involved is one where liability is not fixed and continues to accrue day by day. It asserted that both

of the aforementioned Awards were on point with this case and should be followed. In Award 32889, the Board held:

“ . . . On this property, however, the parties already have Award 63 of Public Law Board No. 4370, issued on March 7, 1997. This decision interpreted the identical time limits language. We will follow this precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process.”

Following the aforementioned reasoning, the Board examined Award 63 and found that in that decision the Claimant was dismissed from service on February 16, 1996. The claim was initiated on behalf of the Claimant and received by the Division Superintendent on March 11, 1996. On June 24, 1996, the Organization advised the Labor Relations Department that it had not received any response from the Division Superintendent. Subsequently, on July 25, 1996, the Division Superintendent wrote to the Organization and denied the claim. The PLB determined that the denial was untimely and stated:

“ . . . the claim will be sustained for the period from February 16, 1996 until July 25, 1996 (the date of the Division Superintendent's tardy response). . . .”

Award 63 sustained the time limit violation from the date of the dismissal to the date of the untimely response. The Board will follow that precedent and sustain the instant claim from March 18, the date of the Claimant's dismissal, until June 23, 2010, the date of the Division Engineer's untimely declination. The Claimant will be compensated in accordance with Rule 13(f) of the parties' Agreement for the Carrier's violation of Rule 14.

The Board finds no other procedural errors that denied the Claimant his Agreement “due process” rights.

Turning to the merits, the facts reveal that the Claimant is a Relief Bridge Tender whose position relieves up to five different railroad bridges and whose duties include operation of the moveable bridge span that allows boats to navigate the river with minimal impact to both maritime and train traffic. The bridges covered by the Claimant's assignment were the Bayou Boeuf, Baldwin, Berwick, Mermentau

and Desallemands. As a Relief Bridge Tender, the Claimant was scheduled to relieve at designated bridges on four work days: Saturday through Tuesday. Wednesday, his fifth work day, was considered a "float day" on which the Claimant performed service as either a Bridge Tender, if a vacancy existed, or performed other duties to assist the Bridge Tenders at one of the five bridges he covered, depending on each bridge's particular need.

On January 20, 2010, at approximately 8:30 A.M., Structures Supervisor J. Effinger tried to locate the Claimant because his name had come up for a random drug screen. Although the Claimant was scheduled to work at Baldwin Bridge, he did not report for duty at that bridge or any other bridge and Supervisor Effinger was not able to locate him.

On January 27, 2010, Supervisor Effinger was reviewing payroll submitted by the Claimant. He discovered that the Claimant had paid himself for December 30, 2009 and January 20, 2010, along with claiming personal vehicle mileage reimbursement for travel between Berwick and Bayou Boeuf, Berwick and Baldwin, and also Mermentau and Berwick bridges on January 20, 2010. According to the Carrier, he did not work on either of those dates and performed no service.

The Carrier argued that the Claimant paid himself for time not worked, whereas the Organization argued that both of the aforementioned dates were Wednesdays and he was entitled to compensation for making himself available wherever he was needed inasmuch as that was his "float day" and he had no definite place or hours that he was assigned to work. The Organization further argued that on both dates in question, the Claimant called all of the bridges that he was responsible for providing "float" relief to and was told that his help was not needed on any of those bridges on either of those days. The Organization further argued that he had never been physically required to report to any bridge unless his help was needed.

Supervisor Effinger repeatedly testified that on Wednesdays the Claimant was supposed to contact all of the different bridges covered by his assignment to ascertain whether his assistance was needed and if they did not need any help, the Claimant should call him (Effinger). For example, the transcript reveals that Effinger was questioned as follows:

**“Joe Finch: But, specifically with regard to Mr. Andras and his job, what specifically did you advise him or instructed to do about Wednesdays?”**

**Joe Effinger: About Wednesdays Mr. Andras and I talked that on Wednesdays he's a floater. On Wednesdays he has the flexibility to work it, to work at either bridge that needs his assistance and that he will call that bridge and find out from that bridge tender, you know, to see which bridge he needs to go to and that any time, you know, there is no bridge for him to go to that he needed to contact me.” (Emphasis added.)**

Supervisor Effinger further testified that none of the Bridge Tenders saw the Claimant on either date, which was substantiated by the various Bridge Tenders. Effinger's testimony was not effectively refuted. As a matter of fact, the Claimant testified that he performed no service on either day and on December 30, 2009, he hung out in the Berwick Bridge parking lot and **“goofed off on the property.”** The Claimant suggested in his defense that he had never been instructed to call Supervisor Effinger on Wednesdays if no bridge needed his assistance. To prove that point he questioned Effinger during the Investigation as follows:

**“Brian P. Andras: Thank you. Mr. Effinger, do you tell Arthur Bertrand to also call you when he arrives at a bridge and he's also looking for work because his no vacation relief, nobody is on a personal leave day, nobody is on a float vacation, because he basically goes to the bridges and performs maintenance too just like I do on a Wednesday on my float day. He's doing the exact same work even though the jobs are bulletined different. He's looking for work. It's what he was instructed to do. Do you tell him to, to also call you if he arrives at bridge and there's no work? Does he have to call you or what's the procedure?”**

**Joe Effinger: Okay well I will speak in reference to Mr. Arthur Bertrand.**

**Brain P. Andras: Straight up does he have to call you yes or no?**

**Joe Effinger: Yes, he calls me.” (Emphasis added.)**

The Claimant's suggestion that he was not directed to report to Effinger on those Wednesdays that the various bridges did not need his service lacks credibility especially when it was not refuted that employee Bertrand had been given the same instructions. Substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Claimant was negligent when he failed to converse with his Supervisor if there was some other work he could have performed. However, the Board is not persuaded that the Claimant was purposely dishonest in putting in for monies on the dates under charge.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, the Claimant had more than 30 years of service with an unblemished disciplinary record. The Claimant's infraction was serious, but based upon his good prior work record, the Board finds and holds that the discipline assessed was excessive. Accordingly, his termination is reduced to a lengthy suspension, which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service (1) with seniority intact (2) with all other rights unimpaired and (3) with backpay from March 18 through June 23, 2010, account of the Carrier's first level time limit violation, to be paid in accordance with Rule 13(f).

### 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. 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 5th day of September 2012.