

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41041
Docket No. MW-40967
11-3-NRAB-00003-090251**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 (withheld from service by letter dated January 11, 2008 and subsequent dismissal by letter dated February 14, 2008) imposed upon Mr. J. Johnston on charges of alleged violation of Maintenance of Way Operating Rule 1.6 - Conduct for alleged false claims for pay for December 31, 2007, January 1, 2008 and January 2, 2008 and alleged violation of Maintenance of Way Operating Rule 1.15 - Duty - Reporting or Absence for allegedly being absent from duty without proper authority on January 2, 2008, was arbitrary, capricious, unwarranted and in violation of the Agreement (System File T-D-3268-H/11-08-0094 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Johnston shall now ‘*** be reinstated immediately to the service of the Carrier, with seniority unimpaired and he must be made whole for any and all losses incurred, and any mention of the discipline must be removed from his record.’”**

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.

Prior to his dismissal, Claimant J. Johnston had more than 11 years of seniority in various classifications within the Maintenance of Way and Structures Department. At the time of the instant dispute, he was working as a Track Foreman at Milbank, South Dakota.

On January 11, 2008, Roadmaster L. Sanders was reviewing the payroll for the Milbank Section when he noticed that the Claimant was paid eight hours straight time as the Milbank Section Foreman for January 2, 2008, and was paid holiday pay on December 31, 2007, and January 1, 2008. However, the Claimant was not entitled to such pay because he did not work on January 2, 2008. Roadmaster Sanders withheld Johnston from service commencing January 14, 2008.

By letter dated January 14, 2008, the Carrier directed the Claimant to attend a formal Investigation on January 23, 2008:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, for your alleged false reporting of time for 8 hours straight time when you were absent from duty on January 2, 2008, and reporting of 8 hours holiday time on December 31, 2007, and 8 hours holiday time on January 1, 2008. These alleged falsifications, first became known to BNSF on January 11, 2008.”

The Hearing took place on January 23, 2008, pursuant to which, in a letter dated February 14, 2008, the Claimant was notified that he was being dismissed as a result of his violation of Rule 1.15 Duty - Reporting or Absence of the Maintenance of Way and Operating Rules and Employee Safety Rule S-28.14.

By letter dated March 5, 2008, the Organization appealed the decision specifying that (1) the Carrier did not meet its burden of proof (2) the discipline assessed was unwarranted and excessive, and (3) the Claimant was denied a fair and impartial Hearing. On March 6, General Manager M. Bruce denied the appeal. On March 20, the Organization appealed the matter to General Director of Labor Relations W. A. Osborn, who denied the appeal on May 19, 2008. A conference was held, but the parties were unable to resolve the matter. The matter was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. It claims that (1) the Carrier has been arbitrary and capricious in its treatment of the Claimant (2) the Carrier abused its discretion and (3) the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. It further contends that the Claimant was denied a fair and impartial Hearing. While the Organization does not contest that the Claimant did not perform any work on January 2, it argues that he did perform work on days prior to January 2 that he recorded as having worked on January 2. The Organization asserts that the Carrier should now be required to overturn the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes clear that the Claimant was guilty as charged. He claimed time for work that he did not perform. The record evidence shows that the Claimant engaged in the behavior with which he was charged and such behavior was clearly improper. Based on the instant offense, dismissal was clearly appropriate.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or

arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

The Board has not found substantial evidence in the record to uphold the Carrier's position in whole. While we note that the Claimant did engage in misconduct, we find that dismissal was too severe. Clearly, the Claimant engaged in misrepresentation. However, we cannot find that the Claimant engaged in theft. Therefore, we find that the discipline must be reduced to a 12-month suspension subject to a Last Chance Order. If the Claimant engages in similar misconduct within a 12-month period following his reinstatement, he shall be subject to immediate dismissal.

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 23rd day of August 2011.

SERIAL NO. 412

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 41041

**DOCKET NO. MW-40967
NRAB-00003-090251**

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes
(Division - IBT Rail Conference

NAME OF CARRIER: (BNSF Railway Company (former Burlington
(Northern Railroad Company)

Award 41041, which was adopted on August 23, 2011, was transmitted to the parties on August 29. According to the Organization, the Carrier did not fully comply with the Award. The Organization petitioned the United States District Court for the Northern District of Illinois for enforcement of the Award. On June 11, 2012, the District Court entered an Order finding that the Carrier had an arguable basis for its position regarding implementation of the Award and granted the Carrier's Motion to Remand the case to the National Railroad Adjustment Board for the purpose of rendering an Interpretation.

Pursuant to the Court's Order, a subsequent Interpretation Hearing was held on September 20, 2013. A number of issues were raised by the Organization in its contention that the Carrier had not fully complied with the Award. Specifically, the Organization contended:

1. The Claimant was not reinstated within the required 30-day period.
2. The Carrier improperly deducted outside earnings from the backpay paid to the Claimant.
3. The Carrier failed to properly reimburse the Claimant for lost overtime wages.

4. The Carrier failed to reimburse the Claimant for out-of-pocket health insurance premiums.

RULINGS:

1. Claimant's Return to Duty

The Board finds that the Claimant was reinstated in a timely manner. The Award ordered that the Carrier was to make the Award "... effective on or before 30 days following the date the Award is transmitted to the parties." The Award was adopted on August 23 and transmitted to the parties via email on August 29, 2011. On September 13, 2011, the Claimant was notified of his reinstatement and informed of requirements with which he had to comply prior to returning to work. On October 6, 2011, the Claimant contacted the Division Engineer to schedule his Employee Review Meeting; the meeting was scheduled for October 17, 2011. On October 6, the Claimant was medically cleared for duty and on October 10, 2011, the Claimant was notified of the training classes that he needed to complete. The Claimant underwent FRA Recertification Training from October 17 through 19, 2011. On October 24, 2011, the Claimant marked up for duty.

The Board reviewed the record and cannot find that the Carrier failed to return the Claimant to duty in a timely manner. The Board finds that based on all the facts and circumstances of this case, the Carrier acted within a reasonable time period in returning the Claimant to work. Further, the Board notes that the Claimant did not suffer any economic loss, because he was reimbursed for lost wages and benefits for the period beginning with the end of his suspension, until he was ultimately returned to work.

2. Outside Earnings Deductions

The Organization contends that the Carrier erred when it deducted outside earnings from the Claimant's backpay calculation. The Organization contends that it is improper to deduct such outside earnings, based on the language of the parties' Agreement and past practice. The Carrier contends that the Claimant should be made whole, but should not get more than what he would have earned with the Carrier had he continued to work. The Board notes that both parties submitted substantial precedent on this point.

After a review of the arguments and precedent cited by the parties, the Board concludes that the Carrier had the right to deduct outside earnings from the Claimant's backpay. The Claimant was to be made whole, except for the 12-month suspension. However, the Board notes that the Claimant should not be made more than whole. If the Claimant were to receive both back wages to which he was entitled, and all outside earnings that he received during the period coinciding with his reinstatement, the Claimant would have received a windfall to which the Board finds he is not entitled.

Therefore, the Carrier was within its rights to deduct outside wages earned during the period of time other than the 12-month suspension. However, the Board also notes that any outside wages that the Claimant would have earned while still working for the Carrier should not be deducted from his backpay.

3. Overtime Pay

The Organization contends that the Claimant is entitled to compensation for any lost overtime hours at the appropriate overtime rate. The Organization contends that had the Claimant continued to work, he would have earned overtime and should not suffer because of his inappropriate termination. Conversely, the Carrier contends that such calculations are speculative at best, and that the Claimant should not be compensated for work that was performed by other employees. If the Board awards lost overtime to the Claimant, the Carrier contends that, at most, the Claimant would be entitled only to lost overtime at the straight time rate of pay.

After a thorough review of the evidence, the Board finds in favor of the Organization. As noted above, the Claimant was to be made whole for all lost wages. The total determined for lost wages includes a reasonable calculation of lost overtime wages. Based on a variety of factors, including the Claimant's overtime history, the Carrier can reasonably determine the amount of overtime compensation that the Claimant would have received had he continued to work beyond the period of his 12-month suspension. The Board notes that the Claimant would have been paid for any overtime at the time and one-half rate. In order to make the Claimant whole, he should be paid at the time and one-half rate for all reasonable lost overtime wages.

4. Reimbursement for Out-of-Pocket Insurance Premiums

This last issue relates to the amounts of medical premiums and expenses to which the Claimant is entitled for the period outside of the 12-month suspension. After a thorough review of the evidence and arguments, the Board finds that the Claimant should be made whole, but he should not receive a windfall. With that in mind, the Board has determined that the Claimant should not have to pay any more in premiums, deductibles and co-pays than he would have paid had he continued to work outside of the 12-month suspension.

The matter is remanded to the parties to first determine the amounts that the Claimant would have paid out for medical expenses had he worked during the period beyond the 12-month suspension. Second, the total amount of medical expenses that the Claimant actually paid out in the form of premiums, deductibles, co-pays, or other out-of-pocket expenses during the same period outside of the 12-month suspension must be ascertained. Finally, the first amount will be subtracted from the second amount and the Claimant will be paid for the difference, if any.

Referee Steven M. Bierig who sat with the Division as a neutral member when Award 41041 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 17th day of December 2013.