

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41457
Docket No. MW-41583
12-3-NRAB-00003-110170**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 (dismissal) imposed upon Mr. S. Everson by letter dated April 28, 2010 for alleged violation of MOWOR 1.13 Reporting and Complying [With] Instructions and MOWOR 1.6 Conduct in connection with charges of alleged failure to comply with instructions and alleged dishonesty for paying time to himself on January 15, 2010 and alleged failure to make corrections as instructed on January 18, 2010 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-10-D070-10/10-10-0313 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Everson shall now receive the remedy prescribed by the parties in Rule 40(G).”**

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.

This dispute arose as a result of the discharge of S. Everson on April 28, 2010, for his alleged violations of Operating Rules 1.13 and 1.6. The Carrier's dismissal notice asserts that Everson "fail[ed] to comply with [supervisory] instructions and [was] dishonest . . . when on January 15, 2010, you paid yourself for time not worked and failed to make corrections as instructed on January 18, 2010." The Organization concedes that Everson "failed to make corrections to a time roll but insists that he was 'confused' rather than 'dishonest' and that the discharge penalty was 'excessive' for conduct which should fairly have been characterized as no more than a "misunderstanding." It seeks his prompt reinstatement with full seniority and backpay.

Everson was scheduled to work as a Trackman/Laborer on January 15, 2010, from 7:00 A.M. to 3:30 P.M. on a mobile system gang engaged in track construction. K. Bristow was the Roadmaster responsible for this gang. He knew that Everson had not done any flagging work before and hence wanted to review those duties with him. He called the Section Foreman at 1:30 P.M. and asked to speak with Everson. He was informed that Everson had gone home early. Apparently, sometime after 12 Noon, Everson received a telephone call from his wife who was incoherent and appeared to Everson, from prior experience, to be in a "diabetic coma." He tried, without success, to advise Bristow of his need to leave work. And he then left. He had been at work for roughly five hours.

Shortly before 2:00 P.M., Bristow received a telephone call from Everson explaining that he had left work early because of a "family emergency." Bristow did not disagree with Everson's action and told him, in effect, that he would have an approved absence for the work period that he missed. But he also gave Everson Track Inspector C. Hall's phone number and instructed him "to contact Hall and discuss the Form B that was to be put into effect under [Everson's] name for

Monday, January 18” The rest of that initial conversation is set forth in a letter from Hall:

“To whom it may concern . . . Everson was unsure of what limits, and time he needed for the Form B. I told him I would check on it and call him back soon. I called . . . Everson back at approximately 1430 [2:30 P.M.] to inform him I had placed a Form B request out in his name between MP 435.8 to MP 440.7, from 0700 to 1700, on All Main Tracks. I also discussed with him where the flags were, when they needed to be up, where the truck was he was to use, and gave him directions on how to get to the flags”

Presumably, at some later time during the afternoon on Friday, January 15 (or perhaps on Saturday, January 16) Everson performed the necessary flagging work¹ as directed by Bristow and Hall. The Carrier does not contend otherwise. When Everson completed such work, he inputted his report for time worked the previous week. He claimed eight hours at the straight time rate for each of his scheduled days, Monday, January 11 through Friday, January 15 and an additional 30 minutes of overtime for his work on Friday after he went home early due to a “family emergency” (or perhaps on Saturday).²

When Bristow examined the employee pay claims for the preceding week on Monday, January 18, he noted Everson’s claim for eight hours’ work at the straight time rate for Friday, January 15. He remembered, however, that Everson had not worked a full shift on Friday, but rather had gone home early because his wife was ill. Bristow telephoned Everson on Monday and asked him to make an adjustment in his pay claim hours for the previous Friday. Everson said that he would do so. There was no mention in this conversation as to how much time Everson would be afforded to make the adjustment. It appears, however, that an adjustment would have been acceptable to the Carrier if it was made on or before January 31. Bristow checked with the appropriate management personnel on January 31 and learned that no adjustment had been made. He thereupon called for an Investigation of

¹Nothing in the record indicates when exactly this flagging work was done.

²The Carrier did not complain about this 30-minute overtime request because supervision realized he had performed additional work on Friday pursuant to supervision’s request.

Everson for what he believed to be a violation of both Operating Rule 1.13 and Operating Rule 1.6.

Everson's account of this Monday, January 18 telephone call was substantially different. According to his testimony at the formal Investigation on April 5, 2010, he stated that Bristow began the conversation with some comment about Everson's 30-minute overtime claim. And when Everson sought to explain, Bristow became "upset" and "irate." Bristow then alleged that Everson had claimed pay for himself for the entire day on Friday, January 15 even though he had gone home early. Everson testified that he tried to be conciliatory and offered "to take 2 hours off . . . his claim . . ." but his offer seemed to make Bristow more "argumentative." Finally, Bristow "hung up," but not before Everson told him, "I'm at fault, I'll take it [the additional time] out" He knew he had not worked eight and one-half hours on Friday, January 15.

Bristow, on the other hand, flatly denies being "upset," "irate" or "argumentative" during his January 18 conversation with Everson. And he insists that Everson clearly stated that he would make the pay adjustment sought by Bristow.

Nevertheless, Everson testified that he was "confused" and "upset" by what was said during his January 18 conversation with Bristow. He was unsure of what exactly he should do. So when he worked with Bristow the next few days, neither man mentioned that conversation. Nor did Everson attempt to resolve his "confusion" by questioning Bristow as to how exactly he should adjust his payroll. Indeed, Everson chose to believe the whole matter had somehow blown over and would be forgotten.

Finally, on February 2, 2010, some two weeks after the January 18 conversation, Everson was advised by the Carrier that a formal Investigation was to be held regarding his "alleged failure to comply with instructions and alleged dishonesty . . . when you allegedly paid yourself for time not worked and allegedly failed to make corrections as instructed" The Hearing was held on April 5, 2010, after several postponements. The Carrier ruled on April 28, 2010, that Everson was guilty of both offenses and discharged him. The Organization promptly protested. When the parties were unable to resolve their differences, the dispute was appealed to arbitration.

The Carrier based its discharge of Everson on two separate and distinct charges.

First, the Carrier alleges that he was “dishonest” by inputting a claim for eight hours at the straight time rate of pay for his work on Friday, January 15, knowing full well that he had gone home early that day, sometime between 12:30 P.M. and 1:30 P.M. However, Everson performed work for the Carrier after he left and the Carrier was aware of that fact. To begin with, he realized that he had not spoken to Bristow before he left. So he called Bristow shortly before 2:00 P.M. to explain that his wife was ill and he had to leave. Bristow understood and approved his early quit. But Bristow wanted to make sure certain flagging work was performed by Everson before Monday morning, January 18. Everson wrote down the instructions that he received, including the completion of a Form B, which required him to contact Track Inspector Hall. After his comments with Bristow ended, he contacted Hall and received more detailed instructions regarding what he had to do. Hall told him where to obtain a Carrier vehicle for the flag work to be done, where the flags were stored, where they should be placed (i.e., the appropriate mileposts) and so on and so forth.

Then, Everson presumably accomplished all of these tasks. At least the Carrier does not claim otherwise. Unfortunately, Everson did not keep a record of when exactly he performed the work and how much time he spent on each task – talking on the phone to Bristow and Hall, making notes of what he was to do, securing a Carrier truck, picking up the flags, driving to the appropriate mailposts, installing the flags, and so on and so forth. Nor was he asked by supervision to provide such a detailed account. Nevertheless, it is obvious that this work would have required a substantial amount of time. That being so, Everson may very well have spent two to three hours performing work on behalf of the Carrier after his early quit between 12:30 P.M. and 1:30 P.M. He may very well have worked for eight hours (or close to it) on behalf of the Carrier on Friday, January 15. At least he could have reasonably concluded, before inputting his claim for eight hours, that he had performed that amount of work.

Given these circumstances, the Board finds that Everson was not guilty of “dishonesty.” That charge should be removed from his personnel record.

Second, the Carrier alleges that Bristow instructed Everson by phone on Monday, January 18 to correct his inputted claim for eight hours of straight time pay on the previous Friday, but Everson failed to do so. It urges that this failure was a violation of Rule 1.13, which requires employees to “comply with instructions from supervisors who have proper jurisdiction.” Everson does not deny that he received this “instruction” and did not carry it out.

The Organization contends that Everson’s failure was prompted by his “confusion” and should not be a proper basis for discipline under the unusual facts of this case. Consider Bristow’s behavior. He knew early on Friday afternoon, January 15 that Everson had gone home early without having completed his eight hours of scheduled work. He knew too from his later conversation with Everson that same afternoon that he had instructed Everson to perform certain flagging work. He presumably knew that such work had been completed before he spoke with Everson again on Monday, January 18. He could not have known how much time Everson spent on this assignment. But he surely must have known the tasks involved could, in their entirety, take as much as two to three hours to complete. Yet he instructed Everson, in effect, that any time for work claimed to have been done after his early quit on Friday, January 15 should be removed.³ Given these circumstances, it is understandable that Everson became “confused.” For he was well aware that he had performed the work that Bristow and Hall expected him to do and Bristow seemed to be ignoring this critical fact. In other words, Everson’s request for eight hours’ straight time pay for Friday, January 15 was probably correct.

The conversation of Monday, January 18 did not last long. Bristow grew angry; Everson grew defensive, perhaps more “confused.” Neither man was able to clarify the situation to the other’s satisfaction. Everson, in an attempt to calm and pacify his supervisor, said, “I’m at fault, I’ll take it out . . .” But a careful review of the testimony reveals that he was not conceding that he was guilty of the charges later made against him by Bristow. Rather, he appears to have been seeking some acceptable compromise to a situation that he did not fully understand. Bristow denies he was angry or argumentative, but Everson’s account was more persuasive.

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These were not Bristow’s actual words. According to the Investigation transcript, Bristow “told him [Everson] he paid hi[m]self all day . . . he agreed . . . I said would you correct your time . . . he said he would . . . he never did. . . .”

Our conclusion is that when Bristow said nothing further to Everson the following week, Everson could reasonably have believed the matter would not be pursued and no further action was necessary on his part.

Accordingly, the Board finds no violation of either of the Operating Rules in question. Accordingly, the discharge was not justified and is hereby overturned.

Claimant Everson shall be reinstated with seniority unimpaired and made whole for his loss of earnings between the date of his discharge and the date of this Award.

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 16th day of October 2012.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 41457

**DOCKET NO. MW-41583
NRAB 00003-110170 (Old)
NRAB 00003-140095 (New)**

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

NAME OF CARRIER: (BNSF Railway Company

Award 41457 was adopted by the Third Division on October 16, 2012. As a result of that Award, Claimant S. Everson was reinstated to service. The Award stated that he should be reinstated "... with seniority unimpaired and made whole for his loss of earnings between the date of his discharge and the date of this Award." The Claimant marked up for service on December 7, 2012, and was paid lost wages through December 6, 2012.

The Organization protests that the Carrier has not fully complied with Award 41457. It alleges (1) the Carrier failed to make the Award effective within 30 days of the date the Award was transmitted to the Parties; and (2) the Carrier failed to pay the Claimant the full amount due him as a result of the Award. With respect to the second allegation, the Organization maintains that the Carrier failed to properly implement the Award in the following ways:

1. The Carrier has refused to pay the overtime wages lost by the Claimant.
2. The Carrier is attempting to avoid payment of wage loss suffered in relation to unreimbursed medical expenses.
3. In violation of the Agreement, the Carrier has attempted to apply common law principles in the calculation of the Claimant's backpay by deducting from its payment an amount the Claimant

earned in other employment during the period of his unjust dismissal.

4. Notwithstanding that the Carrier contends that it can apply common law principles in order to deduct backpay, the Carrier has refused to compensate the Claimant for the additional damages he suffered and expenses he incurred as a result of his unjust dismissal.
5. The Carrier has refused to fully divulge the data and methodology and calculations it used in determining the monetary payments it contends are required to comply with the Award.

RULINGS:

With respect to the Organization's contention that the Carrier failed to implement the Award within the time frame required, the Board finds no evidence to suggest that the delay in the Claimant's return to work was other than the normal processing required before an employee out of work for a long period of time returns to his position. There is no indication that his backpay was affected in any way by the process required. Accordingly, the Board addresses the remaining specific issues raised by the Organization as follows:

1. **Payment of Overtime Wages**

The Board reviewed the record evidence carefully, and does not find that the Organization has presented sufficient evidence that Claimant Everson actually would have worked any overtime during the period that he was out of service. Absent such evidence, we do not find that the Claimant is entitled to any overtime earnings as part of his backpay remuneration. Thus, we find in favor of the Carrier on this point.

2. **Wage Loss Due to Unreimbursed Medical Expenses**

The Organization contends that the Claimant incurred medical insurance costs and medical expenses that he would not otherwise have incurred but for his dismissal. As a result, the simple awarding of back wages lost does not adequately constitute a

just remedy. The Board finds in favor of the Organization on this matter. However, the Board is also concerned that the Claimant not receive a “windfall” gain. Accordingly, we find that the Claimant shall be required to provide the Carrier and the Organization with receipts of his medical outlays that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier’s employ uninterrupted by his dismissal.

3. Deduction of Outside Earnings in Calculating Wages Lost

The Organization has protested that, in calculating the Claimant’s lost wages, the Carrier erroneously deducted his outside earnings during the period that he was not in the Carrier’s service. It cited several Awards on that point. In contrast, the Carrier argues that the meaning of “compensation for time lost” is simply that the Claimant should be made whole such that he is in no worse position in terms of wages earned than if he had not been out of service during the time in question. The Carrier also submitted several Awards in favor of its position.

After a thorough review of the Parties’ arguments and the various Awards submitted by each Party, the Board finds that the Carrier was within its rights to deduct outside earnings from its restitution of backpay. Here, too, the Board concludes that the requirement to make the Claimant “whole” for earnings lost implies that he should be in no worse a financial position than if he had continued in the Carrier’s service rather than spending time out of service. If outside earnings are not deducted, then the Claimant would receive a windfall gain to which the Board finds he is not entitled.

4. Compensation for Other Damages Suffered

The Organization has argued that if the Board finds that outside earnings should be deducted, then it must consider matters of equity regarding other damages suffered by the Claimant as a result of his dismissal. While the Organization has not specified those damages to which it refers, the Board’s jurisdiction is limited to a “make whole” remedy limited to assuring, so far as possible, that the Claimant suffered no financial loss as a result of his time out of service. Other, more ephemeral

alleged “losses” are not within the purview of the Board, nor do we make any ruling thereon.

5. Alleged Failure of the Carrier to Divulge the Data and Methodology Used in Determining Monetary Payments

The Organization protests that the Carrier has not been forthcoming in its calculations of the Claimant’s backpay remuneration. As noted above, in Item 2, such calculations, if any, should involve a mutual review of the relevant records by both Parties. The Board sees no reason to deviate from the finding expressed above with respect to alleged wages owing.

Referee Richard Mittenthal sat with the Division as a neutral member when Award 41457 was rendered. He was replaced by Referee Elizabeth C. Wesman, with the consent of both Parties and the Division, to render this Interpretation.

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

Dated at Chicago, Illinois, this 29th day of January 2016.