

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41529
Docket No. MW-41729
13-3-NRAB-00003-110017

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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. B. McDaniel for alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors and EI 2.4.4 Safety and Protection During Inspections for alleged failure regarding derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on September 13, 2009, allegedly caused by un-repaired previously identified defect in a crossing and his alleged failure to comply with company policy as outlined in the BNSF Engineering Instructions was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3605-H/11-10-0025 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, “*** The Carrier must remove any and all mention of the discipline from Mr. McDaniel’s record, reinstate Claimant immediately, and make Mr. McDaniel whole for any and all losses incurred, including, but not limited to, straight time pay for each regular lost work day, all loss of overtime opportunity, and accreditation for any and all vacation and other benefits.”

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 B. McDaniel on December 11, 2009 for his alleged violations of Engineering Instructions EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors and EI 2.4.4 Safety and Protection During Inspections for his alleged failure regarding a derailment that occurred on September 13, 2009.

By letter dated September 18, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 25, 2009, which was mutually postponed until November 12, 2009. The Notice of Investigation specified that said Investigation would be held:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure resulting in derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on September 13, 2009, caused by un-repaired previously identified defect in a crossing and your alleged failure to comply with company policy as outlined in the BNSF Engineering Instructions.”

On December 11, 2009, the Claimant was found to be in violation of Carrier Rules and was immediately dismissed from service. The Carrier's dismissal notice asserts that the Claimant was “ . . . dismissed effective immediately from employment with the BNSF Railway Company for your failure resulting in derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on

September 13, 2009, caused by un-repaired previously identified defect in a crossing and your failure to comply with company policy as outlined in the BNSF Engineering Instructions.” The Carrier based its charge on the contention the Claimant bore a responsibility to inspect the trackage where the derailment occurred and that he had failed to perform that responsibility. The Organization contends that the Claimant was not in violation of the cited Engineering Instructions. The Organization further contends that the Claimant bore no responsibility for inspecting the location identified as the point of the derailment and thus the imposition of any discipline in this instance was unjust.

As a threshold issue in this case, the Board is presented with the question of whether the Carrier established the Claimant’s responsibility for inspecting the trackage at issue, either as a part of his regular assignment or in relation to the geometry car inspection of August 26, 2009. Indeed, a good deal of the testimony at the Investigation surrounded the establishment of the trackage the Claimant was assigned to inspect as a part of his regular assignment.

The Board examined the testimony and documentation in the record of the Investigation and finds beyond a doubt that the location of the derailment was not a part of the Claimant's daily inspection responsibility. In fact, the Carrier’s internal documentation showed that the Claimant’s inspection territory began at Mile Post 3.3X and extended westward from there, with the Mile Post numbers increasing, whereas the area of track involved in these allegations was east of Mile Post 3.3X. All regular inspection reports filed by the Claimant over the preceding eight years covered only territory west of Mile Post 3.3X and no Carrier Official ever objected that the Claimant was not also inspecting track east of that location. Further, the computer program that the Claimant and other Track Inspectors use to file their regular inspection reports recognized Mile Post 3.3X as the easternmost limit of the Claimant’s inspection territory. The record shows that approximately two weeks after the derailment, the derailment location was added to the trackage for which the Claimant would be responsible for inspection going forward. Thus, the record established that the regular inspection responsibilities of the Claimant did not include performing regular track inspections at the location involved.

The Carrier contends that even if the location was not covered by the Claimant’s regular assignment, he had some responsibility for the defect nonetheless because he had been involved with the follow-up verification of track defects found by a track geometry testing vehicle (the STAR Car) that had

traversed the location on August 26, 2009 and had found a wide gauge defect near what it determined later to have been the point of derailment for the September 13, 2009 derailment. However, a thorough examination of the testimony and evidence adduced at the formal Investigation reveals that upon completion of the geometry car inspection on August 26, 2012, the Claimant was engaged in routine follow-up verification of defects reported by the geometry car and ended that assignment some 14 miles west of the location involved in the derailment. The verification procedure was performed by other employees at the location in question and the Claimant was notified by Roadmaster Urwiller that no defects had been found that required any further inspection or verification by the Claimant. Thus, the record indicates that even if there had been some expectation that the Claimant would be responsible for follow-up verification at the location in question, the Carrier had affirmatively relieved him of any such responsibility.

In disciplinary matters, it is well-established that the burden of proof rests with the Carrier to prove the charges against the employee by substantial evidence. In view of the facts presented, we find and hold that the Carrier failed to meet its burden to prove that the Claimant bore responsibility for inspecting the location involved. Consequently, the claim must be 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 19th day of February 2013.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 41529

**DOCKET NO. MW-41729
NRAB 00003-110017 (Old)
NRAB 00003-140094 (New)**

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

NAME OF CARRIER: (BNSF Railway Company

Award 41529 was adopted by the Third Division on February 19, 2013. As a result of that Award, Claimant B. R. McDaniel was reinstated to the Carrier's service. The Award stated that the claim should be sustained. In Part 2 of its original claim, the Organization requested that:

“ . . . The Carrier must remove any and all mention of the discipline from Mr. McDaniel's record, reinstate Claimant immediately, and make Mr. McDaniel whole for any and all losses incurred, including, but not limited to, straight time pay for each regular lost work day, all loss of overtime opportunity, and accreditation for any and all vacation and other benefits.”

The Organization protests that the Carrier has not fully complied with Award 41529. 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:

Regarding the first allegation that the Carrier failed to make the Award effective within 30 days, the Board does not find that the delay in the Claimant's actual return to work was caused by other than the normal procedure required of any employee returning to work after a lengthy absence. Nor do we find that the alleged delay in any way impacted the calculation of the backpay due the Claimant.

Accordingly, we address the remaining issues raised by the Organization as follows:

1. **Payment of Overtime Wages**

The Organization maintains that the Claimant is entitled backpay for any lost overtime hours at the overtime rate of time and one-half. It notes that had he continued to work, he would have earned hours of overtime pay in addition to his pay for regular hours worked. The Carrier contends that payment of even overtime hours at the straight time rate is appropriate, because the Claimant did not actually work those overtime hours. Thus, the Carrier contends, the work performed was performed by other employees and the Claimant appropriately received straight time for those overtime hours not worked.

The Board reviewed the record evidence, including citations by both the Carrier and the Organization. We find in favor of the Organization on this point. A make whole remedy with respect to wages must take into account the fact that the Claimant may have lost pay from some hours for which he would have earned time and one-half. The Parties shall mutually review the Carrier's records to established when the Claimant would likely have worked overtime, and the Carrier shall reimburse the Claimant the difference between straight time and overtime for those hours he missed.

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, until such time as he returned to service. 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 protested that, in calculating the Claimant's lost wages, the Carrier erroneously deducted his outside earnings during the period 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 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 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 41529 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.