Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41798
Docket No. MW-42135
13-3-NRAB-00003-130093

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Pan Am Railways/Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed by letter dated February 8, 2012 upon Mr. G. Mazzantini for alleged violation of Safety Rules PGR-C (para. 2 & 3), PGR-L (para. 1) and PGR-N (para. 4) in connection with allegations that he was at a scrap company for non-authorized work on numerous occasions was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier's File MW-12-05).

(2) As a consequence of the violation referred to in Part (1) above, Mr. G. Mazzantini shall be returned to work, have his record cleared of the charges and be compensated for all lost wages and benefits as a result of the Carrier's improper discipline."

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.

By letter dated November 22, 2011 the Claimant was directed to report for a Hearing on December 7, wherein it was alleged that on November 9, after questioning, it was determined that he was at a scrap company for non-authorized work while on duty on numerous occasions, in violation of specific sections of Safety Rules PGR-C, L & N, which provide, in relevant part, that employees must not be dishonest, enter time on time slips for time not actually worked, and act in willful disregard of Company interests. After two unilateral postponements, a Hearing was conducted on January 26, 2012 and, by letter dated February 8, 2012, the Claimant was found guilty of all charges and dismissed from employment.

The following provisions of Article 26 - Discipline, are relevant to the arguments raised in this case:

> **"26.1 No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 14 days of the Carrier's first knowledge of the act or occurrence . . . . The hearing will be scheduled to take place on a regularly scheduled work day within 30 days of the Carrier's first knowledge of the act or occurrence . . . .**
>
> **26.2 An Employee may not be suspended pending a hearing except when the act or occurrence to be investigated is of a serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier. Suspension pending a hearing will not be considered as prejudicial to the employee and will be used sparingly by the Carrier.**
>
> **26.3 The employee will have the opportunity to request that the Carrier provide necessary witnesses not listed on the notice of hearing and will have the opportunity to secure the presence of witnesses in his own behalf . . . .**
>
> **26.7 If the Carrier's discipline decision is modified or overturned at any stage of the handling resulting in a payment to the employee, such payment may be offset by any earnings received by the employee during the relevant time period which would not have otherwise been**

> **earned but for the discipline. The Carrier will work with the appropriate government agencies to assure that no Railroad Retirement benefits are adversely affected by the operation of the above provision."**

At the Hearing, Carrier Police Officer Murphy testified that during the course of his overall investigation into the theft of rail commencing in early September, he was given the names of various employees, including the Claimant. Murphy stated that although the Claimant was not found to have been involved with the theft of rail, during the investigation he became aware that the Claimant had been at Apkins Scrap Yard when he was supposedly working on a number of occasions, and obtained detailed Vendor Tickets to this effect on November 1, 2011. Executive Director of Safety and Security Nagy testified that he obtained the Claimant's time records and compared them with the Vendor Tickets establishing the Claimant's involvement with stealing time from the Company a couple of days before taking him out of service on November 9, 2011. The Claimant, a 33-year employee serving as a Surfacing Foreman in the Engineering Department for 20 years, stated that Nagy questioned him that date about who was involved with the rail theft and gave him "the chance to come clean" on that issue, and after he replied that he had no knowledge of that information, he was told by Nagy that he was being removed from service because he may have visited Apkins Scrap Yard to scrap items for personal gain while on Company time, which he also denied. Over the Organization's objections, the Hearing Officer admitted signed, sworn statements from two employees of Apkins Scrap Yard concerning their procedures and records, without requiring the attendance of any representative of Apkins Scrap Yard at the Hearing for the Organization to be able to question, especially in light of the Claimant's written statement and that of his son, about his son's use of the Claimant's account to scrap items at Apkins Scrap Yard during the relevant time.

Without going into further detail about the nature and extent of the evidence relied upon by the Carrier in determining the Claimant's guilt of the charges, the Board will address certain of the procedural Agreement due process arguments raised by the Organization both at the Hearing and during the on-property claim handling process. The Organization argued that the Claimant was improperly withheld from service on November 9, 2011 based on the contention the allegations against him do not rise to the level of seriousness or a threat to the Carrier or its property required under Article 26.2, citing Third Division Awards 21834, 27009, 28767, and 29588. It also asserts that the Carrier failed to issue a Hearing Notice within 14 days of when it had first knowledge of the act involved, and failed to schedule and hold a Hearing within 30

days of such date, in violation of Article 26.1, and that failure to comply with both clear contractual time limits requires overturning the resulting discipline without reaching the merits of the claim, relying on Third Division Awards 16262, 19275, and 28927. Finally, the Organization contends that the Claimant was denied his Agreement due process right to a fair and impartial Hearing by the Carrier's failure to provide necessary witnesses for questioning at the Hearing, citing Third Division Award 13240.

The Carrier argues that the Claimant received a fair and impartial Investigation, and that it first learned of the actions leading to the charges after speaking with the Claimant on November 9, 2011, making both the November 22 Notice of Hearing and the original Hearing date of December 7, 2011 timely under the parameters of Article 26.1. It also contends that there was substantial evidence in the record to support the charges. It asserts that this conduct met the seriousness requirements for removal from service under Article 26.2 because it involved dishonesty, and that the serious nature of the offense warranted dismissal, as noted by the Rules cited, making the penalty neither arbitrary nor unreasonable.

After careful review of the record, the Board is of the opinion that we need not reach the merits of the case, because the record supports the conclusion that the Carrier's official designated to conduct an investigation of individuals including the Claimant learned, and obtained documentary evidence, on November 1, 2011 that the Claimant was present at Apkins Scrap Yard on dates and at times when he was normally working. The Notice of Hearing charging the Claimant with theft of Company time based upon this information was not issued until November 22, 2011, outside the required 14-day period contained in Article 26.1 for the issuance of Hearing notices from "the Carrier's first notice of the act or occurrence." Additionally, the initial December 7 Hearing date falls outside the required 30-day time limit for scheduling a Hearing set forth in the same provision. Even accepting Nagy's testimony that he first knew of the Claimant's actions when he put together the Apkins Scrap Yard information with time record documentation a couple of days before his conversation with the Claimant removing him from service on November 9 or earlier - the November 22 Notice of Hearing is still outside the permissible time limits of the Agreement, and the December 7 Hearing date would not be within the requisite 30-day period.

We adopt the following rationale set forth in Third Division Award 28927 as equally applicable in this case.

> **"The time limit as set forth is clear, unambiguous, and mandatory. It has not been met by the Carrier in this case. We will not, therefore, examine the merits of the discipline inasmuch as the Investigation was not timely held. This Board has ruled in many cases, too numerous to require citation here, that time limits such as those found in Rule No. 25 are meant to be complied with. When they are not complied with, we will sustain the Claim of the Organization."**

Having so found, the Board need not address the other procedural Agreement due process arguments raised by the Organization. The claim is sustained, and the Claimant shall be returned to work, have his record cleared of the charges, and be compensated for all lost wages and benefits commencing on November 9, 2011 when he was removed from service. In accordance with Article 26.7, the Claimant's interim earnings are properly deducted from the compensation owing herein.

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 17th day of December 2013.

****Corrected**** **SERIAL NO. 415**

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 41798

DOCKET NO. MW-42135
NRAB 00003-130093 (Old)
NRAB 00003-140437 (New)

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

NAME OF CARRIER: (Springfield Terminal Railway Company

Award 41798 was adopted by the Third Division and transmitted to the parties on December 17, and December 18, 2013, respectively. The Board sustained the claim and ordered that ". . . the Claimant shall be returned to work, have his record cleared of the charges, and be compensated for all lost wages and benefits commencing on November 9, 2011 when he was removed from service. In accordance with Article 26.7, the Claimant's interim earnings are properly deducted from the compensation owing herein."

A dispute arose over the proper interpretation of Award 41798. Specifically, the Organization asserts that (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, including the payment of overtime wages lost by the Claimant, reimbursement for the Claimant's out-of-pocket medical and dental expenses, compensation for the Claimant's earned personal and sick days, and reimbursement for miles the Claimant was required to travel to maintain outside employment during the period of his unjust dismissal. Therefore, pursuant to Section 3 First (m) of the Railway Labor Act, the Organization requests that the Third Division interpret Award 41798 in light of the dispute over the proper monetary remedy."

Award 41798 found that the Carrier violated the time limits contained in Article 26.1 for the issuance of the Notice of Hearing and the scheduling of the Investigation, requiring that the claim be sustained without reaching the merits. In so doing, the Board ordered that ". . . the Claimant shall be returned to work, have

his record cleared of the charges, and be compensated for all lost wages and benefits commencing on November 9, 2011 . . . .” and that, “. . . In accordance with Article 26.7, the Claimant’s interim earnings are properly deducted from the compensation owing herein.”

The remedial dispute that arose concerns whether the Claimant received adequate compensation in accordance with the Board’s Award. There is no question that the Claimant was reinstated within the required 30-day period. It appears that the Organization does not question that the Carrier made a proper calculation of the Claimant’s straight-time wages for the claim period, and deducted his interim earnings based upon his submission of documentation concerning such earnings. However, the Organization takes issue with the Carrier’s failure to (1) pay any monies associated with lost overtime opportunities, (3) permit the roll-over or payment of personal leave and sick days over and beyond the regular straight-time compensation paid, (3) reimburse the Claimant for losses associated with his medical and dental coverage, and (4) compensate him for the mileage that he incurred in reporting to his outside employment. The record does not contain any specific amounts claimed by the Organization with respect to each of these benefits.

The Carrier first notes that the Organization never attempted to get involved with handling this matter on the property, or submitted requests for any specific amounts associated with the instant claim. It asserts that the Claimant was allowed to accrue all personal and sick days attributable to the claim period and that his pay stubs confirm this; the Carrier submitted a printout showing his accrued and used vacation, personal leave and sick days, and available totals in each category as of July 1, 2015. With respect to medical and dental benefit losses, the Carrier argues that it does not know what would have been covered by the plans that was not covered by the medical plan that the Claimant secured under his wife’s insurance, no out-of-pocket receipts were ever furnished or asserted by the Claimant, and that it made clear that it would compensate him for the difference in premium that he had to pay to secure coverage under his wife’s plan ($38/month for 25 months = $954.50) as well as any out of pocket expenses not covered, although none were proven. The Carrier contends that the Claimant is not entitled to mileage reimbursement (of an unclaimed amount), which is not encompassed within the Board’s Award and is

arbitrary, because the Claimant was never paid for his drive to work when he was employed by the Carrier.

Finally, the Carrier argues that the Board's Award does not specifically direct reimbursement for missed overtime, which is a speculative amount, at best, because the Agreement does not guarantee overtime and the Claimant could have bid to a number of different positions throughout the claim period inasmuch as positions and gangs are routinely eliminated, making a reasonable calculation impossible. The Carrier contends that in the event the Board determines that compensation for lost overtime was encompassed within the original sustaining Award, the only reasonable manner of calculation would be the average of the amount of overtime worked by the person above and below the Claimant on the Foreman seniority roster during the claim period. It points out that no alternative calculation method or monetary figure for overtime compensation was put forward by the Claimant or the Organization.

The Board is convinced that the make whole remedy originally ordered contemplated the normal inclusions, such as lost overtime, (see Third Division Award 37653; Interpretation No. 1 to Third Division Award 41041), reimbursement for out-of-pocket insurance premiums/excess payouts, (see Interpretation No. 1 to Third Division Award 41041), and other benefits that the Claimant would have accrued had he not been wrongfully dismissed. It appears from the record that the Carrier did permit accrual of sick and personal days as well as vacation to the extent, and in the manner, permitted by the Agreement, and that the Claimant was on notice of such accrual from the date of his return to service in January 2014. The fact that the Claimant may have forfeited 80 hours of his personal leave by not taking it during the 15-month time period permitted by the Agreement, is not attributable to the Carrier's alleged noncompliance with the Award. The Carrier also offered to compensate the Claimant for the difference in the insurance premium cost ($954.50). In the absence of submission of proof of other actual benefit related losses or out-of-pocket expenses that would have been covered under the Carrier's insurance and was not so covered, the Organization failed to prove that the Carrier did not comply with this aspect of the monetary remedy. Such amount was properly encompassed within the directed Order and, if not already paid, should be furnished to the Claimant forthwith.

With respect to the payment of lost overtime, neither the Organization nor the Claimant offered a specific manner for calculating the appropriate overtime hours attributable to the claim period, or an alleged sum owed. As noted by the Carrier, the nature of the Claimant's Foreman position and frequency of gang changes makes it nearly impossible to assign an identity to a replacement employee. We find that, in the absence of an ascertainable reasonable alternative, the Carrier's suggested methodology of arriving at the lost overtime hours by averaging the overtime hours worked by the person above and below the Claimant on the Foreman seniority roster is a reasonable method of calculating the Claimant's lost overtime. We direct the Carrier to share that information with the Organization for the purpose of arriving at the number of hours of overtime the Claimant should be reimbursed at the overtime rate.

Finally, we find no support in this record for the Organization's assertion that the Claimant is entitled to reimbursement for the mileage that he traveled to his alternative employment. Compensation for travel to his employment with the Carrier was not part of the Claimant's normal wages and benefits, and the Organization failed to establish that the Claimant was required to expend extraordinary travel expenses in order to obtain outside employment. In sum, the Claimant shall be compensated for any excess out-of-pocket medical premium and other proven expenses that he incurred during the claim period that have not already been reimbursed, and overtime shall be calculated in the manner set forth herein.

Referee Margo R. Newman who sat with the Division as a neutral member when Award 41798 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 26th day August of 2015.

LABOR MEMBER'S
CONCURRING AND DISSENTING OPINION
TO
INTERPRETATION NO. 1
TO
AWARD 41798, DOCKET MW-42135
(Referee Margo R. Newman)

I write in partial concurrence and partial dissent of the interpretation award. I concur with the Majority's findings and it was on solid ground when it held:

> "The Board is convinced that the make whole remedy originally ordered contemplated the normal inclusions, such as lost overtime, (see Third Division Award 37653; Interpretation No. 1 to Third Division Award 41041), reimbursement for out-of-pocket insurance premiums/excess payouts, (see Interpretation No. 1 to Third Division Award 41041), and other benefits that the Claimant would have accrued had he not been wrongfully dismissed. ***" (Page 3 of the Interpretation to Third Division Award 41798)

Unfortunately the Majority then eschewed this foundation when it fashioned an interpretation made up of incorrect information provided to the Board for the first time in the Carrier Board Member's oral argument presented at the July 9, 2015 interpretation hearing. Thus, a dissent is also required.

The first issue this Board member must emphasize is the impropriety of the Carrier's Labor Relations Officer (who is assigned as a Carrier Member of the Third Division for the cases involving his respective railroad) alleging facts and bringing forth specious argumentation which was never first brought up during the local on-property handling. In this instance, the Carrier Labor Relations Officer/ Third Division Carrier Member provided one-sided commentary, seasoned with mistruths and inaccuracies, to which he implied to be irrefutable as the only person in the hearing that was involved during the on-property handling. In connection with these Carrier contentions, the Organization's permanent Third Division Member (who is limited to the record before the Board) could only object to the Carrier contentions as not being raised at a time when the Organization's local members could rightfully respond. If carriers are to use an ever changing game of musical chairs to fill its NRAB positions with local labor relations officials directly connected to these cases, the Board must remember that this process is appellate in nature and is limited to the on-property record.

While this labor member vehemently objected to the Carrier member's attempt to taint the record, it is clear from the written decision that the Majority's interpretation was formulated using Carrier contentions not raised prior to the July 9, 2015 oral hearing. Moreover, it was patently misplaced for the Majority to chastise the Organization for not providing an alternative method of calculating lost overtime wages, because the Organization and Claimant did in fact provide a

methodology to determine lost overtime wages while the issue was yet being handled on the property at the local level. Moreover, the Organization provided award precedent in support of its position, but the Majority did not even address the existence – much less that cogency - of such precedent. While the Organization fully flushed out and presented its position with regard to overtime payments due the Claimant during the on-property handling of the case, the only Carrier position presented while the case was being handled on the property asserted that the Claimant was not entitled to any overtime wages. The Carrier interpretation submission is thus completely barren of any reference to a methodology for calculating lost overtime.

It is no less than shocking that the Majority held that: "... neither the Organization nor the Claimant offered a specific manner for calculating the appropriate overtime hours attributable to the claim period, or an alleged sum owed. ***" (Page 4 of the Interpretation to Third Division Award 41798). This is plainly and unquestionably untrue. The Organization and the Claimant did unequivocally provide a manner via which to calculate the amount of lost overtime wages. On March 25, 2014, the Claimant sent an e-mail with an attached statement detailing the amount that the Carrier owed him. This letter from the Claimant revealed both the manner used to calculate the overtime hours accrued over the course of the claim period and the total monetary sum owed. This document was even furnished to the Majority by the Carrier Member himself and it is identified as Exhibit "J" in the Carrier's submission. The Claimant's March 25, 2014 e-mail (Carrier's Exhibit "J-1") reads, in pertinent part:

> "Mr. Lomato,
>
> Attached is a statement of my earnings, by year, from Nov. 9th, 2011 through Jan. 14th, 2014. **I have subtracted my earnings from those of a junior man to me, who held my job for that time period**. I have also listed my expenses for health and dental benefits I had as a result of my dismissal. The mileage listed is extra miles traveled which I would not have had, if I was not dismissed from my job. I would also like to ensure that my form BA-6 reflects the wages as listed for 2012 and 2013.
>
> Thank you in advance for your timely attention to this matter. Please respond via email or written correspondence by April 8th.
>
> Gary Mazzantini"
> (Bold and underscore added)

The Claimant's calculations were attached to a document in that e-mail outlined in a chart which can be found as Carrier's Exhibit "J-2" which, in pertinent part, reads:

"Paul, following is a yearly total of lost benefits and wages, beginning Nov. 9, 2011 through Jan. 13, 2014. I have all copies of w-2 forms, health and dental insurance premiums, dental bills, airline ticket and union payments.

2011 Nov. 9-Dec. 31			
	lost wages	7863	
	earnings	1188	
	(RR unempl)	-	
		6675.00	Earnings loss for 2011
2012			
	lost wages	95,000	(nearest junior man to me)
	ins. premiums	3,862	(Blue Cross Blue Shield family medical and individual dental Starting April 1 through Dec 31, 2012)
	5 wks. vacation	5,252	
	personal days	1,050	
	mileage	3,795	(6,900 miles x 55/mile)
		108,959	
	w-2 earnings	55,024	
		53,935.00	earnings loss for 2012
2013			
	lost wages	107,419	(nearest junior man to me)
	ins premiums	5,438	(same plan as above, full year)
	mileage	7,682	(13,968 x 55/mile)
	dental bills	292	(Dr. Martin Bush Adams, MA, for sons)
		120,831	
	w-2 earnings	48,233	
		72,598	earnings loss for 2013
2014			
	lost wages	4,618	
	ins. premiums	400	(Jan. 1 to Feb 1)
		5018	earnings loss for 2014

"I believe this brings total to 138, 228
15,985 (amount paid me thus far by PanAm)

122,241 (amount still owed to me)

Thank you, Gary Mazzantini"

In the face of this perfectly unambiguous and unrebutted record evidence concerning how the overtime remedy should be calculated and what it amounted to, the Majority incredibly, somehow found its way to the following conclusions:

> "*** As noted by the Carrier, the nature of the Claimant's Foreman position and frequency of gang changes makes it nearly impossible to assign an identity to a replacement employee. We find that, in the absence of an ascertainable reasonable alternative, the Carrier's suggested methodology of arriving at the lost overtime hours by averaging the overtime hours worked by the person above and below the Claimant on the Foreman seniority roster is a reasonable method of calculating the Claimant's lost overtime. ***" (Interpretation to Award 41798, Page 4)

The record shows that the Carrier never once suggested any methodology for calculating the Claimant's lost overtime wages, prior to the oral hearing on July 9, 2015. In fact, the Carrier responded to the Claimant's March 25, 2014 e-mail, via an e-mail dated April 10, 2015 (Carrier's Exhibit "K-1") which, in pertinent part, reads:

> "Mr. Mazzantini:
>
> This is in response to you March 25, 2014 email.
>
> * * *
>
> *** Furthermore, the Carrier is not required to guess or otherwise pick a random method for computing potential overtime, if any, that you may or may not have worked during this time frame. You have been made whole for the wages that you definitely would have been entitled to earn, in accordance with the Award.

"* * *

Subsequent to receiving payment, but prior to your March 25th email, you called to inform the Carrier that you expected more payment, but did not actually discuss the matter to any extent or provide any detail to support your position. Please be advised that your March 25, 2014 email does not support your claim for any additional payment either.

Having once again reviewed Award 41798, as well as the documentation previously provided by you and the Carrier's payroll records, please allow this to serve as the Carrier's position that you have been paid in full."

The Carrier did not provide a method of calculation in connection with the overtime compensation due the Claimant. To the contrary, the Carrier maintained throughout this case, including in its interpretation submission, that the Claimant was not entitled to receive any overtime payment whatsoever. It was not until its oral presentation before the Board on July 9, 2015 that the Carrier ever deigned to suggest a methodology for ascertaining the overtime that would be due Claimant. The Majority's out-of-the-blue findings were completely unknown and ungrounded in any written documentation presented to the Board, as the findings cannot be found in the Carrier's submission or culled from its on-property correspondence. The Majority's findings are not based on valid evidence properly provided in the record, instead, the Carrier member's unsubstantiated testimony about the case at the Board, which testimony never saw the light of day prior thereto.

For all of the above-stated reasons, this interpretation is palpably erroneous and I vigorously dissent.

Respectfully submitted,

Zachary Voegel
Labor Member