

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41815
Docket No. MW-41784
14-3-NRAB-00003-110422**

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

**(Brotherhood of Maintenance of Way Employes 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 by letter dated July 8, 2010 upon Mr. D. Cockerham in connection with charges of alleged violation of MOWOR 1.6 Conduct - of the Maintenance Of Way Operating Rules in connection with allegedly charging time that was not worked on May 15, 2010 was arbitrary, capricious, excessive, unwarranted and in violation of the Agreement (System File F-10-05D/13-10-0017 ATS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Cockerham shall have the aforesaid discipline removed from his record and he shall receive the remedy prescribed by the parties in Rule 13(f).”

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.

At the time of his dismissal, the Claimant had worked for the Carrier for some five years and eight or nine months.

At the time of the event that led to his dismissal, the Claimant was an Track Backhoe Operator.

The Claimant did not work on May 15, 2010. On that day, a derailment occurred. The Claimant learned of the event and phoned Carrier Officials, including the Track Supervisor two times and the Roadmaster. The calls were not answered.

A contractor was utilized by the Carrier to replace ties damaged by the derailment. Work of this kind was one of the Claimant's primary job functions.

On May 17, 2010, there was a conversation between the Claimant and the Roadmaster. There is dispute between the two as to what was said.

During the course of the Investigation, the Roadmaster stated:

“I believe it was Monday, the 17th . . . [Claimant] had called me to discuss a derailment that had happened over the weekend, and where a Contractor had been called and worked. And . . . [Claimant] was, said that he felt he was entitled to the money and wanted to know what he needed to do. So we talked, and I told . . . [Claimant] to put in a time claim, and if it needed to be they would, you know, work it out. If they agreed to pay it, it would get paid. If not, it would all get worked out through the process.”

The Claimant stated:

“During the course of the conversation . . . [the Roadmaster] and I also discussed how I should get paid . . . [His] response was, his response was, pay yourself. At no point in the conversation did . . .

[the Roadmaster] suggest that I was not entitled to get paid. As a matter of fact, [he] stated I was correct about the situation."

Referring to events after the conversation between the Claimant and the Roadmaster, the Organization's Submission states:

"Following this, on Wednesday, May 19, 2010, Claimant accessed the Carrier payroll system and recorded seven and one-half (7.5) hours of work for May 15, 2010. Included with this was a note referencing the use of a contractor and a statement that Claimant was inputting time per the May 17, 2010 phone discussion between Claimant and [the] Roadmaster"¹

The Roadmaster asserted that on or about June 3, 2010, "I had noticed that . . . [the Claimant] had paid himself for that day, and went back and looked and he had paid himself for the derailment. And that's when I started filling out the process."

The record does not support any conclusion that the Claimant admitted stealing from the Carrier. The facts indicate that the Claimant put in for a payment to which he thought he was entitled. He discussed this view with his Roadmaster and, although there is a dispute about what the Roadmaster told him to do as a cure for his concern, there is no dispute that he made clear to the Roadmaster that he had not worked on May 15, 2010, but thought that he was entitled to be paid because he was available to perform work that a Contractor performed. Further, the record indicates that he made a special notation to accompany his data entry claim for pay for that day.

The Carrier's Policy for Employee Performance Accountability lists Rule 1.6 among the Dismissible Rule Violations. It is, "Theft or other act with intent to defraud the carrier of monies or property not due . . ."

¹ The transcript of the Investigation that was provided to the Board did not include the exhibits admitted during the investigation. Fact No. 7 to which this footnote is appended is included in the recitation of facts because both parties' advocates at the Referee Hearing held regarding this matter alluded to a note the Claimant had appended to his time claim in the payroll system that made reference to the basis for his entry.

As the above discussion indicates, there is no showing in the record that the Claimant intended “to defraud the Carrier of monies . . . not due . . .”

Consequently, the termination of the Claimant cannot be upheld.

However, it is the view of the Board that the Claimant’s actions were not in and of themselves appropriate in that the notation that he entered on the payroll record indicates that he was aware that there was a degree of irregularity in the matter.

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 27th day of February 2014.