

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41866
Docket No. MW-41756
14-3-NRAB-00003-110367**

The Third Division consisted of the regular members and in addition Referee Burton White 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 [Level S thirty (30) day record suspension and a one (1) year probation] imposed upon Mr. J. Schmidt by letter dated April 21, 2010 for alleged violation of MOWOR 1.6 ‘Conduct’ in connection with alleged falsification of pay on Saturday, January 2, 2010 while working as Track Inspector Northtown, Gang ID #TINS0817 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3735-T/11-10-0334 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Schmidt 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.

The Claimant in this matter has been an employee of the Carrier since May 1974. He has worked in various positions, but at the time in question he was a main line Track Inspector.

There is no dispute about the basic facts of this matter. There was a need for a Track Inspector to perform a cold weather track inspection on Saturday, January 2, 2010. Because of his misunderstanding, Luke Babler, who was performing weekend cover duty for the Roadmaster, called Kevin Gaylor, a person of lower seniority than the Claimant, to perform the work. Gaylor informed Babler that the Claimant was more senior, but Babler, who earlier that day had tried without success to call the Claimant regarding other matters on more than one occasion, assigned the less senior employee to perform the inspection.

The Claimant learned of the assignment and spoke to Babler about it. Babler told him that he would check into the matter and get back to the Claimant. At the Investigation Babler stated:

“ . . . [I]called him back five, ten minutes later, let him know that it was my mistake that he didn't [get] called and apologized. He was still frustrated and told me that he felt that I was trying to go around him. I said I wasn't trying to go around anybody, it was my mistake. If he felt he had time coming put in a time slip with the union, and at that point it could be gone through Labor Relations and through claims proceeding.”

The Organization argues, “The only material Carrier evidence offered on the ‘falsification of payroll’ charge against Claimant was the relief Roadmaster’s

testimony. . . .” However, at the Investigation, the Claimant acknowledged that instead of submitting a formal claim for six hours of overtime work on January 2, 2010, he submitted a payroll entry into the computer asserting that he had worked six hours of overtime on that day. The Claimant felt that he was entitled to the pay because it was he who should have been called to perform the service. Be that as it may, the fact remains that he had not performed the work that he claimed to have performed.

The Organization asserts, but does not prove, that there was a local practice whereby informal correction of a wrongful assignment could be achieved by a payroll entry such as that made by the Claimant. As will be addressed later, the Claimant showed little or no awareness of such a practice. Even if the practice had been proven, this matter is not resolved by that means. The Claimant’s own testimony does not support the contention that he relied on the practice:

“Later that morning Luke [Babler] called Kevin [Gaylor] and when they were done talking I asked to talk to Luke. I asked Luke why I wasn't called and was told my company number wasn't on the name call up list that he had at home. I then told Luke that I was going to put in a time slip with the union and he told me I wouldn't get it because he called my home phone and could prove it because he had logged it in his phone. About 15 or 20 minutes later Luke called me on my company phone and apologized three times saying that he transposed the last two numbers of my home phone and had left a message on that recorder. He then asked why I was like that and I told him because I knew he hadn't phoned me. He then told me to put the pay in and I said all right.”

Later in the Investigation, the following exchange took place between the Conducting Officer and the Claimant:

“DOUGLAS PERRY. . . [In] the statement you read in earlier, you referred to making a comment to Mr. Babler that you were going to put in a time slip with the union?

JEFFREY T SCHMIDT: That's correct.

DOUGLAS PERRY: Okay, and did that occur?

JEFFREY T SCHMIDT: No.

DOUGLAS PERRY: Well why, why didn't you pursue that avenue?

JEFFREY T SCHMIDT: Well, first he said I won't get it because he had his, he called me and he could prove it on his phone, just like it says in there. Then he called me back 15 to 20 minutes later and apologized three times to me and then he told me to put the time in. He said that he had transposed the last two numbers of my home phone, left a message on that recorder.

DOUGLAS PERRY: So that's somewhat contradictory to Mr. Babler's testimony earlier where he claimed to, and told you just to put in a time slip.

JEFFREY T SCHMIDT: Oh, yes, yes, he did not tell me to put a time slip in. He actually said I wouldn't get it, until he called me back, you know, the second time.

DOUGLAS PERRY: And you had mentioned time slip, is that the formal process to follow when pay shortages or other claims occur?

JEFFREY T SCHMIDT: It's what I, what I know to do to, if I feel I wasn't called if I was supposed to be called.

DOUGLAS PERRY: Mr. Tyrrell referred to a local claims settlement during some earlier testimony. Are you aware of that process?

JEFFREY T SCHMIDT: Yes.

DOUGLAS PERRY: So they didn't, you chose not to follow that process.

JEFFREY T SCHMIDT: I did follow that process. I think what he was talking about is that Roadmasters can tell you to put time in.

DOUGLAS PERRY: So, that's your understanding of local claims.

JEFFREY T SCHMIDT: Well, I don't know what the, I don't know, I haven't, no, I don't know what the local claims is, but I have been told to put time in by Roadmasters before and that, that didn't work." (Emphasis added.)

In our view, these underlined statements from the transcript of the Investigation indicate (1) the Claimant understood from the Roadmaster's second call that he was to submit a claim through the formal process and (2) the Claimant's responses about the alleged local process indicated a lack of awareness of such a process.

We find that this case differs from Third Division Award 41457 (Mittenthal) that was submitted by the Organization in that the claimant in that case was found to have been confused by conversations with his Roadmaster. The record in the case now before the Board does not support a finding of confusion on the part of the Claimant.

The Organization asserts that the Claimant was denied a fair and objective Hearing because Division Engineer Douglas Perry performed at three levels: Acting Roadmaster Luke Babler consulted with him when he (Babler) discovered that the Claimant had made the computer entry claiming that he had worked six hours of overtime on January 2, 2010; Douglas Perry was the Conducting Officer at the Investigation; Douglas Perry was the signing name on the letter of discipline.

There is no indication in the record that these facts deprived the Claimant of a fair and objective Hearing.

It was Luke Babler, not Douglas Perry who provided information at the Investigation about the Claimant's conduct. As Arbitrator Carroll Daugherty explained about a fair Investigation, "At said investigation, the management official

may be both ‘prosecutor’ and ‘judge’ but he may not also be a witness against the employee.” (Enterprise Wire Co., 46 LA 359, 362, 1966.)

The Organization challenges the veracity of the testimony from Carrier witness Babler. As the Carrier correctly points out, “The Board cannot reverse credibility determinations made during on-property investigations.” In making its point, the Carrier quotes Second Division Award 13756 (Benn). The following portion of the cited passage is of particular significance here:

“Because we do not have the opportunity to observe their witnesses, it is not the function of the Board to make credibility resolutions contrary to those made during the Investigation process which are supported in the record.”

Having acknowledged our appellate role, we feel compelled to comment upon the Organization’s assertion that relief Roadmaster Babler’s testimony was “internally inconsistent.” It appears that the Organization’s concern arose at least in part from the Organization’s own misunderstanding of the record. In his closing statement, the Claimant’s representative stated:

“Mr. Babler contradicts himself in the investigation statements when he said that he first never tried to call Mr. Schmidt at all, [and] then later said he did, and then he's confused about which phone he may or may not have tried to make a call. There's no record of him ever making these calls.”

Testimony from the Claimant quoted above in this discussion tends to support what Babler said at the Investigation. According to the Claimant, Babler first asserted that he had called the Claimant and had proof thereof; he then called back to apologize saying that he had called the wrong number and left a message on that phone. We find no contradictions in the Roadmaster’s testimony. Accordingly, the instant claim must be denied.

Form 1
Page 7

Award No. 41866
Docket No. MW-41756
14-3-NRAB-00003-110367

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2014.