

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41877
Docket No. MW-41925
14-3-NRAB-00003-120205**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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. C. Martinek by letter dated January 6, 2011 for alleged violation of BNSF's Engineering Instruction 22.6.1 Absenteeism & Layoff Policy, Maintenance of Way Operating Rule (MOWOR) 1.13 Reporting & Complying with Instructions and MOWOR 1.15 Duty-Reporting or Absence in connection with charges of failure to report for duty at the designated time of 0730 hours on September 30, 2010 while assigned as machine operator on TMOX3453 Backhoe headquartered at Gillette, Wyoming was arbitrary and without merit (System File C-11-D070-6/10-11-0148 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Martinek shall now receive the remedy prescribed by the parties to Rule 40G.”**

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 Carrier has asserted that the instant case is a continuation of the Claimant's inability to either report to work on time and/or his failure to protect his assignment that was considered in depth in Third Division Award 41871 and because of that repetition, the Carrier brought charges against the Claimant.

On November 1, 2010, the Carrier directed the Claimant to report for a formal Investigation on October 8, 2010, which was mutually postponed until November 12, 2010, concerning in pertinent part the following charge:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report for duty at the designated time of 0730 hours on September 30, 2010, while assigned as machine operator on TMOX3453 Backhoe headquartered at Gillette, Wyoming.”

On December 2, 2010, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that this is the third of three discipline cases involving the same Claimant before this tribunal. Moreover, this is the second of two dismissal cases before the Board involving the same Claimant. The skillful arguments of the respective parties need not be reiterated in this instance as the question of the Claimant's alleged guilt has become academic because in Award 41871 the Board found that the Carrier's decision to dismiss the Claimant was appropriate. Therefore, the Board finds and holds that the dismissal in Award 41871 cannot be overridden and the issue raised in the instant case is now moot; thus the claim must

be dismissed. However, we would add that our review of the transcript and record substantiated that the Claimant was tardy for work on September 30, 2010. Although the Organization correctly argued that the tardiness referenced in the instant case was for only five minutes, the Claimant had already established a pattern of multiple instances of tardiness. One would think that the Claimant, who had just returned from a Medical Leave of Absence and had been coached and counseled on his need to report for work on time, would have timely reported to work on September 30 - his first day back to work.

AWARD

Claim dismissed.

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.