

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41886
Docket No. MW-42009
14-3-NRAB-00003-120364**

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 (withheld from service following letter dated August 2, 2010 and dismissal by letter dated September 8, 2010) imposed upon Mr. D. P. Urbin for alleged violation of MOWOR 1.15 Duty - Reporting or Absence and MOWOR 1.6 Conduct for alleged falsification of time reported for July 31, 2010 while assigned as track inspector working on the Milk River Subdivision was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-M-2249-M/11-11-0008 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. P. Urbin shall now ‘... be cleared of the charges and proceedings of this investigation (File Number MON-MOW-10-0312-B). We also request that Mr. Urbin be made whole for any loss of earnings from the time withheld from service on August 3, 2010, until he is returned to service. We further request Mr. Urbin be made whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.”**

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 facts indicate that on July 31, 2010, the Claimant was working as a Track Inspector on the Milk River Subdivision in Montana. The Carrier believed that the Claimant allegedly left work early and then claimed eight hours' compensation for less than eight hours' work, and because of that, charges were brought against the Claimant.

On August 2, and then on August 4, 2010 (Corrected Notice) the Carrier directed the Claimant to report for a formal Investigation on August 9, 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 falsification of time reported for July 31, 2010 while assigned as Track Inspector working on the Milk River Subdivision.”

On September 8, 2010, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that this is the second of two discipline cases involving the same Claimant before this tribunal.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation. The identical procedural arguments set forth in this

dispute were also made by the Organization in Third Division Award 41885. For the sake of brevity, they are incorporated herein by reference and will be addressed.

Turning to the merits, the Organization asserted that the record and transcript reveal that the Claimant's normal tour of duty is from 6:00 A.M. to 2:30 P.M. with a 30-minute lunch that was scheduled from 11:00 A.M. to 11:30 A.M. Supervisors, including the Claimant's immediate Supervisor, were aware that often-times employees had to work through lunch, and allowed employees who worked through their 30-minute meal period to depart 30 minutes early instead of claiming straight time for working through their meal period and overtime as provided under Rule 28 of the Agreement. According to the Organization, the existence of such policy was admitted to by Roadmaster Nilsen during his testimony at the Hearing that was reviewed by Award 41885.

The Organization argued that on July 31, the Claimant reported for duty at 6:00 A.M. and began his regularly assigned inspection duties. Throughout the course of the morning, the Claimant used his Carrier-issued hy-rail truck to inspect more than 120 miles of track that fell within his area of authority. It asserted, as reflected by the Carrier's records of track authority for that day, the Claimant inspected from 6:00 A.M., through his assigned meal period and eventually stopped around 1:30 P.M. After he completed his inspection duties, he then worked on cleaning out his hy-rail truck, went to check on a troublesome frog, spoke with a train crew about whether the track felt rough and also checked into fixing his work truck's broken windshield.

It further stated that at approximately 2:00 P.M. some eight hours after having started his tour of duty, the Claimant arrived at his home. Upon his arrival, he received a call from Roadmaster Nilsen, via his personal phone, and they discussed the status of a specific area of track and whether a slow order should be revised. After completion of that call, the Claimant called the Train Dispatcher sometime after 2:00 P.M. and asked to have the slow order revised in accordance with his Supervisor's instructions. The Claimant testified that when he spoke to the Roadmaster about the trouble area, he asked his superior if he wanted him to go back out and check the area, but the Roadmaster told him that it was not necessary. The Organization further argued that it repeatedly requested that the Carrier disclose the Train Dispatcher tapes in order to confirm that Roadmaster Nilsen spoke with the Claimant at 2:00 P.M. on July 31, because the tapes would confirm that the Claimant was still working at 2:00 P.M. and would show Roadmaster

Nilsen knew to contact the Claimant at his home, thus confirming the existence of the early departure practice. It reasoned that the Carrier did not meet its burden of proof and it concluded by requesting that the discipline be set aside and the claim sustained as presented.

It is the position of the Carrier that the Investigation was fair and impartial and nothing was done that deprived the Claimant of his "due process" Agreement rights. As stated above the identical procedural arguments and responses made in Third Division Award 41885 will not be reiterated, but rather are incorporated herein by reference for the sake of brevity and will be addressed.

Turning to the record, the Carrier stated that the evidence shows that the Claimant admitted to leaving work between 1:45 P.M. and 1:50 P.M. despite the fact that he was scheduled to work until 2:30 P.M. It argued that the Claimant falsified his time worked when he entered eight hours into the Company's time roll program, and while the Claimant did work through his lunch, his Supervisor testified that doing so does not afford an employee the right to leave work early without permission and simply put in for eight hours.

It further asserted that Roadmaster Nilsen testified that the Claimant did not seek or receive authority from him to leave work early on the date in question. In addition, Nilsen testified that the ambient temperature was above 90 degrees that day, which means that Track Inspectors, including the Claimant, would be required to continue to work beyond their normal eight hours. The Supervisor further testified that if the Claimant had requested permission to leave early it would have been denied because of the soaring temperatures and the need to perform heat inspections of tracks so as to protect employees and equipment traveling on the tracks. Simply put, the Carrier stated that the Claimant took an early quit when there was still work to be performed and then claimed a full day's pay as if that was normal. The Carrier asserted that behavior was a violation of its Rules deserving of the punishment administered. It closed by asking that the discipline not be disturbed and the claim remain denied.

For the sake of brevity, the Board will not reiterate its reasoning regarding the Organization's procedural arguments, but instead refers the parties to the Board's decision in Third Division Award 41885 because it is equally applicable in the instant case, except for the allegation that the Carrier should have secured a copy of the July 31, 2010 taped conversation between the Claimant and the Train

Dispatcher. In the prior case the request for the tape carried less weight, because there was no formal charge that the Claimant had not worked eight hours; instead the Carrier alleged that the Claimant failed to work required overtime to conduct heat inspections. In the instant dispute, the Carrier charged the Claimant with working less than eight hours and requesting payment for eight hours worked. The Organization repeatedly requested that the Carrier furnish the Train Dispatcher tapes in order to show that Roadmaster Nilsen spoke with the Claimant at 2:00 P.M. on July 31, 2010. It argued that the tape would confirm that: (1) the Claimant was still working at and after 2:00 P.M. that day; (2) because slow orders can only be changed with the consent of a Roadmaster, the Organization asserted that would prove that Roadmaster Nilsen and the Claimant had a conversation that afternoon; and (3) it would have shown that Roadmaster Nilsen knew to contact the Claimant at home, thus confirming the existence of the early-departure practice.

The Organization's request for the tape was not unreasonable, and as previously stated in companion Award 41885 that request was far more important to the Organization's defense in the instant case rather than the other case and the Hearing Officer, as an impartial trier of facts, should have made a greater effort to secure that tape, including recessing the Hearing until the tape could either be located, or verify its non-existence. The Carrier's failure to secure the dispatch tapes stripped the Organization and the Claimant of a potentially powerful piece of evidence that might have shown whether the Claimant was still working after 2:00 P.M. and may have confirmed both the time and substance of the conversation between the Claimant and Roadmaster Nilsen. The Carrier's failure to secure the tape and/or make a substantial effort to locate it deprived the Claimant of a "fair and impartial" Investigation. It is clear that in this case the Claimant was not afforded his "due process" Agreement rights. Therefore, the discipline must be set aside without addressing the merits.

The Board notes that the discipline assessed the Claimant in this case is for the same time frame as the discipline that was assessed in Award 41885. Therefore, the Board finds and holds that no compensation is due in the instant case because the monetary remedy afforded the Claimant's estate in Award 41885, due to the Claimant's untimely death, covers the same time period and there is no obligation for the Carrier to make a duplicate payment.

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 16th day of June 2014.