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

Award No. 42616
Docket No. MW-42884
17-3-NRAB-00003-150082

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference**
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(BNSF Railway Company (Former Burlington Northern (Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. T. Brunner, Jr. by letter dated September 10, 2013 for his alleged violation of MOWOR 1.6 Conduct in connection with his '. . . falsification of information that was submitted on form SAFS 1662 dated April 24, 2012….' was on the basis of unproven charges, without merit, excessive and in violation of the Agreement (System File C-14-D070-1/10-14-0002 BNR).

(2) As a consequence of the violations referred to in Part (1) above, the discipline imposed upon Claimant T. Brunner, Jr. '* be overturned immediately and that he be reinstated to service with seniority unimpaired and for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost as a result of Carrier's arbitrary, capricious, and excessive 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.

The Carrier asserts that the contentions that the Claimant's doctor submitted a false statement and did not ask the Claimant what had happened are incredulous and unproven. Claimant reported falsely and tardily about his injury and was properly dismissed due to dishonesty. The Organization did not object at the time to the investigation being conducted while the Claimant was on medical leave and cannot now do so. Should the claim be sustained, the Claimant is to be reinstated with lost seniority and wages only returned, with wages offset by outside earnings.

The Organization insists that there was no fair and impartial Investigation because the Carrier pyramided charges, did not provide material relied upon prior to the hearing and because other than the Conducting Officer signed the disciplinary letter. Given the "net wash" of evidence, the Conducting Officer should have made credibility determinations. No intent was shown. The Claimant should be returned to work with lost seniority, wages and benefits, and with no offset for outside earnings.

The Organization's Procedural contentions may be addressed in short order. The parties' collective bargaining agreement does not include language calling for pre-investigation discovery; thus the Carrier has no obligation to honor the Organization's discovery request. This has been made clear in numerous on-property awards. The Organization cannot reasonably expect this Board to be persuaded to require discovery on the strength of words from a Presidential Emergency Board report when the record does not include the report itself, which would allow the Board to assess the context from which the words came. With all

due respect to those awards that elevate the necessary quantum of proof above that of "substantial evidence," it is the aforementioned quantum of proof, well-known and most often applied in the railroad industry that is used in this case. Also applied is the industry standard that with rare exceptions, credibility determinations of Conducting Officers are to be respected.

It is the Carrier's burden to prove by substantial evidence that the Claimant knowingly falsified the Employee Personal Injury/Occupation Illness Report, SAFS 1662, submitted to the Carrier on April 24, 2012. Certain facts are undisputed. Dr. Vande Guchte's patient notes and the Claimant's personnel record established a history of back problems and a Posterior L3-4 hemilamectomy in March 2011. The doctor's patient notes also state that a week before the appointment, the Claimant "noticed some discomfort in his back at work which progressed to severe pain in his back . . ." The Claimant's April 24, 2012 injury report said "Felt pull right away, then got worse." On April 23, 2012, Claimant had notified Manager Structures Design Swanson of the injury, which he said occurred at work. The Board can only conclude that the Claimant suffered a work-related injury. There is not a shred of evidence that would give rise to a conclusion that the Claimant suffered a non-work-related back injury that he subsequently tried to have covered by the Carrier's health plan.

The dismissal arose from the discrepancy between the doctor's "noticed some discomfort . . ." and Claimant's "Felt pull right away . . ." The reality is that the communication between the doctor and his patient is known only to those two and the doctor's interpretation of the patient's description of the events in question may or may not be exactly what the Claimant intended. Manager Swanson, when questioned by Vice General Chairman Anderson, acknowledged that the doctor could have paraphrased his patient. Jack Landon, Manager of Safety, when questioned by Vice General Chairman Anderson, also acknowledged the possibility that the doctor may have paraphrased his patient.

The conclusion about the Claimant's supposed dishonesty and what appears to be concern that the injury may not have been job related are purely speculative. The possibility of faulty doctor-patient communication is as real as any other scenario, spoken or unspoken. And while "substantial evidence" is at the low end of the quantum of proof scale, speculation is not substantial evidence. The Carrier has not proven the charges.

The remedy is intended to be consistent with that provided in recent on-property cases. The Claimant's dismissal is hereby rescinded and must be expunged from his records. He shall be returned to service without loss of seniority or benefits. In addition, the Claimant is entitled to compensation for all lost wages including overtime he would have been offered and likely would have worked from the most likely date of his return from medical leave to the actual date he is returned to service. Any monies earned or paid to the Claimant, except all monies that he was receiving before being dismissed and that continued after dismissal, are to be deducted from lost wages owed to him. The Claimant is further entitled to be reimbursed for any and all out-of-pocket healthcare expenses that he incurred as a consequence of his dismissal which would have been covered by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal.

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 27th day of June 2017.

SERIAL NO. 421

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 42616

DOCKET NO. 42884
Old Case 3-150082
New Case 3-190525

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

NAME OF CARRIER: (BNSF Railway Company (Former Burlington (Northern Railway Company)

"Request of the Carrier for Interpretation of Third Division Award 42616, Docket No. 42884, for NRAB Case No. 00003-150082."

FINDINGS

Claimant T. Brunner, Jr., with a history of back problems, on or about April 23, 2012 suffered what was determined to have been a work-related back injury. On September 10, 2013 the Claimant was dismissed for a violation of MOWOR 1.6 Conduct for allegedly falsifying information pertaining to the above-noted injury. At the time, the Claimant was on medical leave because of the back injury. Following the dismissal, according to a June 13, 2019 e-mail from the Claimant to General Chairwoman Staci R. Moody-Gilbert, between an unknown date in March 2014 and November 21, 2017 he worked six (6) consecutive jobs, all requiring substantial lifting. The Claimant's self-report is unaccompanied by other confirming evidence. On June 27, 2017 Third Division NRAB Award 42616 was adopted. The award sustained the claim protesting the dismissal and ordered the following remedy:

> **"The remedy is intended to be consistent with that provided in recent on-property cases. The Claimant's dismissal is hereby rescinded and must be expunged from his records. He shall be returned to service without loss of seniority or benefits. In addition, the Claimant is entitled to compensation for all lost wages including overtime he would have been offered and likely**

> **would have worked from the most likely date of his return from medical leave to the actual date he is returned to service. Any monies earned or paid to the Claimant, except all monies that he was receiving before being dismissed and that continued after dismissal, are to be deducted from lost wages owed to him. The Claimant is further entitled to be reimbursed for any and all out-of-pocket healthcare expenses that he incurred as a consequence of his dismissal which would have been covered by the Carrier-provided healthcare insurance plan coverage that he was under at the time of his dismissal."**

The Claimant returned to work on November 21, 2017. Apparently for the first time since his dismissal he had been examined by his treating physician on October 23, 2017, with the physician's notes showing that the Claimant "had been slowly building up a core strengthening component since February 2014" that "has resulted in progressive diminishment of his previous problems" so that "he had essentially been without any significant dysfunctional pain for at least a year, possibly two" (Carrier Submission, p. 5). Based on these notes, the Carrier's medical department determined that October 23, 2016 was the date on which the Claimant most likely would have been returned from medical leave. In a June 19, 2019 letter to General Director Labor Relations Joe R. Heenan, General Chairwoman Moody-Gilbert asserted, based on the Claimant's report of his post-dismissal work history, that the likely return-to-work date should have been several years earlier. By letter to General Chairwoman Moody-Gilbert dated July 17, 2019, General Director Heenan rejected the Organization's claim of an earlier return-to-work date. Prior to the Carrier's rejection, on June 25, 2019 the Organization had progressed the dispute to the NRAB for an interpretation.

The interpretation involves a determination of the appropriate return-to-work date and, therefore, the appropriate compensation, if any, that the Claimant should receive in addition to the $27,244.70 previously provided by the Carrier.

The Organization asserts that the Carrier miscalculated the date of the Claimant's most likely return from medical leave, as his e-mail to General Chairwoman Moody-Gilbert shows that he performed a succession of jobs that involved lifting items weighing 40 lbs. or more and had passed physical and strength tests. Because of the improper return-to-work date, the Carrier has failed to fully comply with Third Division Award 42616.

The Carrier insists that it has complied fully with Third Division Award 42616 because the October 23, 2016 return-to-work date, based on "information received from Claimant's treating physician," was not an arbitrary determination. The Claimant's "self-diagnosis" does not override the Carrier's medical department's evaluation of his ability to safely return following his medical leave of absence. The submission includes many prior awards supporting the Carrier's position. The Organization has not shown with probative evidence that the Carrier's use of the October 23, 2016 return-to-work date was improper or the product of "maleficent intent toward the Claimant" (Carrier Submission, p. 9). Moreover, the Board is not authorized to award excessive damages, which is what the Organization seeks on the Claimant's behalf.

In Third Division Award 24975 it was noted that "Claimant as moving party has the primary obligation to affirm the efficacy of the claim." In the case at hand, the Organization, on Mr. Brunner's behalf, has asserted that the Carrier has not fully complied with Third Division Award 42616. Therefore, the Organization must show that the Carrier's determination that October 23, 2016 was the appropriate return-to-work date rather than the result of an "unreasonable or arbitrary" decision. Third Division Award 32197.

This Board must consider the two pieces of evidence in the record. The Organization has provided the above-noted e-mail containing the Claimant's self-report of his post-dismissal work history. Third Division Award 20745 states that "Unsupported self-serving statements are not evidence and cannot take the place of probative evidence." This Board is not suggesting that the Claimant's e-mail is untruthful, but it is clearly not the best evidence. Missing are potentially supporting documents such as independent evidence of employment in the form of earnings statements, job descriptions showing the need to lift items, documentation that physical and strength tests had been passed, or, if it exists, medical documentation of treatment obtained between the time of dismissal and the October 23, 2017 examination by the Claimant's treating physician. Absent such confirming documentation, the Organization's case founders for lack of better evidence.

The Carrier's evidence, a July 15, 2019 e-mail from Laura Gillis, M.D., Carrier Medical Officer, to Director of Labor Relations Zahn Reuther, refers to the note from the Claimant's treating physician that the doctor had seen Mr. Brunner in February 2014 and again on October 23, 2017. The physician stated that since February 2014 the

Claimant had "slowly build (sic) up a core strength component…which has resulted in progressive diminishment and now resolution of his previous problems…He indicates that he essentially is without any significant dysfunctional pain for more than a year now and possible (sic) even two years." It is well settled in the railroad industry that a Carrier has the right, if exercised properly and prudently, to determine an employee's fitness for duty and to rely on its medical officer for such a determination.

This Board, having evaluated and weighed the record evidence, must conclude that the Carrier's determination of October 23, 2016 as the Claimant's return-to-work date was a proper and prudent exercise of its authority. Therefore, the Board finds that the Carrier has complied with Third Division Award 42616. The Claimant is due no additional compensation beyond that already received.

Referee I. B. Helburn who sat with the Division as a neutral member when Award 42616 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 28th day of January 2020.