

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42617
Docket No. MW-42938
17-3-NRAB-00003-150024**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(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 Track Inspector J. Hoffmann by letter dated September 10, 2013 for alleged violation of MWOR 1.6 Conduct and HR 90.2 Workplace Harassment Policy in connection with her alleged ‘...dishonest, immoral and hostile conduct; and verbal or physical conduct by an employee which harasses, disrupts or interferes with another’s work performance or which creates an intimidating, offensive or hostile environment, when you maliciously conspired against another employee, while working as Foreman (TUCX0004), on approximately July 9, 2013, at or near Skykomish, Washington.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-13-D070-21/10-13-0665 BNR).**
- (2) As a consequence of the violations referred to in Part (1) above, the discipline imposed upon Claimant J. Hofmann shall be overturned, she shall be reinstated to service with seniority unimpaired, her record cleared of the charges leveled against her and she shall be compensated ‘*** 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 alleges that the Claimant and another employee plotted to affect the dismissal of a Foreman and in doing so created a hostile work environment. There is credible testimony and thus substantial evidence. Proof of intent is unnecessary. This was intolerable behavior and a stand-alone dismissible violation. Should the claim be sustained, the claimant is due only reinstatement and the return of lost seniority and wages, with a set-aside for outside earnings, but no more.

The Organization insists that the Claimant's due process was violated when before the investigation the Conducting Officer and the Carrier's chief witness discussed the matter and was further violated when testimony from a previous investigation was allowed and influenced both the Conducting Officer's questions and Carrier witness testimony, which should have been inadmissible. Substantial evidence was not provided as the evidence, which relied on suspect, uncorroborated testimony of a short-term employee, was not credible.

Several of the Organization's contentions may be dispensed with at the outset. The pre-investigation meeting between Conducting Officer Wright and Assistant Roadmaster Strickland was inappropriate in the Board's view and, in some circumstances, could prove fatal to the Carrier's case, but not this time. Unlike Fourth Division Award No. 2158, this was not a meeting with all of the Carrier's

witnesses. Moreover, the Board questions the Organization's characterization of Assistant Roadmaster Strickland as the Carrier's chief witness. The Board finds no reason to disregard testimony that may have been influenced by the previous investigation of Foreman Maley and Truck Driver Lee. That investigation and the investigation addressed in this Award are obviously intertwined and virtually inseparable in terms of testimony that crosses investigation boundaries. 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.

Conducting Officer Wright obviously found Machine Operator Stephenson's testimony credible. The Board notes that there has been no reason advanced for Machine Operator Stephenson to have turned on the Claimant, who may have mentored her. Nor has any explanation been provided for anything Machine Operator Stephenson would gain by making a false report made directly but anonymously or indirectly to a Carrier Security Officer. It is undisputed that Truck Driver Lee loaded ties onto Foreman Maley's trailer, although Mr. Lee was found by Referee Imundo in Third Division Awards No. 42293 and 42294 not to have been part of a conspiracy. While the Claimant denies ordering Truck Driver Lee to have done so, the credible testimony is at odds with the denial. Moreover, during the investigation, the Claimant's explanation for the charges was centered on the allegation that Machine Operator Stephenson, Foreman Maley and Assistant Roadmaster Strickland conspired and provided false evidence. That is an easy allegation to make and one that, when the evidence is weighed, falls far short of a compelling explanation. The Board finds the charges against the Claimant to have been proven and the resulting dismissal appropriate.

AWARD

Claim denied.

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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 27th day of June 2017.

LABOR MEMBER'S DISSENTING OPINION
TO
AWARD 42617, DOCKET MW-42938
(Referee I. B. Helburn)

In this case, the Majority erred when it failed to follow the findings of Award 42294. The Claimant was dismissed for entering into an alleged conspiracy with another employee. The specific allegation was that the Claimant and the second employee essentially framed a third employee for theft. The Carrier held one (1) investigation into the two (2) charged employees. Both cases contained the same factual and evidentiary record. Based on the evidentiary record, Third Division 42294 held:

“Suffice to say, the Board finds no credible, substantive evidence in the instant case record to support any of the charges against the Claimant. Accordingly, the Claimant's September 10, 2013 dismissal is hereby overturned. ****” (Emphasis in original)

This decision was provided to the Majority in this case and should have been followed. This decision lacks any explanation regarding its failure to accept and follow the findings of Award 42294. For this reason, I strongly dissent to the Majority's findings in this case.

Respectfully submitted,


Zachary C. Voegel
Labor Member