

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42618
Docket No. MW-42945
17-3-NRAB-00003-150094**

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. Johnston by three (3) letters dated September 12, 2013 for alleged:

“(a) violation of MWOR 6.3.1 ‘... for failure to properly maintain authority before occupying or fouling the main track when you responded to a rough track service interruption while performing duties as a Track Inspector on the Twin Cities Division between milepost 699.6 and 699.7 on the Appleton Subdivision at approximately 0242 hours on August 5, 2013.’

(b) violation of MWOR 1.13 and MWOR 1.6 ‘... for failure to follow instructions when you were inspecting track at line segment 2004 on the Appleton Subdivision at approximately 0351 hours on August 5, 2013 and you did not call in for prior approval of overtime to the supervisor on duty while working as a Track Inspector.’

(c) violation of MWOR 6.3.1 ‘... for failure to properly obtain authority before occupying or fouling the main track while track inspecting from MP 602.28 to MP 602.31 while hrrailing through the plant at Big Stone on the Appleton Subdivision at

approximately 0800 hours on August 5, 2013 while working as a Track Inspector.'

was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4289-M/11-14-0001 BNR).

(2) As a consequence of the violations referred to in Part (1) above, Claimant J. Johnston shall be reinstated to service and '... must be immediately paid for his lost time and days withheld from service, including any and all overtime paid to the position he was assigned to work, any expenses lost and we also request that Mr. Johnston be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on September 16, 2013 letter from Jason Randash.'"

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.

On Sunday, August 4, 2013, Roadmaster Joshua Fluck, covering the weekend for Roadmaster Larry Sanders, received a report of rough track. Just before midnight, Roadmaster Fluck called the Claimant, Track Inspector Jason Johnston, and directed the Claimant to investigate. Subsequently the Claimant went to investigate the rough track and at about 2:45 AM on Monday, August 5, 2013, called Roadmaster Fluck to inform him that he had lowered the speed in the area from 25 to 10 MPH. While inspecting the track and taking measurements, the Claimant had used a Statement of On-Track Safety or Lone Worker Protection.

When the Claimant concluded his inspection of the rough track, he was about 100 miles from his headquarters. His normal work day began at 7:30 AM. That day he was to inspect track between the rough track location and his headquarters. Because he believed it was the most efficient thing to do, he then began his regular inspection duties while hy-railing toward his headquarters. The work was performed on overtime, although he did not request overtime from Roadmaster Fluck.

Included in those inspection duties was an area known as Big Stone. The Carrier believes that Claimant fouled the track in the Big Stone area by inspecting without obtaining authority. The Organization responds that Claimant was unable to obtain authority and so he set the hy-rail off the track and inspected while walking a parallel road and remaining four feet from the nearest rail.

By letter dated August 7, 2013, the Claimant was informed of an investigation scheduled for August 14, 2013 for an alleged failure to obtain proper authority to inspect the rough track. The letter further informed the Claimant that he was being withheld from service. The investigation was postponed one day by mutual agreement.

By letter dated August 13, 2013, the Claimant was informed of an investigation to be held Sunday, August 18, 2013 because of the Claimant's alleged failure to obtain authority before fouling the track at Big Stone. Again, the Claimant was told that he was being withheld from service. Also on August 13, 2013, the Claimant received a letter informing him of a second investigation to be held on August 18, 2013 because of his alleged failure to request overtime. For a third time the Claimant was informed that he was being withheld from service. The letter stated that the Carrier's first knowledge of the alleged unauthorized overtime came on August 8, 2013.

Following the three investigations, Claimant received three dismissal letters dated September 12, 2013 for the violations noted in the Statement of Claim set forth above.

The Carrier notes that the Claimant was within a review period for a prior serious infraction when he was dismissed for the above-noted charges, for which there is the required substantial evidence. After failing to get proper authority to

occupy track, Claimant Johnston later worked overtime without obtaining approval and again failed to get proper authority to occupy track. Should the claim be sustained, the Claimant is due only the return of lost seniority and wages, with a deduction for outside earnings.

The Organization insists that proper authority was obtained and that the use of overtime was the most efficient and cost-effective way for Claimant Johnston to complete the required inspections. He did not receive a fair and impartial investigation because it was untimely, involved pyramided charges and followed an ex-parte meeting by the Conducting Officer and two Carrier witnesses prior to the investigation. The claim should be sustained and the Claimant reinstated with seniority and lost wages restored along with all benefits. There should be no deduction from wages for outside earnings.

Use of Lone Worker Protection

The relevant MOWOR is set forth below

6.3.3 Visual Detection of Trains

Authority or Protection is not required when using visual detection of trains as outlined below.

A. Lone Workers

Lone Workers using individual train detection must complete the form entitled Statement of On-Track Safety prior to fouling a track. The completed form must be in the employee's possession when used to establish on track safety.

Each employee providing protection for a work group, and each lone worker, will maintain immediate access to a working radio, which can be a portable radio capable of monitoring transmissions from train movements in the vicinity.

Lone Worker Responsibilities

Lone workers must:

- **Identify a place of safety prior to fouling a track.**
- **Position themselves in a predetermined place of safety at least 15 seconds prior to the arrival of the train moving at maximum authorized speed as indicated in the Statement of On-Track Safety.**

Conditions for Use

Lone workers may perform minor work or a routine inspection using individual train detection when they meet all of the following conditions:

- **The work will not affect the movement of trains.**
- **The lone worker is able to visually detect the approach of a train moving at maximum authorized speed and position themselves in a predetermined place of safety at least 15 seconds prior to the arrival of the train as indicated on the statement of On-Track Safety.**
- **Visibility is sufficient to observe the entire track segment at a minimum separation distance as specified by the “Statement of On-Track Safety.”**
- **Power-operated tools or roadway maintenance machines are not in use within hearing distance.**
- **The ability to hear and see approaching trains and other on-track equipment is not impaired by background noise, lights, precipitation, fog, a passing train or other physical condition.**
- **Natural or artificial light and conditions are sufficient to observe approaching trains, engines or on-track**

equipment at the minimum separation distance as specified by the “Statement of On-Track Safety”. Individual train detection is prohibited based solely upon the observation of headlights, ditch lights or markers, such as during conditions of insufficient visibility as affected by darkness or inclement weather.

- The work is performed outside the limits of a control point or a remotely controlled hump yard facility. Automatic interlockings are not control points (Carrier’s Exhibit No. 1).

Roadmaster Fluck testified that the Claimant could not take the necessary measurements without fouling the track and that because the Claimant was working at night he needed to obtain a track warrant from the Dispatch Office. The Board notes that a Statement of On-Track Safety may not be used “during conditions of insufficient visibility as affected by darkness or inclement weather” but that Rule 6.3.3 does not contain an explicit prohibition against the Use of a Statement of On-Track Safety at night, even though the Carrier seems to interpret the Rule that way. The interpretation is highly questionable because the investigation includes a number of statements that were not challenged.

- Jeff Bumpous wrote of using Lone Worker Protection “at night on many occasions, providing that there is adequate lighting, and have never been questioned what so ever . . .”
- Machine Operator E. M. Obregon wrote that “on many different occasions and times I (we) have used lone worker rule in the G.F. Yard terminal area.”
- Track Inspector Larry Stewart, who has been a Foreman for 10 years, wrote that “we use a Lone Worker form day and night to inspect things that don’t need power tools to fix.”
- Timothy Evans wrote that he has used Lone Worker protection at night and “The required site (sic) distance was always considered.”

The Claimant testified that when he inspected the rough track he was in an area with level track on a clear night with some moonlight, with strobe lights and work lights on with perfect visibility in both directions. Moreover, no power tools were used, his truck was in a pre-determined place of safety and he felt safe and protected. He had used Lone Worker Protection many times before and needed only a few minutes to take the necessary measurements. The Claimant noted that had the speed been 40 MPH instead of 25 MPH, he still had sufficient visibility and time to get clear of the track.

Roadmaster Fluck indicated that there is light in yard conditions, but otherwise he did not and could not question the accuracy of the Claimant's description of the existing conditions that night, as he was not at the site. Furthermore, there is no testimony that any Carrier officer took the time and trouble to view the site under approximately the same (or any) conditions as existed early on August 5, 2013.

The Conducting Officer seemingly for all practical purposes ignored the Claimant's testimony simply because the Track Inspector worked at night and ignored the evidence that several other workers had used Lone Worker Protection apparently without being disciplined as a result. The Board finds no credibility question herein because the Organization's and Claimant's evidence was not challenged. Nor has the Board substituted its judgment for that of the Carrier. Rather, the Carrier's investigation was insufficient, leaving it without substantial evidence to support the allegation that Rule 6.3.3 and therefore Rule 6.3.1 was violated. The claim, as it pertains to this particular charge, is sustained.

The Unauthorized Overtime

Rule 40.A requires that employees who have been "in service sixty (60) days or more" receive a "fair and impartial investigation" before they are disciplined or dismissed. Rule 40.B requires that for employees withheld from service, "the investigation shall be held within ten (10) days after the date withheld from service." Rule 40.J states that "If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employe (sic) shall be considered as having been dismissed.

The letter informing the Claimant of the investigation of the alleged unauthorized overtime noted that the Carrier's first knowledge of the supposed

infraction was August 8, 2013. During the investigation Roadmaster Fluck testified that he had not been aware of the overtime worked until on August 8, 2013 Roadmaster Sanders asked if Mr. Fluck had approved the overtime. Roadmaster Sanders testified that it was not until August 8, 2013 that he learned of the unapproved overtime.

Sometime after his dismissal, the Claimant filed suit against the Carrier in U.S. District Court, District of Minnesota. In preparation for trial, Roadmaster Sanders was deposed on August 15, 2016 and Roadmaster Fluck was deposed the following day. Both testified under oath. That part of the deposition where Roadmaster Fluck is questioned about the overtime is set forth below.

Q Okay. Did you raise with Larry Sanders any concern that you had, that when you were looking at the TMDS on Monday morning, the 6th, that Jason was doing other work that night without overtime permission?

A I don't remember.

Q But you certainly could tell by looking at the form that he was working that night, he was doing other work that was –

A Sure. Yes.

Q Did you consider that a rules violation?

A As far as –

Q The fact that he was performing other work that night without overtime permission.

A Sure. (Deposition, p. 102, l. 13 to p. 103, l. 2)

When the individual questioning Roadmaster Fluck said “Monday morning, the 6th, that individual misspoke, since Monday was actually August 5, 2013. Roadmaster Fluck’s sworn testimony establishes the Carrier’s first knowledge of an alleged violation regarding overtime as August 5 rather than August 6, 2013. Roadmaster Sanders’ deposition makes clear that he could not reach the Claimant “till 1:00 o’clock (on August 5), and that’s when I found out he was at home sleeping

because he said he was out all night” (Deposition, p. 140, ll. 13-15). That testimony does not definitively establish that Roadmaster Sanders knew then that the Claimant had seemingly worked unauthorized overtime, but Roadmaster Fluck’s deposition is sufficient to establish first knowledge.

The investigation of unauthorized overtime was held thirteen (13) days after the Carrier received first knowledge and 11 days after the Claimant was first withheld from service. In so doing the Carrier violated Rule 40.B and in accordance with Rule 40.J the charge of unauthorized overtime must be dismissed and the claim sustained.

The Alleged Track Fouling at Big Stone

The charge that the Claimant fouled the track in the Big Stone area without obtaining proper authority must be resolved on the basis of a procedural defect. The Organization has provided evidence in the form of photographs of the relevant vehicles that the Conducting Officer and the two Carrier witnesses met by themselves before the two August 18, 2013 investigations. The Carrier has essentially confirmed the meeting of the Conducting Officer and Roadmasters Fluck and Sanders. Both Roadmasters were Carrier witnesses in the overtime investigation. Roadmaster Sanders was the only Carrier witness in the Big Stone investigation. What was said during the meeting is unknown, but it is the meeting itself and not what was said that is critical. Rule 40.A requires a fair and impartial investigation and that requires a fair and impartial Conducting Officer. Even if the meeting was only for the purpose of determining the order in which the witnesses would be called, the Conducting Officer’s participation in such a discussion breaches impartiality. Furthermore, simply because Roadmaster Sanders was the only Carrier witness in the Big Stone investigation, the violation of Rule 40.A is not cured.

In Third Division Award No. 41224, an on-property award, Referee Andrea Knapp wrote the following:

“Because the Hearing Officer is a Carrier official, it is especially important for the investigative Hearing to be conducted as fairly as possible. For the Hearing Officer, this includes avoiding not just the reality of partiality, but also the appearance of bias, either for or against any party or witness. The job of the Hearing Officer at the

Investigation is to develop facts and to give both the accused employee and charging officials a fair opportunity to tell their version of events, in an effort to further all sides' understanding of what happened, so that the Carrier can make an informed and reasoned decision whether the accused employee is guilty of misconduct and subject to discipline. Given that the Hearing Officer is a Carrier official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process. The Hearing Officer must have – and be seen as having – an open mind, one that is not made up in advance of the Investigation. Anything less would render the idea of a “fair and impartial” investigation a sham. In this case, the Hearing Officer conducted an extensive private meeting with the Carrier’s witnesses immediately before the Hearing. The meeting led to concerns on the part of the Organization and the Claimant that the witnesses were being coached or, alternatively, they were explaining what they would testify to without the knowledge of the opposing side or an opportunity for cross examination. In either case, it appeared that “the fix was in,” so to speak, even before the investigative Hearing started: if the witnesses were being coached by the Hearing Officer or in his presence, his ability to conduct a “fair and impartial” Hearing would be seriously open to question. The witnesses’ privately explaining their testimony could also compromise his ability to conduct a fair and impartial Hearing, as his perceptions of events and of the Claimant’s guilt or innocence would be compromised before the Hearing began. Even if such influence did not actually occur, the opposing side was reasonably left with the impression that it did, and the damage to the Hearing process is the same.”

The Board agrees wholeheartedly with Referee Knapp’s observations. Indeed, the Board could have resolved the claim stemming from the overtime charge on the same basis had it not chosen to focus on the untimeliness of the investigation. Because the Claimant did not receive a fair and impartial investigation of the Big Stone charge, his claim must be sustained without consideration of the merits of the case.

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 date he was withheld from service 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.