

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42873
Docket No. MW-43642
18-3-NRAB-00003-160429**

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

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Foreman M. Kjos, by letter dated March 6, 2015, for alleged violation of MWOR 1.3.3 Circulars, Instructions and Notices, MWOR 1.13 Reporting and Complying with Instructions and MWOR 1.6 Conduct in connection with his alleged ‘... misuse of Company Equipment when you took vehicle 19623 home for the weekend without proper authority on 11/29/2014 and 11/30/2014 while assigned as Foreman TSEC 1368 LaCrosse Section.’ was arbitrary, excessive and in violation of the Agreement (System File C-15-D070-5/10-15-0177 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Kjos shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”**

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 Claimant was absent from a daily conference call held on December 2, 2014 by Roadmaster Barbee, Sr. Discussion on the call indicated that previously the Claimant had taken the LaCrosse section truck home without authority to do so. After a February 6, 2015 Investigation, the Claimant was dismissed by letter dated March 6, 2015. The claim that followed was not resolved on the property and was referred to the National Railroad Adjustment Board for arbitration.

The Carrier asserts that substantial evidence establishes violations of the aforementioned rules. The discipline was proper because the Claimant committed a dismissible offense. Leniency, which the Organization requests, is the prerogative of the Carrier, not the Board, which should not substitute its judgment for that of the Carrier. Should the claim be sustained, the Claimant is due only reinstatement with seniority restored and compensation for lost wages, less outside earnings. He must attempt to mitigate damages. The Board is not authorized to alter the negotiated health plan that sets out related benefits for reinstated employees. The Organization has not shown that alleged procedural defects prejudiced the Claimant, whose absence from the Investigation was his own fault and does not negate the findings. The Claimant made a decision not to attend the Investigation at his peril, but his absence does not negate the findings of the Investigation. Nor can the Organization show that prejudgment occurred.

The Organization contends that the Investigation was not fair and impartial because the Conducting Officer and Carrier's main witness were father and son. The Claimant missed two of the three same-day investigations in order to attend an EAP meeting after the Carrier would not postpone the Investigations. Also, a postponement to review documents not provided prior to the Investigation was denied. Charges were pyramided, with three investigations held on one day, resulting in three dismissals. The Carrier has not proven the charges because, while a Carrier witness testified that a Foreman may not take a Carrier vehicle home on a regular basis, the Claimant did not have an opportunity to attend the Investigation and explain why his use of the section truck was an exception to the rule. The dismissal was arbitrary and excessive as it served only to punish and not to correct. NRAB awards indicate that Rule 40G remedies should include lost overtime wages and reimbursement for premiums, deductibles and co-pays covered by health insurance had the Claimant not been wrongfully terminated.

This case is the second of three involving Claimant Kjos that were heard by this Board at the same sitting. In Third Division Award 42872 the Board denied the claim arising from the dismissal of the Claimant. That denial renders moot consideration of the claim advanced herein.

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 10th day of January 2018.