

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42876
Docket No. MW-43679
18-3-NRAB-00003-160454**

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 D. Warren by letter dated March 19, 2015 for alleged violation of MWOR 1.6 Conduct, MWOR 1.13 Reporting and Complying with Instructions and EI 23.1 Roles and Responsibilities in connection with his alleged ‘... failure to comply with instructions related to payroll entries and filing reports as well as working ’unauthorized overtime and falsification of time on the Panhandle Subdivision while assigned as Foreman on TSCX0034.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4630-E/11-15-0310 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Warren 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 including loss of wages to attend the investigation.”**

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 had a gang of more than five at times relevant, making him responsible for entering work time in the PARS system and handling other reports, for which he was compensated for four additional hours monthly. He allegedly compensated himself daily at the overtime rate before and after his shift. In a February 12, 2015 conference call with his supervisor and Assistant Director Maintenance, the Claimant was told to remove compensation to which he was not entitled and to remove a February 7, 2014 time entry of two hours for an alleged two-minute phone call. Because this had not been done by February 16, 2015, the Claimant was withheld from service the following day. An Investigation led to the Claimant's dismissal for violation of the above-noted MOWRs and EI. When the ensuing claim was not resolved on the property, the matter was referred to the National Railroad Adjustment Board for arbitration.

The Carrier asserts that since the salient facts are not disputed, there is substantial evidence to prove the charges. Overtime is to be approved daily and, except in an emergency, is not to be worked without authorization. The Claimant's unauthorized overtime is documented, as is his refusal to remove the time related to the February 7, 2015 telephone call. The Claimant has been insubordinate and dishonest. Substantial evidence is the sufficient quantum of proof and the Carrier need not prove intent. The Claimant committed stand-alone dismissible infractions, including theft, for which long service is not a deterrent. The Investigation was fair and impartial, with the Organization's procedural objections baseless. The Notice

of Investigation (NOI), which contained an adequate explanation for why the Claimant was being withheld from service, was mailed five days prior to the Investigation. Because the Organization did not object to the timing of the NOI at the Investigation, the objection before the Board is untimely. The Organization's contention that the date of first knowledge was February 4, 2015 is premised on a mistake by Roadmaster Henley, as the actual date of first knowledge is February 12, 2015. While the Claimant's superior could have deducted the disputed time, the issue is the Claimant's disobedience to instructions. The investigation was fair and impartial and the old argument of prejudgment is groundless. If the claim is sustained, the Claimant should only be reinstated with unimpaired seniority rights and compensation for any wage loss incurred, minus a deduction for outside earnings. Damages not contemplated by the Agreement should be excluded and health plan coverage is not within the Board's authority as there is a relevant negotiated agreement in existence.

The Organization argues the Investigation was not fair and impartial. The NOI, mailed on February 20, 2015, was received by the Claimant and the Organization respectively on February 23 and, after the Investigation, on February 25. The NOI was overly vague, thus stifling the preparation of a defense, and the Claimant was prejudged when he was withheld from service. Witnesses were not sequestered and were seen smoking outside of the building and making copies of exhibits. Because the Claimant was accused of dishonesty, proof arguably should be more than just sufficient evidence. He had no intent to defraud the Carrier, believing that the compensation he claimed was due for performing listed Foreman duties. Instructions to remove the time for the phone call were unclear. The Carrier could have issued a cut letter in accordance with Rule 50 to recover the disputed compensation. The discipline was punitive rather than corrective. The Claimant was a 38 year employee with one formal reprimand 16 years ago. 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.

The Board finds the Organization's contentions that the Investigation was not fair and impartial unavailing. The record before the Board, including a careful reading of the Investigation transcript, supports a conclusion that the timing and specificity of the NOI were sufficient to allow the Claimant and his representative to

prepare for the Investigation. Rule 40B allows the Carrier to withhold an employee from service “pending investigation in cases involving serious infraction of rules . . .” The Claimant was alleged, among other things, to have falsified time entries, potentially a “serious infraction of rules.” The Organization is being unrealistic if on the one hand it agrees to language allowing the Carrier to withhold employees from service while on the other hand, attempting to nullify the language every time withholding takes place. See Public Law Board 2143 Award 10.

Contrary to the Organization’s contention, the witnesses were sequestered since they were excluded from the Investigation when they were not testifying. Being outside smoking or gathering around a copying machine is essentially no different than being together in a room while waiting to testify. Had the witnesses met with the Conducting Officer before, during or even after the Investigation, there may have been the impression, if not the reality, of improper communication, but there is nothing in the record that that happened in this case. The Board does not find that the process was tainted.

The Claimant was a Foreman with a gang of more than five. Therefore, he was responsible for preparing reports, including entry of time in the PARS system. Rule 61 Making Reports states in relevant part at 61A that “the preparation of time returns, material and other reports, etc., are part of the duties and responsibilities of such positions, compensation for which is comprehended in the rate established for such positions.” Rule 61B, which applied to the Claimant, states that Foremen “who are required to keep time, make material and other reports outside of the assigned working hours of the general force, will be allowed four (4) hours each month at pro rata rate as compensation therefore.” The Board acknowledges the possibility that Rule 61 may be outdated because the work associated with the filing of various reports now exceeds four hours per month. The Board further acknowledges the possibility that the Claimant felt as though he was owed money. If he was unhappy with the conditions attached to his Foreman’s position, he had two legitimate choices. One choice would have been to seek another position that would not, in the Claimant’s mind, have required him to work for free. A second choice would have been to follow the principle of working now and claiming (grieving) later. The record does not indicate that he did either. Instead, the Claimant decided to take matters into his own hands by ignoring or disobeying Rule 61 and the rule against unauthorized overtime. Moreover, he ignored the

instructions to remove the overtime he had entered for himself, sometimes amounting to 2-2 ½ hours daily. The Claimant further ignored instructions to remove two hours for a telephone call that Roadmaster Henley testified was not on the Carrier's behalf.

Clearly, the Claimant violated the Rules entered into the investigation record and noted in the dismissal letter. The Board has concluded that the Claimant's actions went beyond a mere failure to follow instructions and included dishonesty as well. There is precedent for considering dishonesty a dismissible offense unmitigated by long service. See First Division Award 25917 and on-property Award Public Law Board 4340 Award 20. The Board finds no justification for modifying the discipline.

AWARD

Claim denied.

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.