

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43329
Docket No. MW-44191
19-3-NRAB-00003-170304**

The Third Division consisted of the regular members and in addition Referee Mark L. Burdette when award was rendered.

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

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. G. Holt by letter dated June 22, 2016 for allegedly claiming overtime in excess of hours actually worked was on the basis of unproven charges, excessive and in violation of the Agreement (Carrier's File MW-16-08 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Holt shall be reinstated to service with seniority and all other benefits and rights unimpaired, have his record cleared of the charges leveled against him and be compensated all losses incurred (straight time and overtime), until he is returned to work.”**

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.

A hearing was conducted on June 8, 2016 to consider the charge(s) against Gerald Holt, who at the time was Trackman. Holt had approximately 19 years of service. The notice of hearing contained the following charge:

“Specifically, on May 11, 2016, while you were acting as Trackman on the I&R/Maintenance Crew #3543, at approximately 3:39 p.m., you were called by Track Supervisor Jason Beaudry and asked to return to work to perform Fire Patrol on the Rumford Branch. The overtime hours that you entered on your time sheet allegedly reflect in excess of the actual hours worked.”

Relevant Contract provisions

37.1 Unless otherwise provided, time of employees will start and end at their advertised headquarters.

26.1 No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 14 days of the Carrier's first knowledge of the act or occurrence. The notice of hearing will contain information sufficient to apprise the employee of the act or occurrence to be investigated. Such information will include date, time, location, assignment, and occupation of employee-at the time of the incident. The notice of hearing will also include a list of witnesses to be called. The hearing will be scheduled to take place on a regularly scheduled work day within 30 days of the Carrier's first knowledge of the act or occurrence. The hearing may be postponed by either party due to sickness, injury, or vacation of principals or witnesses. The hearing may be postponed for other reasons by mutual consent of the parties. The hearing may be adjourned to secure necessary witnesses or if it cannot be completed in a day. Hearings will be held at one of the following locations, whichever is closest to the employee's headquarter point-Waterville, Rigby, No. Billerica, East Deerfield. Employees required to attend a hearing at a location other than the location closest to the headquarter point will be allowed Personal Auto Expense payment

from the location closest to the headquarter point to the location where the hearing is held and return.

- 26.4** The employee must be notified within fifteen (15) days of the completion of the hearing if discipline will be assessed. The employee and the General Chairman will be provided with a copy of the hearing transcript at the time the discipline decision is rendered. The types of discipline which may be assessed are reprimand, disqualification, deferred suspension, relevant training, actual suspension, and dismissal. The types of discipline may be assessed individually or in combination. The employee will be required to serve deferred suspension only if he commits another offense for which discipline is imposed within the succeeding six (6) month period.

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- 26.6** If the finding of the hearing is that the employee is at fault, appeal of discipline assessed must be made within thirty (30) days of the date of the discipline notice. Such appeal must be made in writing by the BMWE General Chairman to the Carrier's highest designated appeals officer. Conference must be scheduled within ten (10) days of receipt of appeal. Written response to the appeal will be issued within fifteen (15) days from the date of the conference. If the decision of the Carrier on appeal is in favor of the employee, he will be paid in accordance with paragraph 26.5 of this Article. If the appeal is denied, that decision will be final and binding unless within six (6) months of such denial the case is disposed of on the property or proceedings for disposition of the case are instituted by the BMWE to a tribunal having jurisdiction by law or agreement.”

The Claimant was called for Overtime at 3:39 PM, following his regular shift, which concluded at 3:00 PM, to do Fire Patrols on the Rumford Branch. He agreed to report to Waterville to meet up with Foreman Justin Waltman, to conduct the Fire Patrols. The Fire Patrol was completed at 8:00 PM.

The Claimant reported five (5) hours Overtime on his time sheet. His Supervisor, Jason Beaudry, considered that his Overtime assignment commenced with the call at 3:39, and concluded at 8:00 PM, for a total of 4 hours, 21 minutes; 39 minutes less than what was recorded on his time sheet.

Mr. Beaudry compared the Claimant's time sheet with that of Foreman Justin Waltman, who had claimed four (4) hours of overtime, and asked Mr. Holt to clarify the numbers and see why there was a difference in time. Mr. Holt advised that he was putting down what Justin Waltman put down. Mr. Waltman did have a different Headquarters point than Mr. Holt, however.

During the hearing, Claimant Holt stated that he put down the 5 hours because he was entitled for the time to return to his headquarters at Rumford. The normal drive time from Waterville to Rumford is approximately 1 hour and 20 minutes to 1 hour and 30 minutes. Pay for the time back to Rumford would have yielded a claim for 5 hours and 41 minutes. During the hearing, Mr. Holt stated that he "shortchanged" himself.

Each party supplied opposing statements following the initial hearing about how Article 37.1 is applied to Overtime. The Carrier maintains that because the employee has the right to accept or refuse overtime assignments, Article 37.1 is not applicable to overtime, only to the normal work assignments. It supplied statements from four management representatives in support of that position. The Brotherhood supplied statements from several long service employees that 37.1 applied to all assignments. Each of these positions is self-serving and contradictory and not helpful to the Board in determining which is correct. There is no contract language provided as evidence which would definitively resolve the opposing positions.

The Brotherhood claims that there was a violation of Article 26 in that the transcript and disciplinary decision were not provided within 15 days of the hearing. However, the Carrier provided evidence and documentation that the decision and transcript were postmarked within the required 15 days, (on June 22, 2016 which is the controlling date).

Further, there is the allegation by the Brotherhood that the Hearing in this matter was not fair and impartial because of the fact that the Co-Hearing Officer Ken Pelletier was involved in the initial Investigation of the incident, and was thus not impartial. The Brotherhood cites that as a fatal defect which should

automatically result in a finding in favor of the Claimant, without regard for the merits of the case. While the hearing transcript yields no evidence of a lack of impartiality by Mr. Pelletier, the Board believes that it would have been appropriate to avoid any appearance of impartiality by having another Carrier representative serve that role.

The fact is that there was an opportunity to resolve this issue in discussion between the Claimant Holt and the management representatives who questioned his time sheet, and subsequently approved it, rather than discharging an employee of nearly 20 years of service with an unblemished work record for theft of time.

Claimant Holt shall be reinstated to service with seniority and all other benefits and rights unimpaired, and be compensated all straight time losses incurred (except for overtime) until he is returned to work. Under Article 26.7 the award will be offset by other earnings in the intervening period.

AWARD

Claim sustained in accordance with the findings.

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 14th day of December 2018.