

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43330  
Docket No. MW-44192  
19-3-NRAB-00003-170305**

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. Z. Burgess by letter dated June 17, 2016 for alleged violation of Pan Am Safety Rules PGR-N, PGR-L, PGR-C and PGR-A was on the basis of unproven charges, excessive and in violation of the Agreement (Carrier's File MW-16-09 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant Z. Burgess 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.

Claimant Z. Burgess has an established seniority date of July 7, 2008 and during his approximate eight (8) years of employment with the Carrier, he has established and retained seniority within the Maintenance of Way Department. During the rise of this dispute, he was regularly assigned as a track foreman out of the Rumford Yard under the supervision of Supervisor Beaudry. In connection therewith, the Claimant was responsible for filling out his time sheet, which is then faxed to and approved by Supervisor Beaudry.

In this instance, Director of Safety for Pan Am Railways, D. Nagy, testified that he was called upon to investigate alleged stealing of time by employees working in the Rumford Yard. In response, Director Nagy dispatched Officer Fowler of the Boston and Maine Railroad Police to investigate when employees at the Rumford Yard were arriving and leaving the job site. Officer Fowler stated that he conducted this Investigation on April 13, 18, 19, 22, 2016 and May 6, 2016.

As a result of this Investigation, Officer Fowler reported back to Director Nagy and informed him when the employees in the Rumford Yard were arriving to and leaving the job site. Based on that information, Director Nagy then cross referenced those times to the employees' time sheets and determined that there were some alleged discrepancies, specifically with the Claimant's recorded time compared to his actual hours worked. As a result of his findings, Director Nagy went to the Claimant's location on May 6, 2016 and removed him from service pending an Investigation into allegations that the Claimant was improperly filling out his time sheet in excess of the actual hours worked.

Under letter dated May 9, 2016 (Transcript Exhibit A), the Claimant was notified by the Carrier to attend a formal Investigation:

"This Notice of Hearing is issued to develop the facts and place your responsibility, if any, in connection with the incident(s) outlined below:

Violation of Safety Rule(s) PGR-N, PGR-L, PGR-C & PGR-A

Specifically, on May 6, 2016, while you were acting as Foreman on the I&R/Maintenance Crew #3543, you were taken out of service pending a

hearing when it was discovered on April 27, 2016, that time entered by you on your time sheet for the dates of 4/18, & 4/22, allegedly reflect in excess of your actual hours worked. Additionally, on 5/06, the time sheet that you filled out was also allegedly in excess of your actual hours worked."

Following postponement, the hearing was held on June 7, 2016 and by Carrier letter dated June 17, 2016 the Claimant was subsequently notified of the following:

**"Violation of Pan Am Safety Rules; PGR-N, PGR-L, PGR-C and PGR-A.**

Specifically, on May 6, 2016, while you were acting as Foreman on the I&R/Maintenance Crew #3543, you were taken out of service pending a hearing when it was discovered on April 27, 2016, that time entered by you on your time sheet for the dates of 4/18, & 4/22, allegedly reflect in excess of your actual hours worked. Additionally, on 5/06, the time sheet that you filled out was also allegedly in excess of your actual hours worked.

Please be advised that I have reviewed the transcript of the aforementioned hearing provided for you. I find the testimony supports the Carriers charge against you.

This letter will serve to inform you that you have been found guilty of these charges and as a result you are hereby terminated from the employment of the Pan Am Railways Co. immediately."

#### **Relevant Contract Provisions**

##### **"Article 26. Discipline**

**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.

**26.2**An employee may not be suspended pending a hearing except when the actor occurrence to be investigated is of a serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier. Suspension pending a hearing will not be considered as prejudicial to the employee and will be used sparingly by the Carrier.

**26.3**The employee will have the opportunity to request that the Carrier provide necessary witnesses not listed on the notice of hearing and will have the opportunity to secure the presence of witnesses in his own behalf. The employee will have the right to representation and he and his representative will have the right to question all witnesses.

**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) months period.

26.5 If the finding of the hearing is that the employee is not at fault, he will be compensated for the actual wages lost, if any. If no wages are lost, employee will be paid in accordance with Article 38 of this Agreement."

#### **Relevant Pan Am Safety Rules**

**PGR-A**      Safety is of the first importance in the discharge of duty. Obedience to the rules is essential to safety and to remain in service.

**PGR-C**      Employees must devote themselves exclusively to the Company's service while on duty. They must cooperate and assist in carrying out the rules and instructions, and must promptly report to the proper officer any violation of the rules or instructions, any condition or practice which may imperil the safety of trains, passengers or employees and any misconduct or negligence affecting the interest of the Company.

To remain in the service, employees must refrain from conduct which adversely affects the performance of their duties, other employees or the public.

Any act of insubordination, hostility or willful disregard of the Company's interests will not be condoned and is sufficient cause for dismissal.

Employees must conduct themselves in such a manner that their Company will not be subject to criticism or loss of good will.

Employees must refrain from the commission of a felony in order to remain in service.

**PGR-L Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in deportment or who are careless of the safety to themselves or of others will not be retained in the service.**

**\* \* \***

**PGR-N Employees must report for duty at the prescribed place and time and be ready to work. If subject to call, they must not absent themselves from their usual calling place without giving notice to those required to call them.**

**Employees must not absent themselves from duty or engage a substitute to perform their duties without the permission of a supervisor.**

**\* \* \***

**No time or wages are to be entered on time slips or payroll forms except for work actually performed by the person whose name appears thereon. Time slips or payroll forms must be filled out completely and accurately. Any time slips or payroll forms improperly entered is sufficient cause for dismissal.**

**\* \* \***

**Claimant Burgess was suspended on May 6, 2016 pending a hearing which was not held until June 7, 2016. He was charged with reporting time on his time sheet for April 18 and 22, and May 6, 2016 in excess of the time actually worked. Under Article 26.2, an employee may be suspended pending a hearing if:**

**“...the occurrence to be investigated is of a serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier.”**

**Numerous Awards of this Board and others have consistently held that the Carrier’s right to suspend pending a hearing is limited to situations where retaining the employee in service may endanger the employee himself, other employees, the**

public or otherwise may adversely impact the Carrier's operations. Those conditions did not exist in the instant case. The suspension pending a hearing was not justified. Further, there was disparate treatment of Claimant Burgess when compared to another similarly situated employee, similarly charged, who was not suspended.

The Brotherhood took issue with the conduct of the hearing, alleging that it was not a fair and impartial hearing as required by Article 26. These allegations are based on the conduct of the Hearing Officer and Co-Hearing Officer. The Hearing Officer was asking questions in such a manner to add testimony and presumed the guilt of the Claimant before the evidence was established. Further, the Charging Officer approached the Organization in advance of the hearing to advise that the Carrier would accept Burgess's resignation in lieu of termination. This Board has previously determined that violations of the requirement to conduct a fair and impartial hearing can result in the Claim being sustained.

Further, the Brotherhood alleges that the Carrier failed to issue the hearing notice within fourteen (14) days of the date it had first knowledge of the occurrence. The record reveals that the Carrier first knew of the events which were charged on April 13, 2016, the charge letter is dated May 9, 2016 – more than the contractually required fourteen (14) days. The Charging Letter only lists 4/18 and 4/22, plus May 6. This is a further procedural defect and contractual violation.

The testimony in the hearing revealed that Claimant Burgess reported at 7:12 AM on April 18, 2016 while recording on his time sheet eight hours and one hour overtime. On April 22, 2016 he was observed reporting at Rumsford at 7:45 AM, while recording 8 hours plus 6 hours overtime. On May 6, 2016, Burgess was seen reporting for work at 7:26 AM, and was suspended sometime around 12:00 PM while reporting 8 hours on his time slip – which was subsequently corrected by him to 5 hours, and initialed by Mr. Nagy. None of the Carrier witnesses could precisely affix the time when Burgess was suspended.

Claimant Burgess testified that on the dates in question when he was late getting to Rumsford, he was doing work that had been approved by Jason Beaudry while enroute to Rumsford. In one case he was checking for anchors, and in the other he was looking for a switch stand to replace a broken one in the yard. On May 6, he was checking for timers and ties while enroute. Mr. Beaudry didn't recall these arrangements – he didn't refute the Claimant's testimony, just testified that he didn't recall.

The Carrier failed to support all of the charges of violations of the Pan Am Safety rules. There is no evidence supporting a violation of PGR-A, PGR-C, or PGR-L. While PGR-N would have been applicable had it been proven that Claimant Burgess claimed time on his time sheet for time not worked, he had a credible explanation which was unrefuted by his Supervisor for the fact that he was conducting work for the Carrier before being observed at Rumsford.

Based on all the findings outlined above, the Claimant shall be reinstated to service with seniority and all other benefits and rights unimpaired, and be compensated all losses incurred (straight time) until he is returned to work.

**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.