

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43349
Docket No. MW-44363
19-3-NRAB-00003-170470**

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
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Truck Driver M. Dudek by letter dated January 25, 2016 for alleged violation of MWOR 1.15 Duty Reporting or Absence in connection with his alleged failure to report for duty at a designated time and place from November 9, 2015 through November 13, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D070-4/10-16-0161 BNR).**
- (2) The discipline (dismissal) imposed upon Truck Driver M. Dudek by letter dated January 25, 2016 for alleged violation of MWOR 1.15 Duty Reporting or Absence in connection with his alleged failure to report for duty at a designated time and place from November 16, 2015 through November 25, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D070-5/10-16-0162 BNR).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant M. Dudek shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered at his applicable rate of pay.**

- (4) As a consequence of the violation referred to in Part (2) above, Claimant M. Dudek 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 at his applicable rate of pay.”

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 arrested and incarcerated on November 3, 2015 and as a consequence failed to report for duty on the above-noted dates and was not able to notify his superior of his absences as he was placed in solitary confinement. He was charged with the above-noted periods of unauthorized absence. Notices of Investigation were issued respectively on November 13 and November 25, with postponements resulting in two back-to-back Investigations on January 7, 2016. Thereafter the Claimant was issued two dismissal letters on January 25, 2016, both over the signature of James P. O'Brien, Supervisor Structures, who had been the Conducting Officer. When the ensuing claim was not resolved on the property, it was referred to the Board.

The Carrier asserts that the Claimant received fair and impartial Investigations as called for in Rule 40.A. The Claimant committed a continuing violation; thus, the Investigation was conducted within the required fifteen (15) days. There were no procedural defects that impacted the Claimant's due process rights or rendered the Investigation unfair. There is no rule against holding

separate Investigations for each period of absence, but if this constituted error, the Organization has not shown harmful error. The Claimant admitted that he knew the relevant rule and did not comply with it, therefore providing the necessary substantial evidence. Incarceration is not a defense against a violation of MWOR 1.15 Duty Reporting or Absence, particularly since the Claimant pleaded guilty to one of the four original charges, the other three having been dropped. The dismissals were in accordance with the Policy for Employee Performance Accountability (PEPA). The Organization asks for leniency, which is a decision for the Carrier and not for the Board, which should not substitute its judgment for that of Carrier management. If the claims are sustained, the Claimant should receive a remedy in accordance with Rule 40.G., with an offset for outside earnings but without compensation for health insurance premiums and related health expenses.

The Organization insists that the Investigation was not timely because the Carrier's first knowledge was November 3, 2015 and maybe earlier, or fair and impartial, the latter because what was really one occurrence was divided into two occurrences. Also, during the Investigation, the Conducting Officer conferred with a Carrier witness. The Carrier has not met its burden of proof. The dismissals were excessive and unwarranted as Claimant Dudek's long tenure and mitigating circumstances were not considered. PEPA does not override the Carrier's need to show just cause. The requested remedy is proper and should not include an offset for outside earnings, but should include pay for missed overtime and for health insurance and related expenses.

This case involves two AWOL dismissals that can be dealt with as one matter. Both were for a violation of MWOR 1.15 Duty—Reporting or Absence, which requires in relevant part that "Employees must report for duty at the designated time and place with the necessary equipment to perform their duties . . ." The Claimant's forthright admission that he knew the rules and had violated MWOR 1.15 when incarceration in solitary confinement prevented him from reporting provides the necessary substantial evidence to support the charges. Moreover, there is support for the Carrier's contention that incarceration is not a defense to a charge of AWOL. See PLB 5863, Award 47 and First Division Award No. 26752. And, since the Claimant ultimately pled guilty to a misdemeanor, he has no defense of false imprisonment based on the record properly before the Board.

However, that is not the end of the story, so to speak. The Organization has raised several contentions that deserve consideration. The first concerns Rule 40.A requiring that an Investigation “shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence.” Since first knowledge came on November 3, 2016, if not earlier, the initial Investigation set for December 8, 2016 was said to have been untimely such that the charges should be dismissed. The Board finds otherwise. Awards cited by the Organization are not supportive. They involved theft and dishonesty (Third Division Award No. 41708), quarrelsomeness (Third Division Award No. 36041), a positive drug test (Third Division Award No. 37811) and payroll falsification (Third Division Award No. 42381). PLB 4244, Award No. 257 involved unauthorized purchases and unauthorized use of a procurement card, while PLB 5850, Award No. 81 concerned a positive drug/alcohol test. Each of the above-noted awards involved other than a continuing occurrence. In each it was found that the Investigation was not scheduled within the required number of days following first knowledge.

The Board must consider a very different situation—the ongoing, continuous AWOL of the Claimant. In essence, he was charged with prolonged absence. On November 3, 2016, with no information about the Claimant’s whereabouts or reason for his absence, the Carrier could not have known how long the absence would continue. Indeed, there was no way, because of the Claimant’s inability to communicate with the Carrier or his Organizational representative, that the Carrier could have known of the eventual length of the AWOL until Mr. Dudek was removed from solitary confinement and released. Release occurred the day of the Investigation, and that must be considered the first knowledge in this particular case.

The Organization asserts that Conducting Officer O’Brien and Division Roadmaster Skaar should not have conferred privately during the Investigation. The private communication should not have occurred. Whether or not such communication constitutes harmful error, at a minimum it creates an impression that the process is not fair and impartial, whether true or not. Under some circumstances such a conference may well result in a claim being sustained. The Board does not so rule in this case because we conclude that, impressions aside, the conference did not create harmful error. The dates of the Claimant’s AWOL were known prior to the Investigation. The Claimant admitted the violation and other than explaining that he was unable to contact the “outside world” because of the

incarceration, unfortunately but understandably he did not offer an additional explanation for the prolonged absence. As a result, there is no explanation in the record that the Board can consider.

The Investigation also is viewed as unfair and partial because what was said to be one occurrence was divided into two. In Third Division Award 40444 that the Board stated that “the adding on or ‘stacking’ of discipline by separating or dividing a singular, continuous violation is contrary to fair and progressive discipline.” We agree. Consider the hypothetical situation where a continuous violation that, at best, under PEPA would merit a Level S Suspension with a review period now becomes two Level S violations within a very brief time period, thus subjecting the affected employee to possible dismissal without allowing for the possibility that progressive discipline would encourage the affected employee to improve his or her behavior. That is the danger of “stacking” discipline. The hypothetical illustrates the wisdom of the Board’s above-noted observation.

PEPA, Appendix B lists examples of stand-alone, dismissible infractions, one of which is “(8) Extended unauthorized absence.” When considering the Claimant’s absences as one occurrence, the Board finds no justification for ignoring uncontested prior decisional support and setting aside the dismissal. Doing so would elevate leniency, which is the Carrier’s prerogative, and a substitution of the Board’s judgment for that of the Carrier, above the proof of just cause. Based strictly on the record that is properly before the Board, the claim must be denied.

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 14th day of December 2018.