

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43671
Docket No. MW-44673
19-3-NRAB-00003-170713**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Inspector D. Sanders by letter dated April 29, 2016 for alleged violation of MWOR 1.6 Conduct in connection with his alleged ‘...misconduct and theft of time when you falsified your payroll on March 19th, 2016 while working as a track inspector on the St Paul/Midway Subdivisions while on gang TINS0815.’ and by letter dated April 29, 2016 for alleged violation of MWOR 1.6 Conduct in connection with his alleged ‘... misconduct and theft of time when you falsified your payroll beginning on March 25th, 2016 while working as a track inspector on the St Paul/Midway Subdivisions while on gang TINS0815.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4964-M/11-16-0317/11-16-0320 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Sanders 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 compensated for all losses of wage and benefits as set forth within our initial claim letter dated June 24, 2016.”**

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.

This dispute involves the Claimant's dismissal for time roll entries he made on March 16, 2016, and March 25, 2016. The Carrier argues that there is substantial evidence in the record to support its position that the Claimant was dishonest and falsified his time roll entries on these dates, including entries for pay when no service was performed. Further, the Carrier argues that the Claimant's dismissal was consistent with its policy and industry standards. The Organization argues that the Claimant did not receive a fair and impartial investigation, and the Carrier failed to meet its burden of proof on the charges brought against the Claimant. In addition, the Organization argues that the Carrier brought this case against the Claimant in retaliation against him because he had lodged multiple complaints against his supervisors. Further, the Organization argues that the discipline imposed on the Claimant was excessive and out of step with any discipline that could have been warranted and that the remedy requested should be awarded.

The specific allegations in this case are that the Claimant falsified his payroll entries on March 19, 2016, and March 25, 2016. This alleged misconduct violates Maintenance of Way Operating Rule ("MWOR") 1.6 Conduct, which, among other things, states that employees must not be "Dishonest." The evidence shows that the Claimant submitted a payroll entry for Saturday, March 19, 2016, indicating that he worked his full 8-hour shift from 7:00 AM until 3:00 PM. the Claimant's supervisor testified that on March 19, 2016, the Claimant worked from about 9:00 AM until 1:53 PM – a total of almost 5 hours.

The Claimant testified that on March 19, 2016, he actually worked from 6:20 AM until 2:40 PM, for a total of 8.5 hours. The Claimant testified that he began his work day cleaning out his locker at Bridal Veil at 6:20 AM, and then he performed track inspections while operating out of his personal vehicle before arriving at Dayton's Bluff around 9:00 AM. The Claimant testified that he worked performing inspections with his Carrier-assigned vehicle from about 9:00 AM until 2:40 PM. The Claimant's supervisor testified that she did not authorize the Claimant to change his work schedule or work from his personal vehicle. The Claimant also testified that he was required to submit his time worked in advance, and that he had a "plan" to have a co-worker help him with some payroll issues. When payroll entries made in advance differ from actual hours worked, employees have an obligation to correct them and are supposed to do so the next work day, although there is evidence that employees adjust payroll entries several days later. The Claimant did not testify about the details of his plan in this investigation, and he did not correct his payroll entry for that day before he was locked out of the payroll system on March 29, 2016. If he intended to reduce the number of hours worked to conform with his supervisor's observations, it would have been an admission that he did not work the hours he claimed. If his plan was to claim the one-half hour of overtime he claims to have worked, he testified that it was "easier to pay yourself eight hours than ask for overtime."

Concerning the allegation that the Claimant falsified his payroll entry for Friday, March 25, 2016, the evidence shows that the Claimant initially submitted a payroll entry for 8 hours of holiday pay and 8.5 hours of overtime pay for time worked. There is no dispute that the claim for holiday pay was accurate because that day was the Good Friday holiday, but the Claimant's supervisor testified that the Claimant actually worked from 7:00 AM until 10:13 AM – a total of 3 hours and 13 minutes. After the Claimant received a Notice of Investigation for these alleged falsifications, he submitted a revised entry for March 25, 2016, claiming to have worked 4.5 hours of overtime.

The Claimant testified that on March 25, 2016, he worked from 7:00 AM until 10:40 AM – a total of 3 hours and 40 minutes. The Claimant admitted that the original entry of 8.5 hours of overtime was not accurate. He did not correct the payroll entry on his next work day – March 26, 2016 – but he testified that he had a plan to adjust the entry before the payroll closed on April 1, 2016. That plan involved getting the assistance of a foreman and reviewing his notebook to get the correct hours and making the adjustment on Tuesday, March 29, 2016. Before acting on that plan, the Claimant was given a Notice of Investigation regarding these charges and he was

sent home. At home, he made an adjustment to the payroll record to claim 4.5 hours of overtime pay for March 25, 2016. Later that day, the Claimant was precluded from making any further adjustments because he was locked out of the computer system.

In discipline cases, the Carrier has the burden to prove that there is substantial evidence that the Claimant engaged in the alleged misconduct. Third Division Award 39872; Public Law Board 6204, Award 20; First Division Award 16785. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison v. NLRB*, 305 U.S. 197, 305 (1938). The arguments advanced by the Claimant raise issues that challenge the testimony of his supervisor and the Carrier's conclusions, but there is substantial evidence in the record upon which to conclude that the Claimant falsified his time records by submitted payroll records claiming that he worked more hours than he actually worked. Specifically, there is substantial evidence that the Claimant submitted a payroll entry for March 19, 2016, for 8 hours when he actually worked 5 hours, and that he submitted an adjusted payroll entry for March 25, 2016, for 4.5 hours when he actually worked 3 hours and 13 minutes.

Rule 40(A) requires that an employee will not be disciplined until a fair and impartial investigation has been held. The Organization argues that the Hearing Officer was biased because he was not interested in exculpatory evidence and he did not make the dismissal decision. A careful review of the record does not indicate that the Hearing Officer (1) made any conclusions about the case in advance; (2) showed partiality or hostility to any witnesses or Organization representatives; (3) refused to hear evidence, objections or argument; (4) or otherwise showed bias. As to the specific allegation that the Hearing Officer was not interested in exculpatory evidence, there is no evidence that he excluded relevant evidence, and the extent to which he may have been interested in any particular piece of evidence, is not a part of this record. Finally, the dismissal letters are issued under the Hearing Officer's name, and there is no basis in the record upon which to conclude that he did not make the decision.

The Organization also alleged that the Claimant was dismissed in retaliation for complaints he made against his supervisors. There is evidence in the record that the Claimant made such complaints in close temporal proximity to the charges being brought against him. This temporal connection raises questions about the supervisors' motives, but there is evidence that the Claimant's immediate supervisor had a legitimate non-discriminatory reason to investigate the Claimant's time entries.

Specifically, she observed the Claimant leaving early the day before the incidents involved here. Ultimately, there is insufficient evidence in this record upon which to find that the Organization has met its burden to establish this affirmative defense.

Finally, there is the issue of whether the Claimant's dismissal was excessive. In discipline cases, the Board sits as an appellate forum. Arbitral precedent is clear that boards do not grant pleas for leniency or compassion, but may set aside disciplinary penalties that are unjust, unreasonable, or arbitrary. See Third Division Awards 27742, 30124, 30429 and 41038.

The Carrier contends that the disciplinary penalty arrived at in this case was justified under the circumstances and its Policy for Employee Performance Accountability ("PEPA"). Under PEPA, disciplinary violations are categorized by degree of severity as (1) standard; (2) serious; and (3) stand alone dismissible. There is substantial evidence in the record that the Claimant acted dishonestly by falsifying his payroll entries. Under PEPA, dishonesty is a stand alone dismissible offense, so the Claimant's dismissal was within the parameters set by the policy and, therefore, was not excessive.

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 17th day of May 2019.