

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43688  
Docket No. MW-45074  
19-3-NRAB-00003-180576**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 Mr. L. Molder, by letter dated March 14, 2017, for violation of MWOR 1.15 and MWOR 1.6 in connection with his alleged leaving work without proper authority and alleged dishonesty for paying himself for time not worked between August 15 and November 21, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File S-P-2121-G/11-17-0244 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Molder shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

**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 is foreman of a surfacing gang. When his supervisor could not locate him, the foreman checked GPS records and saw that on December 2, the Claimant started at 7:13, went to headquarters by 1, and was home by 2. However, the Claimant paid himself overtime that day for time when he was not at the job site. Upon checking other records, the Carrier concluded that between August and November, the Claimant had been doing this on regular basis. The Carrier concluded he was guilty of theft and dismissed him. Specific dates were not given in the Notice of Investigation. In the Carrier's view, the main date was November 21. It maintains the Claimant knew the allegation was that he claimed time for when he did not work.**

**The Organization argues the Notice of Investigation was too vague to give the Claimant proper notice because it failed to identify the days on which the Claimant was alleged to have committed violations. Further, the Carrier failed to hold a timely investigation.**

**The Organization contends the Claimant was working and performing duties at all times for which he claimed compensation. It maintains records show he was on the phone for the Carrier yet did not charge much of the time. In its view, the Carrier's case is based on speculation. It further maintains the Claimant was the victim of disparate treatment in that employees who overcharge time are generally issued a cut letter.**

**The Organization expressed frustration because it was required to attend an investigation when the allegations had not been adequately defined, then upon learning more about the allegations at the investigation, it attempted to respond, only to be advised that since the investigation was over, the response was too late. As to November 21, the Claimant provided phone records showing calls made to BNSF personnel on behalf of the Carrier.**

**The Board is concerned by the lack of specific allegations in the charges leveled against the Claimant. The Notice of Investigation states as follows:**

**“An investigation has been scheduled at 0800 hours, Thursday, December 15, 2016, at the Bob Downing conference room, 4510 E. Wisconsin Ave., Spokane, WA, 99212, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged violations that occurred on or about August 15 to November 21, 2016 at Fairchild, Washington on the Columbia River Subdivision while working as a Foreman on gang TSCX0939. Alleged violations include, but are not limited to, leaving your assignment and paying yourself for being on assignment without proper authority and dishonesty for paying yourself for time you were not working. The date BNSF received first knowledge of this alleged violation is December 2, 2016.”**

By mutual agreement, the Investigation was postponed three times. Carrier maintains there were fully 99 different instances of falsification of time records during the named months. However, the notification failed to identify days and times of alleged falsification. Though the Carrier had the GPS records, this information was not provided to the Organization until the day of investigation. At that point, the HLCS Reports, PARS Time Roll and GPS coordinates were entered into evidence to support the Carrier’s position. They did show that the Claimant charged the Carrier for time when he was not on assignment or at the depot.

The Organization allowed the investigation to close without requesting a continuance, and its later submitted evidence was rejected as falling outside the Investigation process. We find the Notice of Investigation left much to be desired in that it named the offense only in the most generic way, and gave the Organization no specifics from which to prepare its case. However, by allowing the Investigation to close without offering rebuttal evidence, the Organization relinquished its opportunity to do so. Significantly, we find the Claimant may not have been prejudiced by the vagueness of the Notice. The Carrier’s case rises and falls on the allegations made in the Notice of Investigation. Hence, the Carrier must establish that the act of charging time -- when not on assignment or at the depot -- constitutes a serious offense. The Claimant’s defense focused on what work he claimed he was doing from non-work sites. If performance of tasks from non-work sites is not recognized as compensable, then the Claimant’s defense was inapposite, and he was not prejudiced by the vagueness of the Notice of Investigation. On the other hand, if he should properly be paid for work done from home or other non-work site locations, then the vagueness of the Notice was fatal. We now turn to the merits of the case to answer the question raised regarding the propriety of charging time from non-work locations.

November 21 was the most discussed day. For that day, the Claimant provided telephone records establishing that he made phone calls to BNSF personnel. He argued that this evidence supported his assertion that he was doing company work while at home. His job did entail making contact with other BNSF employees. However, he conceded that no arrangement had ever been discussed with his foreman to permit paid work from non-Company location, such as his home:

**“AMANDA BISHOP:** Did you ever uh discuss with Mr. Stiver or any other exempt that um you would be doing your your Foreman duties, so you've already stated what those are

**LAWRENCE MOLDER:** Uh huh.

**AMANDA BISHOP:** there are various things, from home.

**LAWRENCE MOLDER:** No, it that's it's never been discussed.”

The Claimant referenced doing work from his hotel when on the road, suggesting this gave him the impression that it was permissible to charge time for work done after leaving the work site. The Board does not find the Claimant’s position persuasive. First, we wish to make it clear that we are not addressing practices which apply when employees are away from home since that is not the situation at hand. Our analysis is limited to the employee who goes home from a work site or depot.

In the view of this Board, any employee who endeavors to charge time worked away from a known and accepted work site must have authorization to do so. As we see it, a necessary requirement for such authorization would entail keeping a log of how much time was spent, when, and doing what. The fact that the Claimant had no such log is, in our view, an admission that his unrestrained and undocumented activities, allegedly on behalf of his employer, were not actually authorized and cannot be retroactively deemed acceptable here. No record keeping regarding the Claimant’s contested time entries was referenced by either party. The Board does not find it credible that employees were allowed to do whatever work they deemed necessary from any place they wanted without any explanation or explanatory report to management.

The Carrier has met its burden of proof. The Claimant’s phone records provided after the hearing would not have changed this result, hence no prejudice has been shown by the Carrier’s vague Notice of Investigation.

**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 18th day of June 2019.**