

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43696
Docket No. MW-45132
19-3-NRAB-00003-180660**

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. A. Overton, by letter dated May 10, 2017, for violation of MWOR 1.6, 1.19 and 1.25 in connection with his alleged conduct concerning theft of company material on April 5, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-17-D070-11/10-17-0233 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Overton shall be reinstated to service with seniority and all other rights and benefits unimpaired, have his record 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.

On April 5, 2017, Roadmaster Scott Farrell received a report that the Claimant and Foreman Behrens had been observed heading north out of the depot after hours. They were said to be driving a section truck and a personal truck with a trailer attached, with the intent to load up concrete ties and take them for Behren's personal use.

Farrell followed the GPS coordinates for the section truck to Hughes Bros. The Claimant admitted to assisting Behrens in removing 18 new cement railroad ties. At the investigation, the Claimant testified that he did not know whether Behrens had permission to take the ties, but said he assumed there was nothing improper. In the Carrier's view, these actions made the Claimant an accomplice to theft, such a serious offense that there can be no question but that dismissal is an appropriate disciplinary action.

The Organization argues that the Claimant was only doing what his foreman told him to do; he followed instructions as he is expected to do day in and day out. To terminate him for this was an egregious abuse of managerial discretion in its view. Management is essentially trying to burden the Claimant with responsibility for knowing whether his foreman has authorization for any and all instructions given, a position it views as untenable. It insists the Claimant had no obligation to investigate his foreman's authority and in no way should be disciplined for any failure to do so.

We do not find substantial evidence of dishonesty in this case. Though Foreman Behren's actions were certainly unusual, materials can be removed from Carrier premises whenever there is permission. The Claimant had no affirmative obligation to question his foreman's authority. His assumption that the foreman had proper authority was not unreasonable or improper. The Board has not met its burden of proof in this case.

AWARD

Claim sustained.

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 18th day of June 2019.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 43696
DOCKET NO. MW-45132
OLD NRAB Case No. 3-180660
NEW NRAB Case No. 3-200196**

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 (Former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

Whether BNSF complied with the Award No. 43696 when its retroactive compensation to Claimant Overton consisted of what he would have earned from BNSF less any outside earnings?

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 Overton was reinstated to BNSF Railway by Third Division Award 43692, with the claim being deemed “sustained.” The Organization argued this meant the contested discipline would be removed from his record, and the Claimant would be reinstated with compensation “for all wage loss suffered including lost overtime, expenses and benefits.” BNSF calculated the backpay, but the Organization objected to the deduction of interim wages and the failure to reimburse medical expenses and monies that were not contributed to the Claimant’s 401(k) while he was dismissed.

BNSF contends the Claimant need only submit his claims to his retroactively reinstated insurance, and he will receive the benefits at issue. It does not consider such claims or 401(K) claims to be wage loss. It submits that its deduction of earnings from outside employers was entirely appropriate. Both sides have cited various precedential awards in support of their positions.

Insofar as the claim herein concerned has been sustained, the Claimant must be offered reinstatement subject to the Carrier’s return to service policies. It is also clear that the Carrier must remove the invalidated discipline from the Claimant’s record, with seniority, vacation and all other rights restored. We are not of the view that all work done during the time away from work should be deducted from the backpay calculation; an employee who worked weekends in a bakery prior to dismissal from BNSF should not have his bakery earnings deducted from backpay because they are not part of his lost earnings. We therefore find the calculation of time lost should be reduced only by interim earnings from replacement employment. Likewise, lost overtime shall be compensated at the overtime rate.

The object of a make whole remedy is to recreate the same circumstances as if the improper dismissal had not occurred. Retroactive restoration of the Claimant’s medical insurance meets this objective, with deduction from backpay of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he must be reimbursed for the premiums.

Clearly, the Carrier must have a reasonable means of verifying the accuracy of its calculations. Hence, the Claimant’s backpay shall be contingent upon his providing

the Carrier with reasonable proof of income, including his tax records as well as proof of any replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claim not expressly granted by this Award is hereby denied.

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 10th day of June 2021.