

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43717
Docket No. MW-44063
19-3-NRAB-00003-170091**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 Foreman H. Zogg by letter dated October 8, 2015 for alleged violation of MWOR 1.6 Conduct and MWOR 1.15 Duty Reporting or Absence in connection with his alleged conduct of leaving his assignment early and claiming a full day’s pay on September 3, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D070-1/10-15-0332 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Zogg 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 including loss of wages to attend the investigation.”**

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 Thursday, September 3, 2015, the Claimant, Harry Zogg, was working as the Structures Foreman on Gang BBCX0532. The gang's normal work schedule was 10 hours a day, four days a week, 7:00 A.M. to 5:30 P.M. (including a lunch break), Monday through Friday. One of Claimant's responsibilities as Foreman was to input everyone's hours worked into the Carrier's PARS computerized payroll system. The record establishes that it is common for foremen to enter the gang's expected work hours at some point during the workday (that is, before the work day is ended) and to adjust the hours up or down later depending on how long the crew actually worked; adjustments can be made at any point during the payroll period until it closes. The Claimant testified that he normally made any corrections for the preceding work day when he went into the PARS system to input hours for the next work day.

At some point in the late afternoon on September 3, 2015, Manager of Structures Edford Ferguson went to take a look at the bridge Claimant's crew was working on, only to find that no one was there. Ferguson telephoned Supervisor of Structures James O'Brien told Ferguson that Claimant and his crew were supposed to be working in the area. Neither O'Brien nor Ferguson had given permission to leave work early. Ferguson went to the gang's tie-up location at a Best Western hotel and found everyone's trucks parked there. Ferguson then checked the PARS system and learned that the Claimant had paid himself and everyone else on the gang for a full 10-hour work day.

According to the Claimant, the gang finished their assigned duties for the day at about 3:00 P.M., approximately 2 ½ hours before the scheduled end of the shift. Everyone agreed that they would not be paid for a full 10-hour day and they left work early. Although the Claimant had gotten permission in the past to leave early, he did not do so in this instance. Because the weekend was Labor Day weekend, the Claimant's next scheduled work day was Tuesday, September 8. He testified that it was initially his intention to adjust the hours he and the gang had worked when he returned to work on September 8. However, Mr. Zogg stated, on Saturday, September 5, 2015, he was running hours near the depot and he decided to stop by and correct his and the crew's

hours for September 3. However, when he tried to access the system, he discovered that he had been administratively locked out on Friday, September 4, 2015.

The Carrier charged the Claimant with violating Maintenance of Way Operating Rule 1.15, Duty—Reporting or Absence, when he left work early without permission. The Carrier also charged the Claimant with violating Maintenance of Way Operating Rule 1.6, Conduct, paragraph 4, Dishonesty, when he claimed 10 hours' pay for a workday that he had not completed. Following an investigation, the Carrier found Claimant guilty of the charges against him and terminated his employment.

The Carrier argues that the evidence clearly establishes that the Claimant left work early on September 3, 2015, and that he input 10 hours into the PARS system for his hours worked that day. This is sufficient to establish violations of MOWOR 1.15 and 1.6. An employer need not tolerate dishonesty in its employees, and termination was appropriate under the circumstances.

The Organization does not dispute that the Claimant violated MOWOR 1.15 when he left work early without permission. However, it contends that the Carrier has failed to meet its burden of proof with respect to the charge of dishonesty. Specifically, dishonesty requires an intent to steal and the Carrier has not established that intent. The Claimant intended to correct his hours for September 3, 2015, afterward, as was common practice, but he was unable to do so because he had been locked out of the PARS system when he tried to make the corrections. Claimant is a 10-year employee with a good record, and termination is too harsh a penalty for one incident of leaving work early.

With respect to the alleged violation of MOWOR 1.15, Duty—Reporting or Absence, there is no dispute that Claimant left work early without permission. Regarding the charge of dishonesty under MOWOR 1.6.4, the Board finds the Organization's arguments persuasive, given the practice of foremen entering hours into the PARS system before the end of a work day and then going back to correct the entry after the actual hours worked are known. That the Claimant intended to adjust his and the gang's hours is demonstrated by the fact that he went to the depot over the weekend on his off-duty time to do just that, rather than waiting until the next work day on Tuesday, September 8, 2015. Failing proof that the Claimant intended to claim pay for

hours he had not worked, the Carrier has not met its burden of proof on the charge of Dishonesty.

This brings us to the question of the level of discipline imposed. The Claimant violated MOWOR 1.15 when he left work early without authorization. This is a serious rules violation, for several reasons. Because employees work out in the field, the Carrier must be able to trust that they will work a full day. But for Ferguson's desire to check on the bridge that Claimant's gang was working on, their leaving work early on September 3, 2015, might not ever have come to light. The Claimant knew that he had to obtain permission to leave early, and he had done so in the past. More importantly, as a Foreman, he was to some extent a role model for the gang he oversaw and expected to abide by the Carrier's reasonable rules.

But was the Claimant's violation of MOWOR 1.15 serious enough to warrant termination? The Carrier has implemented a Policy for Employee Performance Accountability (PEPA) that sets forth standards for employee discipline. Appendix A formally categorizes "Unauthorized absence" as a Serious Offense, but not a Stand Alone Dismissible Violation under Appendix B. In Section II.A, Serious Violations — Progression, PEPA specifies the levels of discipline that will be imposed:

"The first Serious violation will result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 years of service and having been discipline-free during the five years preceding the date of the violation in question.

A second Serious violation committed within the applicable review period may result in dismissal."

The Claimant's Employee Transcript establishes that he had been assessed a prior Level S violation and a record suspension in June 2015 for "Use of an electronic device while operating company vehicle." The Carrier justifies its decision on PEPA, which states that a second Serious violation "may result in dismissal." PEPA must be administered consistent with the principles of just cause. While some second Serious violations may warrant termination, the Board is of the opinion that, given the circumstances, the length of the Claimant's service, and his relatively good work record,

this is not one of those cases. While the Claimant's conduct in leaving work early without permission warrants discipline at some level, termination is too harsh. Claimant shall be returned to work with back pay and benefits, subject to a 30-day actual suspension.

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 18th day of June 2019.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 43717
DOCKET NO. MW-44063
OLD NRAB Case No. 3-170091
NEW NRAB Case No. 3-200065**

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
(BNSF Railway Company (Former Burlington Northern
(Railroad Company)

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 Board previously heard and decided this claim. *See*, Third Division Award No. 43717 (Knapp 2019). The Board ordered the Claimant returned to work with back pay and benefits, subject to a 30-day actual suspension. Having been unable to agree upon the appropriate remedy, the parties submitted the matter to the Board for an interpretation of its prior Award.

The Organization contends that the Carrier improperly failed to compensate the Claimant for his CDL differential and his yearly gang bonus. When the Claimant was dismissed, in 2015, he was assigned as a foreman on a mobile Bridge and Building gang, a position that required him to possess and maintain a valid Commercial Driver's License. Pursuant to the parties' Agreement, employees who are required to have a CDL license are entitled to an hourly differential of \$0.31. In addition, the Claimant was working in a position that was eligible for an annual \$1000 mobile gang

bonus each year that he was awaiting reinstatement. The principle of “making employees whole” includes wage differentials and annual bonuses, and the Carrier should be required to pay these items.

Rule 40.G of the parties’ Agreement states:

If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or discipline.

The Carrier contends that the rules only contemplate payment for direct wage loss; differentials and bonuses are not included.

Having considered the parties’ arguments, the Board finds that the Claimant should have been paid the wage differential of \$0.31 per hour, because of the position to which he was assigned when he was dismissed. The annual gang bonus is another matter, however. Employees are only eligible to be paid the gang bonus under certain conditions. The Claimant was not working on any gangs during the period of his dismissal, and it is impossible to determine whether he would have met the eligibility requirements. The annual gang bonus thus being speculative, the Board will not order it paid.

INTERPRETATION

The Organization’s prayer for additional relief is sustained in accordance with the findings above.

Referee Andria S. Knapp who sat with the Division as a neutral member when Award 43717 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of April 2021.