

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43844
Docket No. SG-44862
19-3-NRAB-00003-180312**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when the award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of L.W. Crowley, for reinstatement to service with compensation for all time lost, including skill pay and overtime, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on December 1, 2016. Carrier’s File No. 35-17-0002. General Chairman’s File No. 16-132-BNSF-20-C. BRS File Case No. 15782-BNSF.”

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 held the position of Signal Foreman in the Carrier's service. On February 9, 2016, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct and dishonesty by falsifying hours of service records for January 18, 2016, and alleged claiming pay for overtime instead of straight time for travel on January 18, 2016, for yourself and your gang, working as a foreman on gang SSCX0180. The date BNSF received first knowledge of this alleged violation is February 5, 2016."

After a formal investigation on December 1, 2016, the Claimant was found in violation of MWOR 1.6 Conduct and MWOR 1.17 Hours of Service Law and was dismissed from the Carrier's service.

The Claimant was instructed by Signal Supervisor Victor Escandon to mobilize his crew at 7 am at their headquarters in Kansas City, Missouri on January 18, 2016, in order to travel to Haslet, Texas, to report on January 19, 2016. The Claimant and the members of his gang were all present for duty on January 19, 2016, as instructed.

The Claimant allowed two members of his gang who resided in Iowa to start their day at 7 A.M. in Iowa rather than at their headquarters. After driving two hours from Iowa, these gang members worked at headquarters before beginning their travel to Texas at 2:30 P.M. and arriving at 11:30 P.M. They had a total of 16.5 hours of on-duty time, in excess of their federally mandated hours of service of no more than 12 consecutive hours. The Claimant's payroll records for these members falsely indicated that they began their day in Iowa at 7 A.M. and ended it at 7 P.M. in Texas.

Based on the Claimant's payroll records, the entire crew was paid ten hours of straight time and three hours of overtime, although the entire duration of the drive was nine hours. The overtime was not authorized by the Claimant's supervisor and the Claimant's entries caused the two members who began their day in Iowa to be underpaid.

Claimant was charged with violation of MWOR 1.6, Conduct, and

MWOR 1.17 Hours of Service Law

Employees must be familiar and comply with the requirements of the federal hours of service law. Employees are expected to use off-duty time so they are prepared for work.

The Carrier contends that the Claimant was given a fair and impartial hearing, despite going forward with the formal investigation without the Claimant being present. The Carrier contends that it postponed the hearing nine times to permit the Claimant to attend but he still did not. The Carrier contends that numerous boards have ruled that the absence of the principal at the formal investigation does not, in and of itself, negate the findings of the investigation or prove that the investigation was unfair or partial.

The Carrier contends that it has presented substantial evidence that the Claimant permitted two employees to begin their workday in Iowa rather than Missouri as directed. This caused these employees to log 16.5 hours of continuous work on that day, in violation of the federally mandated limits. The Carrier further contends that it provided substantial evidence that the Claimant falsified payroll records to hide this fact. Finally, the Carrier contends that the Claimant paid three hours of unauthorized overtime to the gang members.

The Carrier contends that the Claimant was an experienced Signal Foreman who did not simply make a clerical error, but falsified payroll records. The Carrier contends that this violation is a “standalone” dismissible offense under the Carrier’s Policy for Employee Performance Accountability (PEPA).

The Organization contends that the Claimant was deprived of a fair and impartial hearing because he was not present at the formal investigation. The Organization further contends that the Carrier had first knowledge of the incident “a week after January 18, 2016,” but failed to write the Investigation Notice until February 9, 2016, taking more than the contractually mandated 15 days to conduct its investigation.

The Organization contends that the Claimant did not violate MWOR 1.6, because there has been no showing that his actions were intentional. The Organization

contends that the Claimant made a simple clerical error when he inputted the payroll. The Organization contends that it would be absurd for the Claimant to deliberately pay himself and the gang less wages than they were entitled to.

The Organization contends that the Carrier failed to properly consider the merits of the case when it issued the harsh and excessive discipline of dismissal.

This Board finds the procedural arguments raised by the Organization to be without merit. The Carrier's witnesses testified that they first learned of the Claimant's misconduct on February 5, 2016 and the Notice of Investigation was issued on February 9, 2016. The Organization has not presented sufficient evidence to contradict this assertion to show that the Carrier's first knowledge was earlier. With respect to the Carrier's decision to hold the formal investigation in absentia, the Carrier postponed the investigation nine times while the Claimant was on medical leave. No reason, medical or otherwise, was given for his failure to appear. Prior boards have held that when an employee fails to appear at a hearing without explanation, he does so at his peril. Third Division Award 34048.

Turning to the merits of the claim, the Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

The Carrier's unrefuted evidence is that the Claimant directed members of his gang to travel in contravention of directions given by his supervisor. Then he falsified payroll records to cover up this indiscretion. Finally, he submitted records that sought payment for overtime which his gang was not authorized to work. The Organization did not rebut these facts, but argued that the Claimant's actions were a clerical error, not deliberate action. The Carrier provided substantial evidence of Claimant's guilt.

Dishonesty is a serious charge that can warrant dismissal, so the penalty is neither harsh nor excessive. This Board finds no reason to disturb the Carrier's judgment.

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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 4th day of September 2019.