

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44120  
Docket No. MW-45302  
20-3-NRAB-00003-190101**

**The Third Division consisted of the regular members and in addition Referee I.B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Kansas City Southern Railway Company  
(Former Gateway Western Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [thirty (30) day suspension ‘\*\*\* Five (5) days to be served as actual time off commencing January 29, 2018, continuing through and including February 2, 2018, and a twenty-five (25) day record suspension, which will not be served, but recorded in your personnel file as an actual suspension. \*\*\*’ (Emphasis in original)] imposed upon Mr. R. Hart by letter dated January 21, 2018 for alleged violation of General Code of Operating Rules 1.13 – Reporting and Complying with Instructions was arbitrary, excessive and in violation of the Agreement (System File 18 01 21/2017-0754 GAT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hart shall now ‘\*\*\* be eneredated (sic) of all charges and be reimbursed for all wage loss sustained as a result of the Carrier’s action. Said Claimant should have his record cleared of all charges and not affected by this decision.’”**

**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.

Claimant R. Hart established and maintained seniority in the Carrier's Maintenance of Way and Structures Department. At the time of the alleged violation of GCOR 1.13 he had approximately 28 ½ years with the Carrier and one, supposedly minor discipline. After an investigation, the Claimant was assessed the above-noted discipline because the Carrier concluded that Mr. Hart had worked twenty-four (24) hours of relief overtime on December 25, 26 and 27, 2017 without authorization when he covered the overnight shifts of a co-worker on personal leave. The resulting claim was timely filed, and properly processed on the property without resolution and, therefore, has been progressed to this Board for final adjudication.

The Carrier contends that the Claimant received a fair and impartial investigation and that the infraction has been shown by substantial evidence. Other Bridge Tenders, Mr. Sibley, who was on vacation on December 25-27, 2017, and Mr. Lemons, stated that they had been instructed in the new policy regarding overtime and were aware that the policy was immediately effective, although the Claimant said he was unaware that he needed authorization to work overtime. The suspension was in accordance with the Carrier's policy because a prior major infraction placed the Claimant at Step 3 of the Discipline Matrix. Therefore, the discipline was not arbitrary or capricious. The arbitrator should not substitute his judgment for that of the Carrier.

The Organization insists that the Carrier has failed to meet its burden of proof. The Claimant explained that he had not been told that the new policy was effective prior to 2018. For twenty (20) years authorization was not necessary in order to work overtime to cover open shifts. The "net wash" in the testimony should go against the Carrier. Moreover, the discipline was arbitrary and unwarranted, particularly when the Claimant's long tenure and one violation, said to be minor, are considered. At best, this was a technical violation. A co-worker who supposedly committed the same infraction was not disciplined; thus, the Claimant received disparate treatment.

**GCOR 1.13 – Reporting and Complying with Instructions, which the Claimant allegedly violated, states as follows: “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.”**

**The policy that Claimant Hart was said to have violated is found in a document titled “New policies for 2018.” Particularly relevant is the following item: When covering vacation, 1st shift must be on site for the entirety of the shift (0700-1500). Second and third shifts will be on a call-out basis.**

**The Claimant is alleged to have violated the above-noted Rule when, unauthorized, he covered the overnight shifts of a co-worker on leave instead of going home after he completed his shift and being available for callout. Bridge Superintendent Hamilton testified that the Claimant had not been instructed to stay and work the overtime and, therefore, was unauthorized, Call-out instructions were both written and verbal. Bridge Tender Sibley testified that he had received only verbal instructions, while Bridge Tender Lemons testified that he had signed for the relevant policy. Mr. Hart acknowledged that he had not been instructed to actually work Mr. Sibley’s shift, but indicated that as the senior Bridge Tender, he had first choice of overtime assignments. He did not believe that the new policy was in effect.**

**Obviously, the Carrier has determined that the evidence provided by Supervisor Hamilton and Bridge Tenders Sibley and Lemons is persuasive and that the Claimant’s testimony is not. The Board finds no basis on which to overrule what, implicitly, is a credibility determination.**

**The Organization contends that the discipline was harsh and unfair, in part because Mr. Lemons was said to have worked overtime for Mr. Sibley without being disciplined. No testimony about the overtime that Mr. Lemons was said to have worked was elicited during the investigation and the record contains no payroll evidence or even an assertion that such evidence requested from the Carrier was refused. What amounts to a disparate treatment defense remains an unsupported assertion that has had no impact on the Board’s decision.**

**The Carrier has met the burden of proving by substantial evidence that the Claimant violated GCOR 1.13—a minor violation under Carrier disciplinary policy. The Board finds no justification for overriding the discipline that was assessed in accordance with that policy.**

**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 11<sup>th</sup> day of August 2020.