

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44247  
Docket No. MW-45560  
20-3-NRAB-00003-190416**

**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:**

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

- (1) The discipline (dismissal) imposed upon Mr. W. Hanke, by letter dated January 25, 2018, for violation of MWOR 1.15 and MWOR 1.13 in connection with his alleged failure to report for duty at a designated time and place on November 18, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-7/10-18-0112 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Hanke shall be reinstated to service, 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.**

**The Carrier maintains the Claimant's direct supervisor and a supervisor on TP-01 both notified the Claimant throughout the week that he and his gang would be required to work on Saturday, November 18. Upon hearing of this mandatory overtime, the Claimant initially stated "I'm not working, bud." Roadmaster J. Cowper then reminded the Claimant that this was not an option, but a mandatory directive. Even though the Claimant never stated why he did not, or would not, work on November 18, Cowper took it upon himself to look for a replacement, without success. Cowper informed the Claimant that a replacement was unavailable so he would be required to come to work. The Claimant said he understood.**

**On Saturday, November 18, 2017, the Claimant did not report to work. The following Monday, when asked why he did not report, the Claimant chose not to give Cowper a reason. It turned out that he is divorced and was scheduled to have his children over the weekend. At the time, the Claimant had a prior Level S violation with a 36-month review period, meaning this incident resulted in his dismissal.**

**The Organization asserts this claim must be sustained based on the Carrier's untimely response. Rule 42 states as follows:**

**"RULE 42. TIME LIMIT ON CLAIMS**

- A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not**

be considered as a precedent or waiver of the contentions of the Company as to other similar claims.”

The investigation in this case was conducted on January 9, 2018. The Carrier’s discipline letter followed on January 25. The Organization’s appeal letter was dated February 26, 2018. The Organization’s letter of appeal went out that same day and was available to the Carrier as of March 3. The Organization did not receive the Carrier’s declination letter dated April 25, 2018 until May 3, 2018. The Organization counts 28 days in March plus 30 days in April, and three days in May totaling 61 days. It concludes the mandatory timeline established by Rule 42 has not been met.

While having a response be only a day late seems to give rise to a drastic result here, the language of the Agreement is both crystal clear and mandatory in nature. It does not countenance exceptions, extenuating circumstances or situational difficulty. The limit is 60 days, and the Board does not have either the authority or inclination to alter the language the parties have agreed to. Rule 42 specifically and expressly requires that unless the Organization is notified of declination within 60 days of grievance presentation, “the claim or grievance shall be allowed as presented.”

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the Claimant’s record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant’s medical insurance shall be retroactively restored, with deduction from the backpay herein granted 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 shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of 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 claims not expressly granted by this Award are hereby denied.

**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 23rd day of October 2020.**