

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44280
Docket No. MW-45790
20-3-NRAB-00003-200014**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn 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. M. Kirtwright, by letter dated September 24, 2018, for violation of MWOR 1.1 Safety, MWOR 1.1.1 Maintaining A Safe Course, MWOR 1.6 Conduct and MWOR 6.3.3 Visual Detection of Trains – Lone Worker/Lookouts in connection with his alleged non-compliance of on-track safety as a lone worker while performing switch inspections on March 6, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-21/10-18-0355 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Kirtwright 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.

During a May 18, 2018 prior investigation, the Claimant testified that he had not obtained track and time to inspect a switch that was within the limits of a control point. Rather, he testified that he was alone and used lone worker protection. As a consequence, by letter dated May 22, 2018 the Claimant was informed that:

“An investigation has been scheduled at 1000 hours, Friday, June 1, 2018, at the Building #3-MOW Conference Room, 1650 Murray Dr, Kansas City, MO, 64116, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged non-compliance of on-track safety as a lone worker, MP 222, Brookfield Subdivision, at approximately 0800 hours on March 6, 2018, while performing switch inspections as a Track Inspector. The date BNSF received first knowledge of this alleged violation is May 18, 2018.

This investigation will determine possible violation of MWOR 1.1 Safety, MWOR 1.1.1 Maintaining a Safe Course, MWOR 1.6 Conduct and MWOR 6.3.3 Visual Detection of Trains—Lone Workers/Lookouts.”

Following two mutually agreed to postponements the investigation took place on August 31, 2018, time and location unchanged. Following the investigation, by letter dated September 24, 2018, the Claimant was notified that the Carrier had concluded that all of the above-noted MWORs had been violated and that he was dismissed.

On October 19, 2018 the Organization filed the above-noted timely claim on Inspector Kirtwright’s behalf. The claim was properly progressed on the property

without resolution and thereafter referred to the National Railroad Adjustment Board for final adjudication.

The Carrier asserts that the claim should be denied as there is substantial evidence proving the allegation—that evidence being the Claimant’s admission that he used lone worker protection. Because safety is critical, the dismissal was appropriate, with “Conscious or reckless indifference to personal safety or safety to others or the public . . .” listed as a stand-alone, dismissible violation in the Policy for Employee Performance Accountability (PEPA). Moreover, this was the Claimant’s “second serious violation for a safety related track authority violation during an active review period.” The Organization is asking for leniency, which is not the Board’s to provide, but resides within the Carrier’s discretion. Inspector Kirtwright received a fair and impartial investigation before a fair and impartial Investigating Officer. The Organization has not shown that any alleged procedural defects were prejudicial, nor was the Claimant prejudged. Andrew Molgren, the Conducting Officer at the May 18, 2018 investigation, no longer worked for the Carrier at the time of this investigation. Therefore, the Carrier could not have compelled his appearance, which would have not added new information.

The Organization asserts that the claim should be sustained because the investigation was not fair and impartial. Because the original accuser did not appear as a witness, the Claimant was tried with “hearsay and second-hand testimony.” The Carrier’s allegation was based on facts developed during a previous investigation. Hearsay evidence does not meet the Carrier’s burden of proof in light of the Claimant’s consistent avowal of innocence. The dismissal was punitive rather than corrective and failed to take into account the Claimant’s twenty-six (26) years of satisfactory service. The PEPA, which cannot override just cause, was mechanistically applied. The remedy should not include an offset for outside earnings, but should include reasonably calculated overtime and reimbursement for premiums, deductibles and co-pays for health-related expenses and insurance necessary because of the dismissal.

At the hearing for this claim, the Board was informed that the claim stemming from a prior dismissal case had been denied. Therefore, this claim is moot.

AWARD

Claim dismissed.

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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 23rd day of October 2020.