

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44577
Docket No. MW-46197
22-3-NRAB-00003-200786**

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**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. W. Bellinger, by letter dated April 9, 2019, for violation of MWOR 1.6 Conduct and MWOR 1.15 Duty-Reporting or Absence was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D070-6/10-19-0181 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Bellinger shall ‘... be reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;**

(3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the Claimant not been removed from service; 4) health, dental and vision care insurance premiums, deductibles and copays that he would have paid had he not been unjustly removed from service. All notations of this dismissal should be removed from all carrier records, due to the Carrier's arbitrary, capricious, and excessive discipline leading to the Claimant being improperly dismissed.'"

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.

Factual Background:

The Carrier alleges in this case that the Claimant made submissions for pay and for overtime when, in fact, he drove the Company vehicle to his barn and turned it off. The Organization defends based on an allegation that the Hearing Officer met with a Carrier witness during the investigation of the case. It claims this constituted a fatal breach of Rule 40. This provision states as follows in pertinent part:

RULE 40. INVESTIGATIONS AND APPEALS

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held.

Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule. * * *

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.

E. The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record. * * *

G. 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 suspension. * * *

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

Position of Organization:

The Organization first argues that the Carrier failed to hold a timely investigation in the case. Under Rule 40A, an investigation must be held within 15 days of the Carrier's officer learning of the alleged offense. Carrier witness E. Burns had first knowledge of the incident on January 18, 2019 and January 19, 2020 (TR 99, 100), which rendered the original investigation scheduled for February 4, 2019 outside of the 15-day time limit. The Organization concludes the charges against the Claimant must be dismissed in accordance with the provisions of Rule 40J.

The Organization also maintains that the Carrier's Notice of Investigation failed to comply with the requirements of Rule 40C. The Carrier's January 24, 2018 Notice of Investigation fails to specify the charges being made. The Carrier stated in its dismissal letter dated April 9, 2019 that the Claimant was found guilty of violating MWOR 1.15 Duty-Reporting or Absence. The Carrier did not initially charge the Claimant with this alleged offense. Furthermore, Hearing Officer Hughes was hostile, angry and arrogant towards the Claimant and his Union representative. His behavior at the investigation undeniably placed the Claimant at a disadvantage and illustrated a distinct bias towards a ruling in favor of the Carrier.

The Organization points out that Hearing Officer Hughes went to Carrier Witness Burns' office during a recess and discussed the Claimant's testimony with her, had her gather evidence to be brought back in and then submitted the evidence that she gathered. In the Organization's view, the very fact that this meeting occurred is itself a clear violation of the Claimant's due process rights. However, in this instance the breach of the obligation to be impartial was incontrovertible.

Hearing Officer Hughes denied a postponement or to reconvene to a later date so that the Organization and the Claimant could try and process the almost 200 pages of exhibits entered into evidence. He then unilaterally said the hearing would be postponed until the next day, which was not enough time for the Claimant to research the data which was seven months old.

In addition to the foregoing, the Organization asserts that the Carrier violated Rule 40 yet again when it failed to render a decision within 30 days following the investigation. The Organization did not receive the Carrier's April 9, 2019 dismissal letter until April 13, 2019, which was 31 days instead of the 30 days required by the Agreement.

On the merits, the only reason the Claimant is being investigated is because he filed time claims and he asked Ms. Burns about contractors being allowed to work in violation of the rule. When she told him they were ok, he contacted the Union and then the Union Representative contacted Ms. Burns. At this point, Burns 'decided' to investigate him.

Position of Carrier:

The Carrier maintains it relies on the honor system for payroll calculation, and contended the Claimant paid himself for parking his truck. It asserts no amount of theft is excusable. In its view, the procedural violations cited were merely technical and without prejudice to the Claimant. It insists the decision to terminate was well justified.

Analysis:

Rule 40 requires a fair and impartial investigation as a prerequisite to disciplinary action. The language is clear, definitive and mandatory; the Board has no wiggle room here. If there is no fair and impartial investigation, there can be no discipline.

It is well established in applicable precedent that Rule 40 requires a claim to be granted in full in the event a witness(es) meets with the assigned Hearing Officer before or during an investigation. Numerous cases by a variety of umpires have addressed the issue and found that meetings between a Hearing Officer and a witness destroy any appearance of impartiality, even if the case is not discussed. However, in this instance, the Hearing Officer Matthew Hughs and Carrier witness Ellen Burns specifically discussed the case. (TR 165). Awards 41224, 42618, 42699 and 43682 are in agreement that such activity violates Rule 40 and requires that the claim be granted on procedural grounds. Insofar as this breach is dispositive of the claim, the Board has no need to address the parties' other allegations in the case.

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 29th day of October 2021.