

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44614
Docket No. MW-45888
22-3-NRAB-00003-200368**

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)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. S. Voss, by letter dated October 16, 2018, for alleged violation of MWOR 1.6 Conduct was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3168-E/11-19-0169 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Voss shall be reinstated to service, have his record cleared of the charges leveled against him and:**

‘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 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 the 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 co-pays than (sic) he would not have paid had he not been unjustly removed from service.”

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 Voss has established and holds seniority within the Carrier's Maintenance of Way Department, having been hired on April 16, 2007. On the date of the incident in question, he was assigned as a Machine Operator on System Tie Gang TP02. On June 6, 2018, the Tie Gang was given a Train Night. An undetermined number of the Gang, the Claimant included, spent the latter part of that evening and possibly the first third of June 7, 2018 in the parking lot of the Sherman Motor Inn in Wolf Point, MT, one of two BNSF Lodging Facilities in the area, drinking alcohol. The Claimant has admitted being drunk. He appears on the hotel surveillance video at 0356 and 0845 hours on June 7, 2018.

At about 1000 hours on June 7, 2018, Gang member Deborah Paxinos exited the hotel parking lot in her 2016 red Chevrolet pick-up truck and drove about three (3) miles before the truck's engine sputtered and died. Ms. Paxinos had the vehicle towed back to the hotel and had a mechanic come. He was able to start the vehicle but the engine immediately became inoperable and the pick-up was towed to High Plains Motors for repair. There 2-3 gallons of an unidentified liquid was found in the fuel tank, which was thereafter flushed.

Suspecting vandalism, Ms. Paxinos inquired about possible surveillance tapes, which the hotel gave to the Wolf Point Police Department. Ms. Paxinos was thereafter able to view the tapes at the Police Department and was able to identify the Claimant as having been close to her vehicle. She also was able to identify three other Gang members who were in the parking lot on June 7, 2018.

The Carrier learned of what it characterized as an alleged violation of MWOR 1.6 Conduct on June 12, 2018 and by letter dated June 14, 2018 informed the Claimant and Jered Morrison of an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged unbecoming conduct during your stay at a BNSF Lodging Facility by vandalizing another employees (sic) vehicle when parked at the Sherman Motor Inn, Wolf Point, MT on June 7, 2018 . . ." The Claimant was withheld from service pending the results of the investigation. Following the investigation, the Claimant was found to have violated MWOR 1.6 and was dismissed. The resulting claim was timely filed and properly processed without resolution and thereafter was progressed to this Board for final and binding adjudication.

The Carrier avers that the investigation was fair and impartial with no elements that prejudiced the Claimant. Rule 40 does not require pre-investigation discovery or the identification of possible witnesses in the notice of investigation (NOI). The NOI made clear the location of the events in question and the Organization never asked for clarification prior to the oft-postponed investigation. During the investigation the Organization was shown the video tapes. Ex-parte conversation between the Conducting Officer and Paxinos was explained. The video tapes, which do not violate Montana law, along with the Claimant's inconsistent testimony and failure to provide definitive answers to the Conducting Officer's questions, provide substantial evidence of the MWOR 1.6 violation. The Claimant stated memory loss due to the alcohol he had consumed. The only rational explanation for the mechanical problems that Paxinos' vehicle incurred is that the Claimant urinated in her gas tank.

Should the claim be sustained, the Claimant is due only wage loss as set forth in Rule 40.G.

The Organization contends that the investigation was not fair and impartial. Of the supposedly sixteen (16) Gang members in the hotel parking lot, only the Claimant and Mr. Morrison were withheld from service and dismissed. The NOI was ambiguous as to the location of the alleged violation and exactly what the Claimant was accused of. The incident did not occur on Carrier property or while the Claimant was on the clock. The ex-parte conversation between the Conducting Officer and Ms. Paxinos constituted collusion. The Carrier refused to consider pre-investigation discovery. The Conducting Officer testified, limited recesses, badgered the Organization to return to the investigation and would not provide a copy of the surveillance tapes that were illegal because they had been obtained without the Claimant's permission. Not all of the direct witnesses were called to testify. The Carrier has not provided substantial evidence of how the unidentified liquid wound up in Paxinos' gas tank and there is no proof that the Claimant urinated in her gas tank. During the on-property progression of the claim, the May 17, 2019 Carrier declination included as appendices copies of the Policy on Employee Performance Accountability (PEPA), the Employee Transcript, the Montana Code and EI 21.2; none of these having been submitted during the investigation. For all of these reasons the claim should be sustained and damages set forth above ordered.

The Board finds that the claim must be sustained procedural grounds. Many of the Organization's procedural contentions appear consistently in their claims and can be dismissed with only brief explanations. Nothing in Rule 40 mandates pre-investigation discovery. The NOI was specific regarding the location of the incident. A reading of the transcript supports a finding that the Organization was well aware of what the Claimant was alleged to have done. Additionally, the Claimant testified that he understood the charges. The general rule on employee behavior while off the property and on his or her own time is that what the employee does when these conditions apply is of no concern to the employer unless that behavior impacts the employer's business. In the case under consideration, the Claimant and Paxinos were staying in the same lodgings approved and paid for by the Carrier and the Claimant's alleged misdeed had the potential to have a significant negative impact on the relationships among Gang members. Thus, the Carrier was well within its rights to investigate the Claimant's behavior on June 6-7, 2018. The Board further finds that the Carrier properly withheld the Claimant from service while it investigated the alleged vandalism, which potentially constituted serious, and even disruptive,

behavior. The Board sees no need to reach a conclusion on the legality or illegality of the hotel surveillance tapes and, moreover, do not believe that this Board is the proper forum in which to resolve that contention.

Much, but not all, of the Carrier's conduct of the investigation complied with the fair and impartial dictate of Rule 40.A. The Claimant and his representative viewed the surveillance tapes during the investigation. Rule 40.A. obligates the Carrier to call witnesses that can fully develop the facts, including those in the Claimant's favor, but that obligation does not require the Carrier to call every witness listed in the NOI or to list every witness that might be called. The Board finds that the Claimant's representative was neither badgered nor denied witnesses.

However, the Conducting Officer's discussion with Paxinos at his request, even if it only involved the mechanical aspect of the investigation—presentation of exhibits—is an obvious breach of the Rule 40.A. requirement that the investigation must be “fair and impartial.” Paxinos was a key, if not the key, Carrier witness. The Conducting Officer's ex parte discussion with a significant Carrier witness was an act of impartiality and that finding holds even if the discussion had no impact on the outcome of the investigation, in part because only the Conducting Officer and Paxinos truly know what words passed between them. In on-property Third Division Award No. 41224, the Board wrote:

. . .Because the Hearing Officer is a Carrier official, it is especially important for the investigative Hearing to be conducted as fairly as possible. For the Hearing Officer, this includes avoiding not just the reality of partiality, but also the appearance of bias, either for or against any party or witness. The job of the Hearing Officer at the Investigation is to develop facts and give both the accused employee and charging officials a fair opportunity to give their version of events, in an effort to further all sides' understanding of what happened, so that the Carrier can make an informed and reasoned decision whether the accused employee is guilty of misconduct and subject to discipline. Given that the Hearing Officer is a Carrier Official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but

also that it is perceived to be a fair process. The Hearing Officer must have – and be perceived as having – an open mind, one that is not made up in advance of the Investigation. . . See also on-property Third Division Awards No. 43682, No. 42699, No. 42618.

The Carrier's breach of the "fair and impartial" dictate of Rule 40.A., standing alone, for reasons set forth above, requires a sustaining Award with further consideration of the record.

While the Board sustains the claim, it does so with a modification. The dismissal is to be expunged from the Claimant's records and he is to be returned to duty and made whole for all pay lost as a result of the dismissal, including holiday pay and overtime hours that it is more likely than not that the claimant would have worked. Money earned by the Claimant by virtue of alternate employment during the time between dismissal and reinstatement shall reduce the amount of the make-whole remedy, which will include health care expenses that would not have occurred but for the dismissal.

AWARD

Claim sustained in accordance with the Findings.

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.