

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44624  
Docket No. MW-46102  
22-3-NRAB-00003-200233**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(The Kansas City Southern Railway Company  
(former MidSouthrail Corporation)**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. J. Hudson, by letter dated May 10, 2019, in connection with an incident that occurred on April 22, 2019 when he allegedly falsified time on his payroll was excessive and without just and sufficient cause [System File 19 05 10 (007)/2019-0235 MSR].**
- (2) As a consequence of the violation referred to in Part (1) above, the Organization requests that Claimant J. Hudson be returned to work on a leniency reinstatement.”**

**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.**

After investigation held May 2, 2019 and by letter date May 10, 2019, the Claimant – an employee in the Carrier’s service since September 2007 – was dismissed for falsely reporting time on April 22, 2019.

On April 22, 2019, the Claimant was working as a Foreman on Bridge Gang 240 (a gang of five employees). On that date, the Claimant (who was responsible for reporting time) entered payroll time for himself and other members of the gang showing that all worked from 06:00 until 16:30 hours with .50 hours for lunch. Investigation Exhibit 9. However, the record shows that Claimant’s work truck was tied up at 15:21 hours (Investigation Exhibit 10; Tr. 18) and some other members of the gang were released early (as early as 13:30 hours). Tr. 8-9, 18; Investigation Exhibits 7, 7A.

While the Organization correctly argues that with respect to employees who gave statements referenced at the investigation “... the Organization can’t cross-examine them” (Tr. 14), that objection is moot because the Claimant does not deny the allegations against him (Tr. 25):

Q: ... Would you agree that you turned in incorrect time for the day on the 22nd?

A: Yes.

Q: And doing so falsifying time on a regular report?

A: Yes.

Substantial evidence shows that the Claimant admittedly submitted a false time report for himself and other members of his gang as charged.

With respect to the amount of discipline imposed, the Claimant’s record shows a number of prior discipline entries, the most recent and lengthiest being a 30-day suspension (five days actual). Carrier Exhibit K.

Falsification of records is serious misconduct. However, progressive and corrective discipline is fundamental to discipline in this industry. See First Division Award 30396 (“... the purpose of discipline is to correct employee misconduct and not punish and to do so by sending a corrective message to employees that they must comply with the Carrier’s Rules”); First Division Award 28215 (“Discipline is meant to be corrective ... [and u]nless the demonstrated misconduct is sufficiently

serious so as to warrant immediate dismissal without regard to prior disciplinary actions, that corrective goal is accomplished through progressive discipline consisting of increasing amounts of discipline (e.g., suspensions) to get the message through to the employee that he or she must follow the Carrier's Rules"); First Division Award 30490 ("... the purpose of progressive discipline being to send a message to employees that they must comply with the Carrier's rules ...").

Prior to this incident, the Claimant was not on the "bubble" in the sense that his next act of misconduct would automatically progressively move him to the dismissal level. And we note that this Carrier has imposed lengthy suspensions even after imposition of 30-day suspensions. Indeed, the Carrier's Discipline Matrix specifically lists 60-day suspensions which, depending on the rule violation, can follow 30-day suspensions. Carrier Exhibit I at 8.

This Board is not a rubber stamp of the Carrier's imposition of an amount of discipline to merely determine whether the Carrier followed its Discipline Matrix. Our function is to determine whether the discipline imposed by the Carrier in a given case was arbitrary. See e.g., First Division Award 27218:

"... With respect to whether the discipline is arbitrary, the Board is not a rubber stamp – either for imposing the amount of discipline determined appropriate by the Carrier or for limiting the discipline to that imposed ...."

The point here is that even the Carrier recognizes that there are instances where employees with 30-day suspensions on their records can receive something less than dismissal for another act of demonstrated misconduct, but our overall function is to determine whether any discipline imposed is arbitrary – even if the Carrier follows its own disciplinary guidelines.

It is well recognized that this Board has broad discretion to formulate remedies. See e.g., First Division Award 26088 ("... in the formulation of remedies, it has long been held that arbitration tribunals have substantial discretion for crafting a remedy to fit a particular circumstance"); First Division Award 27865 ("The Board has broad discretion to formulate remedies"). In this case, that broad discretion needs to be exercised.

We note that the Claimant did not try to evade the allegations of misconduct. In his testimony quoted above, the Claimant acknowledges that he engaged in the

charged misconduct. That acknowledgment by the Claimant and ownership of his actions is an indication to this Board that the Claimant is amenable to further corrective discipline – but that discipline must be strong.

To strongly send the message to the Claimant that he cannot engage in the conduct exhibited in this case and to remain an employee of the Carrier and to allow the Claimant to perhaps complete his career as a railroad employee, we find that dismissal in this case was excessive and therefore arbitrary. As a remedy – and subject to the Claimant’s passing all necessary return to duty tests and qualification requirements – the Claimant shall be reinstated to his former position. However, to send the corrective message to the Claimant that he must be completely honest in his reporting requirements in all respects, the Claimant’s reinstatement shall be without compensation for time lost. And to further send that corrective message, in the event the Claimant again engages in similar misconduct as demonstrated in this case, he shall be dismissed. To make it clear to the Claimant, his reinstatement is on a last-chance basis for the demonstrated misconduct. The Claimant may not have been on the “bubble” before, but for the type of misconduct demonstrated in this case, now he is.

### **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 15<sup>th</sup> day of December 2021.