

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44674
Docket No. MW-46434
22-3-NRAB-00003-200870**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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. B. Bolinger, by letter dated March 1, 2019, for violation of MWOR 1.15 Duty-Reporting or Absence and MWOR 1.13 Reporting and Complying Instructions was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-3238-E/11-19-0452 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Bolinger 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 co-pays than (sic) he would not have paid had he not been unjustly removed from service.

5. Straight time pay from the date discipline (sic) was assessed absent proper adjudication of rights in violation of the current agreement from April 20, 2018 until the violation is remedied to include removal of all record of this discipline.

All notations of the Dismissal removed from all Carrier records.”

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 Claimant, Maintenance Welder Brooks Bolinger has been employed by the Carrier since April 8, 2013. The Claimant was dismissed on March 1, 2019, for violating Maintenance of Way Operating Rules (“MWOR”) 1.13, Reporting and Complying with Instructions and 1.15, Duty-Reporting or Absence, on October 30 and 31, 2018, and failing to comply with his supervisor’s instructions to mark his Daily Reporting form with unapproved absences for the two days he did not appear for work. After several postponements an Investigation was held on February 1, 2019.

Before reaching the merits of the dispute, the Board addresses the Organization’s numerous procedural objections and claim that the hearing officer failed to ensure the Claimant had a fair and impartial hearing. A review of the record does not support the Organization’s allegations.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the evidence presented, the Board here finds that System Welding Supervisor Donald Comstock provided credible testimony and reliable documentary evidence that the Claimant violated the MWOR’s 1.13 and 1.15. when he failed to follow instructions to report for duty at 5:00 a.m. on October 30 and 31, 2018, and improperly submitting his absences as “approved absence” instead of an “unapproved absence” as instructed by Mr. Comstock. The Claimant admits to not reporting for his assignments and therefore, the Board need go no further in our review of those allegations.

The Claimant’s testimony that Supervisor Comstock told him to mark his absences an “approved absence” is found to be unreliable. His testimony is contradicted by Mr. Comstock who testified that he told the Claimant to mark himself with an “unapproved absence” on both days. It is well established by arbitral precedent that the Carrier’s credibility determinations of witnesses who testify during the hearing and investigation are not to be disturbed absent substantial evidence that its conclusions are arbitrary. A review of the record here

does not provide a basis to ignore the Carrier's assessment of the testimony. The Board sits in review of the Carrier's determinations made on the property and does not make *de novo* findings.

A review of the record confirms that the Carrier has applied a penalty consistent with its disciplinary policy and is not otherwise arbitrary. In his short five years of service, he amassed a poor disciplinary record which included lengthy suspensions. The Claimant was assessed a serious violation and a 36-month review period in 2017. His conduct in October 2018 addressed here is confirmation that the Claimant's recidivist tendencies continued after being given ample opportunity to correct his poor conduct.

The Board here finds that the Carrier has met its burden of proof with substantial evidence and, therefore, its decision to dismiss the Claimant is upheld.

AWARD

Claim denied.

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 28th day of January 2022.