

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44750
Docket No. MW-46532
22-3-NRAB-00003-210445

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes 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. E. Syme, by letter dated December 31, 2019, for alleged violation of MWOR 1.6 Conduct was on the basis of unproven charges, arbitrary, excessive and in violation of Rule 40 of the Agreement because the Claimant was on a “medical leave of absence and was not present at the December 10, 2019 investigation (System File S-P-2337-S/11-20-0191 BNR).

(2) The discipline (dismissal) imposed upon Mr. E. Syme, by letter dated December 31, 2019, for alleged violation of MWOR 1.6 Conduct was on the basis of unproven charges, arbitrary, excessive and in violation of Rule 40 of the Agreement because the Claimant was on a medical leave of absence and was not present at the December 11, 2019 investigation (System File S-P-2338-S/11-20-0192).

(3) As a consequence of the violation referred to in Part (1) above, Claimant E. Syme shall be reinstated to service, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered and all benefits that may apply.

(4) As a consequence of the violation referred to in Part (2) above, Claimant E. Syme shall be reinstated to service, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered and all benefits that may apply.”

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:

Notwithstanding a request for delay from the Organization, the Investigation of the Claimant's case was held *in absentia*; the Claimant was on medical leave. His representative briefly appeared, explaining that he could not provide representation with the Claimant absent. The Carrier maintains the *ex parte* Investigation was proper, in that there was no indication that the Claimant could not have attended.

Position of Organization:

Following postponements, the Claimant's Investigation was held on December 10, 2019. The Organization argues that the Claimant was on a medical leave of absence and excused himself from the Investigation. Nevertheless, the Carrier proceeded with the Investigation without either the Claimant or his representative in attendance. The Organization insists that this was an utter and obvious failure to provide a fair and impartial Investigation. The Carrier found the Claimant guilty of violating MWOR 1.6 Conduct and dismissed him from service.

The Organization cites Rule 40(A), which provides as follows:

RULE 40. INVESTIGATIONS AND APPEALS

- A. An employe 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.

The Organization requested postponement of the hearing for one more week to protect the Claimant's fundamental right to offer a defense. Instead, the Claimant was deprived the opportunity to testify on his own behalf and of the opportunity to cross examine the Carrier witnesses.

The Organization notes the Carrier has never proffered a reason that could have justified a refusal to grant a postponement of one more week for investigations that had already been delayed for six weeks. It maintains the Carrier's obstinate and unreasonable refusal to grant a postponement served to deny the Claimant his day in court.

Position of Carrier:

There were three postponements prior to the Investigation at issue. The Carrier points out that the Organization had requested a delay until then end of the Claimant's leave, which was not until December 14, 2019. The Carrier maintains that precedent uniformly holds that it may draw an inference of guilt from his absence. In its view, investigations cannot be postponed indefinitely. It notes the Organization did not request a fourth investigation and provided no documentation of any reason why the Claimant could not attend. It maintains the testimony and exhibits support the dismissal decision.

The Claimant worked as a Predictive Maintenance Inspector, with little supervision. On October 1, 2019, while reviewing the reported equipment inspections from the previous month, Mr. Hutterer came across several equipment inspections reported by the Claimant that seemed out of place. Mr. Hutterer discovered that on September 13, 2019, the Claimant reported inspecting nine separate machines between the hours of 0939 and 1014. Not only was it highly improbable that such inspections could have been completed in such a short amount of time (since the typical inspection on one machine takes anywhere between three hours to three days), several of the reported inspections overlapped each other and were conducted on machines located hundreds of miles apart. Mr. Hutterer then reviewed the work orders from the Claimant's September 13th inspections. Mr.

Hutterer found the Claimant did not report a single exception for the nine machines he allegedly inspected. As stated in Mr. Hutterer's testimony, it is very rare for an inspection to result in zero exceptions; usually, an inspection reveals nine to ten deficiencies. Finding this very unusual, Mr. Hutterer investigated further.

Despite the fact that the Claimant reported the machines inspected on September 13th, Mr. Schroedel indicated that the Claimant had reported to him that five of the nine inspected machines were inspected on the week of September 2nd and were located in Rugby, ND; Havre, MT; Shelby, MT; and Great Fall, MT. The Claimant reported that the remaining four were inspected on the week of September 9th. Those machines were located Chinook, MT; Page, ND; Aberdeen, SD, and Stanford, MT. Evidence of record showed that in order to inspect the reported machines on the week of September 2nd, the Claimant would have had to drive over 1,600 miles. For the machines reported inspected on the week of September 9th, the Claimant would have had to drive over 2,000 miles. Based on the information received, giving the Claimant the benefit of the doubt, Mr. Hutterer reviewed the Claimant's driving history to determine if it coincided with his reports.

As an inspector, the Claimant was assigned a company provided Ford F-450 Truck (Vehicle No. 26774). In order to fuel the truck, the Claimant was provided a fuel card, which required him to enter the vehicle's mileage at the pump prior to fueling. This vehicle is also equipped with a GPS data logger, which records the vehicle's speed, location, and each time the vehicle is turned on and off. When comparing the reported inspections to the GPS data logger and mileage reported on the fuel card, the recorded data shows that from September 3rd to September 18th, the Claimant's assigned vehicle was only operated for two of the twelve work days and driven approximately 150 miles. The GPS data also showed between September 4th and September 18th, the vehicle sat stationary at the Claimant's residence. The only exception to this occurred on September 12th when the vehicle was moved to the street then back to the Claimant's driveway.

The Carrier concludes that the Claimant falsified his reports. Contrary to the Organization's assertion, BNSF is not precluded from holding an investigation for an employee who is on medical leave. However, BNSF often strives to make accommodations to ensure employees with existing medical conditions can attend investigations comfortably, and if such arrangements are not possible, BNSF allows for investigation postponements. In this case, the Organization failed to prove or even state that the Claimant was unfit to attend the investigation.

There was no credible evidence proving that a medical condition prevented attendance or that accommodations could not be met, meaning the Organization could essentially “stonewall” the investigation. Arbitral precedent addressed this very issue when it denied the Organization’s claim in Public Law Board 6240, Award 14, which held: The Board also finds that the Carrier was justified in conducting the formal investigation *in absentia* in view of the fact that it had acted reasonably in granting the Organization's request for several postponements due to assertions regarding Appellant's medical condition. At some point, the Carrier is justified in requiring some medical documentation before it is obliged to continue granting adjournments. On the state of the record herein, there is no basis to conclude that the Carrier denied any request for an adjournment of the formal investigation based on any documented medical condition. Absent credible medical documentation, the Carrier would be placed in the position of allowing an employee to "stonewall" a formal investigation. Furthermore, arbitral precedent holds that claimants, who fail to attend their investigation, do so at their own risk. For instance, Referee Mason affirmed this principle in Third Division Award 34048 when he stated: “It is the Board’s conclusion that when an employee fails to appear at a properly scheduled Hearing and offers no reason or explanation for not appearing he does so at his own peril. The holding of a Hearing *in absentia* under such circumstances does not create a situation where the Hearing is not fair and impartial.”

ANALYSIS:

On October 9, 2019, the Organization requested that the investigation be postponed until the Claimant returned from medical leave. The Claimant’s leave was scheduled to end on December 14, 2019. The Carrier was legitimately concerned about the timing of the Investigation for two reasons: the allegations were fact specific and the Claimant’s memory would be important. It did grant two postponements before scheduling the Investigation in question.

The Board is aware that the Claimant’s leave would have ended before Investigation, if only the Organization’s request for one more week had been granted. This fact would make the Carrier seem unreasonable except that there is not the slightest evidentiary suggestion that the Claimant was unable to attend.

In view of these facts, we find that the hearing was fair and impartial, even though it was *in absentia*. The Claimant has provided no medical explanation for his

failure to appear. As a result, his absence is found to be volitional, and the continuance of the Investigation without him did not violate his rights.

The evidence of record provides ample support for the Carrier's finding that the Claimant falsified reports and was paid for work not performed. The Carrier's decision that this constituted a stand-alone dismissal offense was proper.

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 6th day of May 2022.