

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44752  
Docket No. MW-46568  
22-3-NRAB-00003-210386**

**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. D. Lindsey, by letter dated October 7, 2019, for alleged violation of MWOR 1.6 Conduct, EI 21.6 Weekend Lodging and EI 21.6.1 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-6234-M/11-20-0148 BNR)**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Lindsey: ‘... 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) Any 401K he had to use and the payment for match and match that he would have been making during this time.”

**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 contends the Claimant was dishonest when he improperly claimed weekend travel allowance and submitted fraudulent expenses on multiple dates beginning on July 20, 2018. It asserts he was guilty of theft when he allegedly fraudulently used CLC lodging during this period while working as a sectionman/machine operator on various mobile gangs.

The Organization alleges due process violations and emphatically denies the allegations on the merits. Insofar as the Organization has alleged due process violations in addition to a failure of just cause on the merits, the Board will address the procedural issues prior to consideration of the merits of the case.

**Position of Organization:**

The Carrier contends that Hearing Officer Breden met with Carrier witness K. Pendergraft prior to the investigation. The Organization took a photo of the meeting (Employees' Exhibit "A-2") and asked that they cease their pre-investigation conversations. The Conducting Officer and Carrier witness refused. The Organization had no way of knowing what was said during this meeting because the Claimant and his representative were excluded.

**Position of Carrier:**

The Carrier does not deny that the Hearing Officer met with a witness during a recess from the hearing. In its view, collusion cannot be assumed just because the two officers were sitting in the same area of the hotel lobby during recess.

**ANALYSIS:**

It is well established by way of applicable precedent that a fair and impartial hearing, as required by Rule 40 of the Agreement, cannot exist if the Hearing Officer confers with witnesses prior to or during the investigation. Regardless of the subject matter of their verbal exchanges, any appearance of impartiality or fairness is obliterated by such an exchange. The Board need look no further in order to find a fatal flaw in the processing of this case.

The claim is 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 and benefits restored. The Carrier shall make the Claimant 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 6<sup>th</sup> day of May 2022.**