

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 366, (Case No. 366)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 15, 2020, when Claimant Jamie A. Shain (1666510) was removed from service and subsequently dismissed on August 24, 2020, from service for dishonesty on June 22, 2020, when Claimant paid himself for overtime not worked and failed to complete duties in violation of MWOR 1.6.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing July 15, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0278) (Organization File No. 1251-BN40C5-2034)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate Claimant was assigned as Foreman on Gang TTPX0005, Position 07500, working on the Beardstown Subdivision. It was alleged that Claimant may have made time entries for overtime Claimant did not work on June 17, 22 and 24, 2020, and because of that

Claimant was directed to attend a formal Investigation on July 23, 2020, which was postponed until July 29, 2020, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged carelessness and dishonest on 06-17-2020, 06-22-20, and 06-24-20 when you paid yourself for overtime not worked and failed to complete duties which you were assigned while working as the foreman on gang TTPX0005 on the Beardstown Subdivision. The date BNSF received first knowledge of this alleged violation is July 14, 2020.”

On August 24, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

The Board notes that this is the first of two dismissal cases involving the same Claimant (the second case is Award No. 367 of this Board).

It is the Organization’s position that the Carrier did not provide the Claimant with a “fair and impartial” Investigation because the Investigation was not held in a timely manner. It argued that Rule 40 of the Agreement states that an Investigation will not be held later than 15 days from the date of occurrence. It alleged that the Carrier had first knowledge of the matter on June 22, 2020, and when the Carrier issued a Notice of Investigation with removal from service of Claimant on July 14, 2020, it was 12 days beyond Agreement requirements. It argued the Carrier’s expiration of issuance of the notice was July 2, 2020 (with a five day notice to the Claimant). It further argued that was a fatal flaw. It asked the discipline be rescinded without reviewing the merits.

Turning to the merits, the Organization argued that the Carrier alleged dishonesty because Claimant did not secure permission to work during the time claimed from the hotel room Claimant was staying at. It argued that Claimant began his Foreman position on Tie Production Gang TTPX0005 in January, 2020, and while working on various Subdivisions under the authority of multiple Roadmasters, Claimant performed compensated duties after assigned work hours at different motels. It further argued that it was a common system-wide practice for Foreman to complete their work at motels without requesting authorization to do such. It also stated that no local Supervisors ever told Claimant that completing work from a motel would not be approved. Lastly, it argued there was no proof offered that Claimant failed to fulfill his assigned duties. It concluded that the Carrier had not met its burden of proof and it requested the discipline be set aside and the claim be sustained as presented.

It is the position of the Carrier that Claimant falsified time entries for the aforementioned dates. It argued that the Drive Cam records were pulled and compared to Claimant's time entries and it was clear that Claimant paid himself for overtime while his carrier vehicle was parked at the hotel Claimant was staying at. It argued there was no reason for Claimant to spend as much time as Claimant allegedly did before and after his work shifts allegedly preparing briefing sheets, printing and planning work for the next day, etc. It further argued that Claimant was unable to state that he had permission to work from the hotel or produce any evidence showing he actually did work during the time claimed. It reiterated that Claimant did not secure permission from proper authority, therefore, Claimant was guilty as charged. It determined that in light of the seriousness of Claimant's misconduct, dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural argument that the Carrier's holding of the formal Investigation was untimely. A reading of the transcript reveals that the Organization argued at the Investigation that the Investigation and its Notice were untimely based upon the Carrier's first knowledge of the incident under charges. That same argument was made by the Organization in its appeal of the Carrier's dismissal decision. Examination of the Carrier's denial of the Organization's appeal finds it to be devoid of any time limit discussion. In its conclusion the Carrier stated:

"BNSF rejects and denies all other objections, arguments, and claims raised in the Organization's appeal. BNSF's failure to repeat or elaborate on any position, or to rebut any assertion made by the Organization, in this case, shall not be seen as a waiver or its right to do so later, nor shall it be construed as an admission by BNSF."

The Board would assume that it is likely that the Carrier disagrees with the Organization's time limit argument, but Carrier's closing statement offers no reasoning for its disagreement. The Carrier's only mention of its first knowledge of the incidents under charges was in its Notice of Investigation wherein it stated that its' first knowledge was July 14th, however, that statement was challenged by the Organization and should have been answered. The Board can think of various arguments that could be possible, but it is outside of the Board's authority to presuppose arguments in behalf of either party. Therefore, in this instance, it is determined that the Organization's argument must prevail that the Investigation was untimely because it was not challenged and the claim is sustained without reviewing the merits. Although, the Board will not review the merits it exercises its authority to note that the Organization offered a strong argument that the Claimant had done compensated work after assigned hours while on the same gang without explicit permission from different Supervisors without complaint. The Board also

suggests to the Claimant upon reinstatement to service that he makes sure that he understand all directives of his Superiors wherever he might be working.

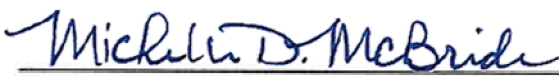
The Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from service, until reinstated in accordance with the parties' Agreement. The Board advises the parties to consider precedential Award No. 287, Interpretation of Award No. 202, of this Board in its settlement of monies owed Claimant.

AWARD

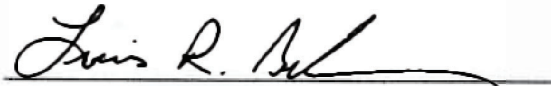
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: March 25, 2022