

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NUMBER 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 9
Carrier File No. 12-07-0050
Organization File No. B-2300-4
Claimant: Gregory W. Carter

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on February 21, 2007, when Claimant Gregory W. Carter was dismissed for failing to notify the proper authority that he was going to be absent and failing to report for duty on February 12, 13, 14, 15 and 20, 2007 violating Maintenance of Way (MOW) Operating Rule 1.15 – Duty – Reporting or Absence.
2. As a consequence of the Carrier's violation referred to in part (1) above, the Claimant should be returned to service, paid for all lost time, and that all references to this incident shall be removed from Claimant's personal record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Organization contends that the Carrier improperly dismissed Claimant Gregory W. Carter for his violation of Maintenance of Way Operating Rule 1.15 – Duty – Reporting or Absence, when he failed to notify the proper authority that he was going to be absent and failed to report for duty on February 12, 13, 14, 15 and 20, 2007. The Organization asserted that the Claimant had never been notified or counseled regarding his absenteeism prior to his dismissal on February 21, 2007. The Carrier denied the grievance, contending that its action was proper under the collective bargaining agreement.

The Claimant, Gregory W. Carter, was assigned as a Machine Operator on a Mini-Tie Gang (TMG XO522) working four days per week with regularly scheduled days off on Friday, Saturday and Sunday. According to the Carrier, the Claimant failed to report for work or contact his Roadmaster or Foreman to advise of his protracted absence commencing on Monday, February 12, 2007. The Claimant continued to be absent without approval through February 15, 2007. His regular rest days on his assignment were February 16 through 18, and Monday, February 19 was a contractual holiday. The Claimant was charged with being absent without leave on Tuesday, February 20, 2007, and dismissed from all service on February 21, 2007.

The Carrier denied the grievance, contending that the Claimant had previously been suspended on four occasions, in 1989, 1996, 2004 and 2005 for absence-related infractions, including violating the three-day no-call/no show rule; being absent ten days from duty without proper authority in August, 1996; absence for three days without reporting for duty in June, 2004; and being absent without proper authority in January, 2005. According to the Carrier, the Organization's assertion that the Claimant's failure to protect his position by notifying the Carrier that he was going to be absent cannot be excused because of the Claimant's personal circumstances, whether they include severe depression due to financial circumstances or other medical issues. The Carrier discounted the Organization's contention that the Claimant had been seeking counseling and medical treatment through the Carrier's Employee Assistance Program, as the Organization did not provide evidence to support its assertion to the Carrier.

An investigative hearing was held on March 6, 2007 at the Roadmaster's Office in Tulsa, Oklahoma before Scott Boehme as Investigating Officer. The Claimant attended this hearing, and was accompanied by a representative of the Organization, Dana Sconyers , the Vice General Chairman, Frisco System Federation, Maintenance of Way. The parties were unable to resolve their dispute within the

grievance procedure and the dismissal of the Claimant was appealed to Public Law Board 6968 for adjudication.

FINDINGS AND OPINION

The facts underlying the instant dispute are uncontroverted.

The Claimant, Gregory W. Carter, failed to report for duty as scheduled on February 12, 13, 14, 15, and 20, 2007, without notifying his Supervisor as required by Maintenance of Way Rule 1.15. The Claimant does not deny that he did not notify an appropriate Carrier representative regarding his unexcused absences in February, 2007.

Rule 1.15 – Duty – Reporting or Absence, provides that;

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on work duty working only for the Railroad. Employees must not leave their assignment, exchange duties or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

The Carrier has demonstrated persuasively that the Claimant knew, or reasonably should have known, of his obligation to report off to his Supervisor if he was going to be absent on a scheduled work day.

Moreover, the Claimant attended a Maintenance of Way Rules Requalification Class on February 18, 2006.

The Organization cited General Responsibility Rule S.28.14 of the Safety Rules, which provides:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty, working only for the Railroad. Employees must not leave their assignment, exchange duties, or allow others to fulfill their assignment without proper authority. Employees must not be absent from duty without proper authority except for a scheduled vacation period, authorized absence in excess of ten calendar days must be authorized by formal leave of absence unless current agreement differs.

According to the Organization, the applicable agreement for the Frisco portion of the Railroad provides that employees who are going to be absent in excess of thirty days must obtain a formal leave of absence. The Organization contends that Mr. Carter did not violate the applicable rule because he did not leave his assigned job for more than thirty days. The Organization further asserted that the policy for handling unexcused absences or tardiness provides for a counseling following the first violation of the rules, a formal letter of reprimand following the second violation of rules, and a formal investigation with more severe disciplinary action for any subsequent violations, and that the Carrier failed to issue the proper sequence of discipline before dismissing the Claimant.

The Carrier acknowledges that there was no counseling of Claimant Carter after his first violation. Nor was a letter of reprimand placed in his file following a second violation of the rule. According to

the Carrier, these steps were not taken because they considered the Claimant to be absent without leave and having abandoned his position after five consecutive days of no-call, no-show. The Carrier contends that the Claimant's failure to maintain proper contact while being absent for five days constituted an independent basis for terminating his employment.

In his testimony, the Claimant acknowledged that he was aware of Maintenance of Way Rule 1.15 and the responsibilities imposed under this rule. He acknowledged that he failed to call in on the days in question from February 12 through February 20, but explained, "The reasons I didn't call is my phones were cut off and I had no access to call in." In addition, a garnishment had been placed on his bank account and all of his money had been frozen at the time, so he could not call from a pay phone.

The execution/garnishment document printed on the stationery of the Sheriff of Greene County, Missouri submitted into evidence by the Organization is, however, a blank form. Appended to this form is a Claim for Statutory Exemptions, also in blank. The second form purports to establish that the debtor subject to a garnishment in Missouri may "exercise my right to hold exempt from execution, any property, real, personal or mixed, or debts and wages, not exceeding in

value the amount of \$1,250 plus \$350 for each dependant under the age of 18 years or dependant as defined by the Internal Revenue Code of 1986.” There is no record that the Claimant sought to protect any of his funds in this manner, thereby retaining some financial resources. Moreover, the notice to debtor of exemptions from levy by Ford Motor Credit Company is dated April 5, 2007, after the notice of exemption dated February 7, 2007 by Jack Merit, Sheriff of Greene County, Missouri in relation to a judgment of \$5,568.18. Thus, the Claimant’s contention that he was destitute because of a judgment that had been entered against him on or about February 7, 2007 does not explain, and therefore cannot not excuse, his failure to notify his foreman that he would be unable to report for work as scheduled for a period of five days.

The Claimant’s contention that he could not call the Company because he had no money, while worthy of great sympathy, is insufficient to excuse his failure to call in over a period of five days. The Claimant could have tried to call the Carrier collect, or the Claimant could have borrowed the use of a cell phone or asked an acquaintance, or even a stranger, to effectuate this crucial call necessary to preserve his employment.

Nothing in the evidentiary record demonstrates that the Claimant's depression so debilitated him that he was medically or practically incapable of calling his foreman, especially as the Claimant admittedly had the wherewithal to call a physician in order to make an appointment. Thus, he should have been able to enlist the aid of others to preserve his employment by calling his foreman.

The Claimant also testified that "I had surgery and was off three months at the end of last year, and had been suffering this depression and stuff from falling behind on all my bills ... (Tr. 24)." This claim has not been adequately substantiated in the record, especially to the degree necessary to demonstrate that the Claimant's medical circumstances precluded him from reporting to his supervisor for more than five days.

Under the applicable rules governing BNSF Maintenance of Way Employees, the Claimant placed his employment in jeopardy by remaining absent without leave as a no-call, no show for five consecutive work days. The Claimant was well aware of his obligation, especially in view of the four prior suspensions beginning as early as 1996 and as recurring recently as 2005. Thus, the Claimant knew that failure to apprise the Carrier for a period of five consecutive work days would jeopardize his employment and could result in his dismissal from all service.

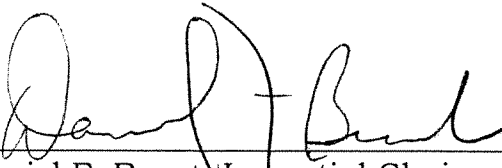
The evidentiary record does not support the Claimant's contention that his medical condition of chronic or acute depression precluded him from fulfilling his obligation to report to his foreman when he would be absent. Thus, a medical exception is not applicable in the instant case.

Finally, Rule 22.5 – Absent from Duty Procedures, cited by the Organization does not excuse the Claimant's conduct. Not only is the issue of a formal leave of absence when an employee will be absent for more than thirty days irrelevant to the instant case, but the Organization's interpretation is satisfied by the fact that the Claimant had received multiple disciplines for unexcused absences in the past. To hold that the Carrier must re-set the clock and begin a new sequence of progressively severe discipline after each occurrence is contrary to the plain language of the parties' collective bargaining agreement as it has been applied in the past.

The Carrier's determination that the Claimant's failure to fulfill his obligation to protect his employment by notifying his supervisor at least once every five days during his absence justified terminating his employment was neither arbitrary nor capricious. Therefore, no valid basis exists for the Board to overturn the Carrier's initial decision dismissing the Claimant.

Based on the evidence submitted, the Carrier did not violate the Agreement on February 21, 2007, when Claimant Gregory W. Carter was dismissed for failing to notify the proper authority that he was going to be absent and failing to report for duty on February 12, 13, 14, 15 and 20, 2007, thereby violating Maintenance of Way (MOW) Operating Rule 1.15 – Duty – Reporting or Absence. The instant grievance is hereby denied.

We so find.


Daniel F. Brent, Impartial Chair

Dated: 9-24-08

☒ I concur. () I dissent.


Carrier Member

Dated: 10/24/08

() I concur. ☒ I dissent.


Organization Member

Dated: 10/31/08