

**PUBLIC LAW BOARD NO. 7564**

Case No.: 13/Award No.: 13  
Carrier File No.: 11-10-0295  
Organization File No.: S-P-1509-G  
Claimant: Alfred L. Hull

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYEES DIVISION - IBT )  
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**Statement of Claim:**

The Carrier violated the Agreement when on April 1, 2010 Claimant Alfred L. Hull was issued a Level S 30-Day Record Suspension and a one (1) year review period for violating EI 22.6 Absence from Duty Procedures and MOWOR 1.15 Duty Reporting or Absence.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel record and make the Claimant whole for losses resulting from his being withheld from service pending investigation.

**Facts:**

By letter dated February 17, 2010 the Claimant was directed to attend an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with the events that occurred at approximately Midnight on Saturday, February 13, 2010, near First and Cedar Streets, Marysville, Washington, that led up to your being arrested by the Marysville Police Department, including your alleged intoxication while on BNSF property, fouling mainline tracks without proper authority, and conduct unbecoming a BNSF employee. In addition to these charges, you were allegedly absent without authority beginning Saturday, February 13, 2010, through Tuesday, February 16, 2010." As a consequence of these events, Claimant was withheld from service pending investigation.

**Carrier Position:**

A fair and impartial hearing was conducted and there was a proper investigation. Questions by the Conducting Officer following the Organization's closing statement were not prohibited. The introduction of the e-mail from Russell M. Schafer containing

Special Agent J. D. Burns' narrative did not prejudice the Claimant because Carrier charges related to this exhibit were dropped. Mr. Hull was AWOL on four different occasions in February 2010. He admitted this violation. The Claimant was aware of the relevant rule and committed a serious violation that required discipline beyond a counseling or a formal reprimand.

**Organization Position:**

The Carrier did not provide a fair and impartial hearing because the hearsay statement of Schafer was admitted in violation of Rule 40 and because the Claimant was questioned when the investigation was reopened following closing statements. While the violation of MOWOR 1.15 was admitted, the Carrier has never referred to EI 22.6 as a rule. The discipline was excessive because the four consecutive unauthorized absences were treated as four separate violations rather than as one instance of unauthorized absence. This treatment is inconsistent with prior awards and with Supervisor Gordon's testimony. The Claimant was last disciplined for absenteeism over three years ago and thus should have received coaching and counseling rather than excessive discipline for what was not a serious violation. The Carrier was not justified in withholding Mr. Hull from service. The serious charges initially levied against Mr. Hull were shown to be unfounded. The Carrier inappropriately attached the PEPA to Mr. Osborn's October 10, 2010 response as that Policy was not a part of the original record compiled during the investigation and inappropriately added a new charge. The Carrier has ignored its own progressive discipline policies.

**Findings:**

For two reasons the Conducting Officer failed to conduct a fair and impartial hearing as required by Rule 40. First, the inclusion of Exhibit 4, a February 16, 2010 e-mail from Russell M. Schafer to Supervisor Gordon containing the narrative of Marysville Police Department Special Agent (S.A.) Burns deprived the Claimant of the right to "confrontation and cross-questioning." Neither Mr. Schafer nor S.A. Burns were called as witnesses by the Carrier, thus depriving the Claimant of the above-noted right, yet the hearsay document was allowed to stand as part of the record of investigation.

Second, Mr. Hull should not have been questioned following the Organization's closing statement. The testimonial phase of the investigation had been completed. Mr. Garisto, on the Claimant's behalf, had exercised his right to summarize the evidence as the Organization viewed it and to argue the implications of the evidence. The Conducting Officer was responsible for eliciting testimonial evidence prior to closing statements and not additionally as a response to closing statements. Should a re-opening of testimony following closing statements become the norm, or even an occasional exception to the rule, this could have a chilling effect on closing statements so that the Organization might say little, thus diminishing what in some instances might be an important aspect of the record.

However, despite the fact that the Board finds that a fair and impartial investigation was not conducted, the Board will resolve the Statement of Claim on substantive rather than procedural grounds because we do not find that the unfairness and impartiality prejudiced the Claimant in this particular case. Because the Carrier did not charge Mr. Hull with other than unauthorized absence, the hearsay statement is irrelevant. And, the testimony adduced after the closing statement added nothing to the Carrier's case and, indeed, was supportive of the claim for reasons noted below.

The Board's decision not to resolve the claim based on the Rule 40 violation is limited to the facts of this particular claim and is not intended to set precedent for future claims. The Board acknowledges that there may be future investigations where the degree of partiality and unfairness may be so severe and so harmful to the Claimant as to require that a claim be sustained solely on the basis of the Rule 40 violation.

Consideration of the seriousness of Mr. Hull's violation involves both the allegations contained in the February 17 and 22, 2010 letters directing the Claimant to attend an investigation and the specific charge of unauthorized absence. The Carrier has alleged "intoxication while on BNSF property, fouling mainline tracks without proper authority and conduct unbecoming a BNSF employee." These allegations did not result in direct, related charges by the Carrier or in eyewitness testimony supporting the allegations. Mr. Hull acknowledged that he had "had a few beers" before he was apprehended at a time when he was off duty and was crossing the BNSF tracks while on a public roadway (TR-23).<sup>1</sup> These allegations resulted neither in charges nor in substantial evidence that would allow the Carrier to meet its burden of proof had the Claimant been so charged. Furthermore, the evidence establishes that the Claimant was not incarcerated because he was drunk, disorderly or trespassing but because of an open warrant for his arrest, presumably because of an earlier, unrelated occurrence.

While any of the allegations, if proven, might be considered a serious violation, none were proven. In essence, the Carrier did not pursue the allegations during the investigation other than asking Mr. Hull a couple of questions about them. There is no evidence that justifies the decision to withhold the Claimant from duty pending investigation.

Nor did the four consecutive days of unauthorized absence justify withholding the Claimant from service once he was released from jail. Treating the four days, all the result of the one open warrant, as four separate violations is inconsistent with the Carrier's own actual treatment of the four absences and with precedent in the railroad industry as found in the decision in Public Law Board 4768, Award 58. The Carrier applies a progressive discipline policy as set forth in EI 22.6.1., with the progression including counseling, a letter of reprimand and thereafter formal investigations. The Claimant admittedly violated MOWOR 1.15 but the violation was not "extended unauthorized absence," which the Carrier has not defined. The absence should not have been treated as a serious rule violation under the Policy for Employee Performance

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<sup>1</sup> TR-23 is the citation to the investigation transcript and page number.

Accountability. The Board finds it unnecessary to consider whether EI 22.6 is actually a rule because it is redundant.

Because the Carrier has not shown via testimony or documents produced before Mr. Garisto's closing statement that the Claimant had prior informal or formal discipline for unauthorized absence, the February 13-16, 2010 continuous absence should have been treated in accordance with the procedure testified to by Supervisor Gordon and the Claimant should have been counseled and no more.

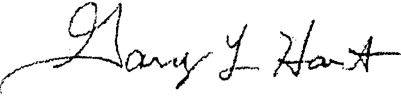
The Claimant was not charged by the Carrier with violations directly related to "the events that occurred at approximately Midnight on Saturday, February 13, 2010. . ." Furthermore, there is no evidence in the record that the Marysville Police Department filed civil or criminal charges against the claimant because of his behavior on February 13, 2010. There is no evidence that on that evening the Claimant was intoxicated, fouled the mainline tracks without authority or engaged in conduct unbecoming a BNSF employee. Therefore, the Carrier has shown no justification for withholding the Claimant from service pending investigation.

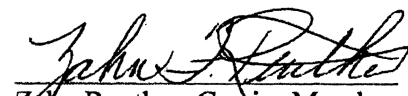
**Award:**

Claim sustained.

**Order:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made and that the Level S 30-Day Record Suspension and one (1) year review period for violating MOWOR 1.15 Duty Reporting or Absence be expunged from the Claimant's personnel record. The Carrier will make the claimant whole for all losses resulting from his being withheld from service pending investigation. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.

  
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Gary Hart, Organization Member

  
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John Reuther, Carrier Member

  
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I. B. Helburn, Neutral Referee

Austin, Texas  
June 28, 2013