

PUBLIC LAW BOARD NO. 7564

Case No.: 15/Award No. 15
Carrier File No.: 11-10-0408
Organization File No.: S-P-1527-G
Claimant: Terry R. Klein

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on June 1, 2010 Claimant Terry R. Klein was issued a Level S Thirty (30) Day Actual Suspension and a three (3) year review period for violating EI 22.6 Absence from Duty Procedures, MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.15 Duty – Reporting or Absence, MOWOR 13.1 Rules, Regulations, and Instructions and MOWOR 1.6 Conduct.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel record and make him whole for lost earnings.

Facts:

By letter dated March 31, 2010 the Claimant was directed to attend an investigation on April 9, 2010 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your allegedly leaving your assignment early without permission from your supervisor on March 26, 2010, while working as Foreman assigned to gang BBCX0381, on the Scenic Subdivision, on duty 0700 hours to 1530 hours." After agreed-upon postponements, the investigation was conducted on May 5, 2010. The claimant was withheld from service pending the investigation.

Carrier Position:

The Organization presented no evidence of other than a fair and impartial hearing. There were no procedural irregularities and there was no badgering of the Claimant. The Conducting Officer repeated questions because the Claimant was evasive. There was no requirement to hold the investigation in Spokane so that holding it in Seattle did not violate the Claimant's contractual rights. The Organization has not shown that the Claimant's guilt was prejudged and the Claimant was not placed at a disadvantage by the unavailability of Ms. Teaford.

The Carrier met the burden of proving the charges with substantial evidence. The Claimant admitted that he left early without proper authority. Thereafter the Claimant had ample opportunity to change the inaccurate time records he submitted, but did not. Mr. Stockwell testified that he did not see the Claimant eat or work during the lunch period. Entering time not worked is akin to theft.

The discipline was proper considering the two charges against the Claimant and the fact that falsification of the time records is a dischargeable offense. The discipline should be considered lenient under the circumstances.

Organization Position:

The Claimant was not provided a fair and impartial investigation for several reasons. He was the only one charged and thus his guilt was prejudged. The investigation was held in Seattle rather than the Claimant's Spokane headquarters, requiring him to make a 600 mile round trip at his expense, including meals, lodging and incidental costs. The Conducting Officer served as the Carrier's advocate, badgering the Claimant, refusing the Organization's evidence of disparate treatment and find Mr. Stockwell's testimony credible despite an admission of memory problems. Also, Supervisor Gordon's testimony cannot be considered credible because it contained many contradictions.

The Carrier has ignored relevant Rules in the negotiated agreement. The testimony of the Claimant, Mr. Tils and Mr. Keuter established that the crew worked during the designated 11 – 11:30 lunch period because they had track time then. The Claimant stated that he has never been told to call for authority to work through lunch. Doing so was an efficient use of resources. Because the designated lunch period was lost to work, the crew was due forty-five (45) minutes of overtime and twenty (20) minutes for lunch. The Claimant followed the practice of allowing the crew the last forty-five (45) minutes on Friday for the purpose of washing up, which could not be done at the hotel because they had checked out that morning, and eating lunch. The Claimant did not allow the crew to leave early and therefore did not need the supervisor's permission. When the Claimant spoke to Supervisor Gordon at 3:15 and asked if he should return to the hotel, the supervisor said to go on, in essence authorizing the Claimant to leave.

The Claimant simply applied his understanding of the labor agreement. He had not been instructed on interpreting that agreement or on how to fill out payroll forms. There was no theft or time and no dishonesty. The Carrier has not shown an intent to be dishonest. If anything the Claimant and Mr. Tils were not paid for all the time due because of the missed lunch period.

The Carrier has erroneously applied EI 22.6, which is a policy and not an instruction and which specifies counseling for a first offense of unapproved absence, rather than the overly harsh discipline the Claimant received. The Carrier also violated its own Vision & Values Statement.

Findings:

Because this investigation was not fair and impartial and because the Carrier cannot prove the alleged falsification of time, this Board must set aside the discipline. Both of the above-noted shortcomings will be considered, although either, standing alone, would be sufficient grounds for the Board's action.

The investigation was not fair and impartial for one overriding reason and two other reasons deemed significant. First, the Conducting Officer refused to accept as evidence documents provided by the Organization that purported to show that the Claimant's discipline was harsher than that issued to similarly situated employees—in other words, that the Claimant was disparately treated. The Carrier is required to prove the charges against the Claimant by substantial evidence. The Organization's most obvious defense against the charges is to indicate why proof does not exist. But even if the charges can be proven, the Claimant has a right to another defense, which is that he has been disparately treated in one of two ways. First, the Organization can attempt to show that others who have acted similarly have not been disciplined at all. Second, the organization can attempt to show that others who the Carrier has disciplined for similar behavior have received lesser discipline. In PLB 7564, Case No. 11, this same Board set aside the discharge of a Claimant where a violation was found because the Organization was able to show that others who had engaged in the same behavior had not been disciplined. In that hearing, the Conducting Officer allowed the Organization to introduce evidence of disparate treatment, which is an affirmative defense.

In the case now under consideration, the Conducting Officer, in what the Board believes was an unfortunate and fatal misunderstanding of the process called for by Rule 40, refused to allow the Organization to enter evidence of disparate treatment. Even after the Conducting Officer determined that the Claimant had committed the alleged violations, a second decision about the appropriate level of discipline would have been necessary. The Organization's disparate treatment evidence might have impacted that second decision. This Board does not render a judgment about whether the rejected evidence would have been sufficient to show disparate treatment. What is critical is that the Organization was precluded from making its case on the Claimant's behalf. The Claimant's due process rights were ignored, thus creating an unfair and impartial investigation.

Adding to the deficient investigation was the Conducting Officer's badgering of the Claimant. The transcript at pp. 106-110 provides examples of the Conducting Officer asking the Claimant multiple times in a variety of ways whether he had worked eight (8) hours on Friday, March 26, 2010. Other examples of unduly repetitious questioning can be found elsewhere in the transcript. The Board does not feel as though the repetition was a response to the Claimant's evasiveness, but rather a reaction when the Conducting Officer did not get the desired responses. At p. 109, line 18, the Conducting Officer asks, "Mr. Klein, is 1445 earlier than 1530?" The question adds nothing to the factual record, is irrelevant to the Conducting Officer's responsibility to simply get the necessary facts in the record and is viewed by this Board as argumentative and indicative of the Conducting

Officer's partiality. The Board fully accepts the approach taken in Third Division Award 41224, a recent on-property award that noted that the Hearing (Conducting) Officer, as a Carrier Official, must avoid both the reality and the appearance of partiality and simply develop the facts.

This Board also subscribes to the long-standing practice in the industry that with rare exception, the Conducting Officer's credibility determinations are to be accepted because the Conducting Officer had the opportunity to question and observe the demeanor of the various witnesses. This case is the rare exception to the rule. The Conducting Officer appears to have found credible the testimony of Carrier witness Mr. Stockwell and to have dismissed the testimony of Organization witnesses Mr. Tils and Mr. Keuter as well as that of the Claimant about the 11 – 11:30 lunch period. The Organization witnesses all testified without hesitancy that they worked from 11 – 11:30 because they had track time. They had no trouble remembering what had occurred on March 26, 2010. Conversely, Mr. Stockwell said that he did not see the Claimant work or eat lunch during the designated lunch period and noted that the crew did not take lunch even though there was time to eat. However, the transcript at pages 79-83 shows that at several points Mr. Stockwell indicated that his memory was imperfect about things that had occurred that day. The Board cannot accept testimony from an imperfect memory that is so at odds with others who were clear about what took place. In the Board's view, what appears in this instance to be a "rush to judgment" is consistent with the partiality of the investigation as noted above.

The Claimant has been charged with 1) leaving his assignment without the supervisor's permission and 2) falsification of time. Clearly the second charge is by far the more serious of the two. General Manager Jones' August 13, 2010 response to the Organization's claim noted that falsification of time is considered a dischargeable offense. Thereafter on December 6, 2010 General Director of Labor Relations Osborn responded to General Chairman Glover that falsification of time could be viewed as irreparably damaging to the employer-employee relationship.

Proof of the falsification charge consists of two elements. The Carrier must show that falsification occurred and also that it was intentional. The Board finds credible the testimony of the Organization's witnesses that on March 26, 2010 the crew worked through the lunch period because they had the necessary track time. Rule 28 is clear on allowing payment of forty-five (45) minutes for the missed thirty (30) minute lunch period plus an additional twenty (20) minutes without loss of pay to eat lunch. There is evidence that early quits, at least on Fridays, which this was, have occurred for many years for a variety of reasons, including instances when work precluded a lunch period. Furthermore, the record is clear that overtime is not allowed without the permission of the supervisor.

Also important to the Board's consideration is the Claimant's testimony that when he spoke to Supervisor Gordon at 3:15 and asked if he should return to the hotel, he was told to continue on his way and that the two of them would talk about the incident during the following week. When Supervisor Gordon was recalled during the investigation, he

stated that during that conversation he did not "give any representation that it was okay for Mr. Klein to be absent from his duties," but neither did Supervisor Gordon contradict the Claimant's earlier testimony (TR-144).¹ Had there been a follow-up conversation between the two, it is possible that the matter might have been resolved short of an investigation.

Weighing all of the credible evidence, the Board concludes that the Claimant made mistakes in judgment, but that he did not intentionally falsify time. Because the crew worked through lunch and thus incurred overtime, the Claimant should have requested prior authorization to do so as he did not have the latitude to make the decision on his own. That error in judgment and the subsequent decision to apply his interpretation of the negotiated agreement, about which he had not been schooled, and the practice that existed, do not equate to dishonesty. The Claimant's entries in the time records, his included, may have been improper but they were not intentionally dishonest. The Claimant would have had no reason to change the entries given his belief that he had not done anything wrong. The Carrier has not shown a violation of MOWOR 1.6.

Even if the claimant was guilty of leaving his assignment without the supervisor's permission, and that remains an open question in view of the 3:15 conversation with Supervisor Gordon, the Board sees no need to address the matter. Under some contractual formulations, failure to prove the more serious of two or more charges would result in reduced discipline but not a removal of all discipline. Because in this instance the more serious charge has not been proven, the Carrier has unjustly disciplined the Claimant. Omitting consideration of the question of a fair and impartial investigation for the moment, Rule 40G requires that the discipline be "set aside and removed from the record." And, as noted above, the diminishment of the Claimant's due process rights and other deficiencies in the investigation, standing alone, require the same result.

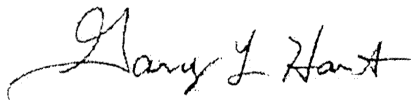
Award:

Claim sustained.

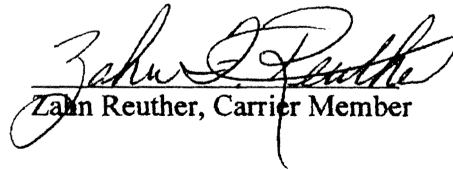
¹ The reference is to the transcript and page number.

Order:

This Board, after consideration of the above-noted dispute, hereby orders that an award favorable to the Claimant be made so that the Level S Thirty (30) Day Actual Suspension and three (3) year review period are set aside and expunged from the Claimant's personnel records. The Claimant is to be made whole for lost wages and benefits, to include wages and benefits lost because the Claimant was withheld from service pending the investigation. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 28, 2013