

PUBLIC LAW BOARD NO. 7564

Case No.: 22/Award No.: 22
Carrier File No.: 10-12-0400
Organization File No.: C-12-D070-12
Claimant: Ronald D. Jensen

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

Statement of Claim:

The Carrier violated the Agreement when on May 10, 2012 Claimant Ronald D. Jensen was issued a dismissal for violation of MOWOR 1.6 Conduct.

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

Facts:

By letter dated April 16, 2012 the Claimant was directed to attend an investigation on April 24, 2012 "for the purpose of determining your responsibility, if any, in conjunction with your alleged theft of BNSF property and alleged misuse of BNSF Company Fuel card. The Carrier's first date of knowledge with this alleged violation is April 16, 2012." After a mutually agreed to postponement, the investigation was conducted on May 1, 2012. Claimant Jensen had been notified that he was being withheld from service pending results of the investigation.

Carrier Position:

The investigation was fair and impartial. The Claimant was not prejudged, the Carrier is not required to engage in discovery and if there were shortcomings in the investigation, they were irrelevant because the Claimant admitted to the charges. The admission provides substantial evidence and eliminates the need for additional proof. The Policy for Employee Performance Accountability (PEPA) lists dishonesty as a stand-alone infraction justifying dismissal. Claimant acknowledged that he knew the rules. There is strong precedent for dismissing dishonest employees. Only the Carrier, not the Board, is empowered to provide leniency. If the Board were to find a lack of substantial proof, it must remove the discipline and reinstate the Claimant with a make-whole remedy. However, such remedy should include an offset for other earnings.

Organization Position

The investigation was not fair and impartial because the Organization's pre-hearing request for copies of the evidence was denied and because Assistant Roadmaster Lorenzo was a surprise witness who introduced rules that the Claimant was prejudged to have violated. The Carrier produced no evidence besides the two receipts for gas purchased in 2012. The Claimant, a long-term, dedicated employee, was forced into desperate circumstances by the costs of his wife's illness. Carrier fuel cards were readily accessible to employees. The Claimant showed remorse and offered to make restitution of \$219.45. While the Carrier noted that the Claimant's prior record was considered, the record was not made available to the Organization to check for accuracy. Finally, contrary to the Carrier's own policy, the dismissal letter was signed by other than the Conducting Officer and thus the signee had no direct knowledge of the investigation.

Findings:

Claimant Jensen was provided a fair and impartial investigation. The Agreement between the parties does not mandate discovery in any form. Thus the Carrier had not obligation to provide wither a witness list or items intended as evidence prior to the investigation. The Claimant's representative was given an opportunity during recesses to review all evidence, including the surveillance tapes, and declined to review the tapes.

Whether or not Assistant Roadmaster Lorenzo prejudged the Claimant is irrelevant. The Organization cannot show that prejudgment existed or that prejudgment extended to the Conducting Officer. Regardless of what occurred prior to the investigation, the Carrier was required to produce substantial proof during the investigation. Furthermore, the claimant had admitted the theft of gas the day after the surveillance. And, it bears repeating that the Claimant's admission, both before and during the investigation, of the wrongful use of the Carrier's fuel card removed the possibility that shortcomings in the hearing, if any existed, prejudiced the outcome.

The Claimant used the BNSF fuel card to purchase fuel twice, once not only for himself but also for his father. The purchase of gas with Carrier funds for the father diminishes in the Board's mind the argument related to the financial impact of the claimant's wife's illness. This was about more than simply making ends meet.

The Board does not make light of the Claimant's personal problems or ignore the fact that the Claimant ultimately was cooperative with Deputy Chief Carruthers and Special Agent Loftus. The Board believes that the Claimant was sincere in his apology, contrition and offer to make restitution, although the Board notes that because of Claimant's admission that he had been converting Carrier gas to personal use beginning in 2010, full restitution would involve many thousands of dollars more than the \$219.45 total of the two receipts entered in evidence.

This is a case in which the Claimant's prior record is irrelevant. PEPA contains a "non-exhaustive list of violations which may result in immediate dismissal." The second

item on that list is "Dishonesty about any job-related subject. . ." The Claimant testified that he was aware of the rules, this one included. There is precedent in the industry for proven theft to result in dismissal, as it constitutes an irreconcilable breach of trust. A good faith offer to make restitution does not erase the basic fact that Carrier property was wrongfully converted to personal use. Proof in this instance is not simply substantial, but beyond any reasonable doubt.

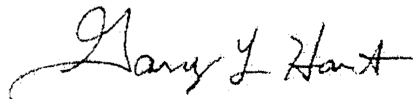
While the Claimant's wife's health and associated costs may well have played a role in the Claimant's unfortunate and illegal decision, any leniency to be ascribed to the Claimant's circumstances belongs to the Carrier. It is well settled in the industry in general and on this property in particular that leniency is not within the Board's purview. The Carrier has decided that the seriousness of the proven infraction dictates dismissal and the Board has no basis for finding otherwise.

Award:

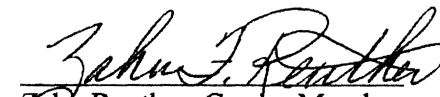
Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
June 28, 2013