

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No.: 27/Award No.: 27  
Carrier File No.: 11-12-0248  
Organization File No.: T-D-4101-G  
Claimant: Kelly James Barthel

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

The Carrier violated the Agreement when on May 14, 2012 Claimant Kelly James Barthel was issued a standard 10-day record suspension and a one-year review period for violation of MOWOR 1.13 Reporting and Complying with Instructions.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel file.

**Facts:**

By letter dated March 27, 2012 the Claimant was directed to attend an investigation on April 2, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to move vehicle 22083 from St. Cloud, Minnesota to Hibbing, Minnesota on Monday, March 19, 2012 as instructed, while working as Foreman Twin Cities East Zone Crew TMGX1026. In addition, you did not submit a production report as required resulting in production disruptions on Tuesday, March 20, 2012, while working as Foreman Twin Cities East Zone Crew TMGX1026. BNSF RR first knowledge of these alleged failures was Tuesday, March 20, 2012." The Investigation was postponed by mutual agreement and was held on April 24, 2012.

**Carrier Position:**

The investigation was fair and impartial. The Claimant's admission that he did not move the pickup truck makes any procedural error moot and eliminates the need for further proof. The Claimant failed to transport the truck from St. Cloud to Hibbing and failed to complete a production report on March 19, 2012; therefore the discipline was justified and in accordance with the Policy for Employee Performance Accountability

(PEPA). In essence, the Organization is asking for leniency, but that is the prerogative of the Carrier and not of the Board. The Organization's appeal is to go to the Office of the General Manager and not the General Manager by name. The Claimant was not prejudiced because the General Manager had been replaced. The Organization's objection in this regard is baseless. Should the claim be sustained, the Claimant is not due make-whole pay as no wages were lost because of the record suspension.

**Organization Position:**

The investigation was not fair and impartial as the Carrier had no interest in obtaining the facts and called three witnesses without advance notice. Conflicting Carrier witness statements were disregarded. The Carrier attempted to get even with the Claimant for exercising his Rule 19A rights. Thus charges were trumped up and pyramided and the resulting discipline was harsh and excessive rather than corrective, even though the Claimant was a hard-working, 18-year employee who met or exceeded production goals. The Claimant made arrangements to move the gang's vehicles to Hibbing, but he could not have moved his pickup truck on Monday and reported to his new assignment on Tuesday. There would have been no vehicle to get him back had he taken the pickup to Hibbing. The failure to deliver the truck to Hibbing did not cause a failure to production. The Claimant told Foreman Babler on Tuesday that he had a new assignment. It was not necessary to file a production report on a moving day, but in any case it was the Assistant Foreman's responsibility to file the report. The Organization believes that it is required to appeal to the General Manager as an individual and not to the Office of the General Manager.

**Findings:**

The investigation was fair and impartial as the parties' Agreement contains no discovery language that would require the Carrier to give advance notice of the witnesses it expected to call. Furthermore, the Board does not view the Carrier as pyramiding charges. The Board acknowledges that the Claimant was charged with a second, more serious violation of the Operating Rules, but that involved different elements of the Claimant's conduct and has not been considered herein. In fact, contentions contained in the Organization's appeals and the Carrier's responses that arose from evidence not a part of this investigation are viewed as new evidence not properly considered by this Board. Similarly, contentions unrelated to the charges in this case also have not been considered.

The Claimant is alleged to have violated MOWOR 1.13 Reporting and Complying in two ways: 1) failure to move from St. Cloud to Hibbing, MN with his pickup truck on Monday, March 19, 2012 as directed and 2) failure to submit a production report for March 19, 2012. The production report is considered first. The Organization provided testimony that a production report is not required on a moving day since there is no production to report. This testimony was not contradicted by Carrier witnesses. The Organization also provided convincing testimony that the responsibility for submitting production reports had been delegated to the Claimant's Assistant Foreman. Had a report been required and had the Assistant Foreman neglected to submit

the report, the Claimant would not have escaped notice because the ultimate responsibility to ensure that the report was issued was his. However, there is no justification for the Carrier to charge the Claimant with failure to submit a production report on a moving day when there was no production and therefore no report was due. This element of the allegation has not been proven with substantial evidence.

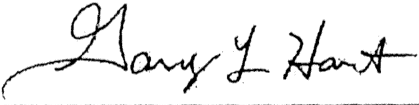
The second element of the allegation involves the failure to move to Hibbing with the pickup truck as directed. The investigation established that as of Monday morning, March 12, 2012 the Claimant knew that his Rule 19A request had been approved, that he was to report Tuesday to his new assignment and, that as a consequence, he was in a seemingly impossible situation. The Claimant could not have made the move from St. Cloud to Hibbing on Monday and have reported as newly scheduled on Tuesday. The Board credits the Claimant's testimony that he was not obligated to tell Supervisor Babler that the Rule 19A request had been approved, although courtesy and coordination suggest that such a call might have been made. But, as a consequence of the new assignment, the Claimant was unable to carry out the directive to move, which he acknowledged would have included the pickup truck. Even though the Claimant had made arrangements for the rest of his gang to move, he, too, was part of the directive. Therefore, the Board finds that the Claimant did have an obligation to inform Supervisor Babler or another superior Carrier officer of the dilemma so that the inability to carry out an order while the Claimant was still Foreman could have been addressed. Simply put, the Claimant had a choice on Monday to say something or say nothing. He made the wrong choice, resulting in at least some lost production on Tuesday because his absence had to be addressed. Had the Claimant made Carrier officers aware of the dilemma on Monday and had he still been charged with not making the move as directed, it would have been difficult if not impossible for this Board to have concluded that there was substantial evidence to support the allegation. Because the Claimant elected to take matters into his own hands rather than attempt to resolve the dilemma he was properly charged with not Reporting and Complying. Because he had received discipline five months earlier, the 10-day record suspension and one-year review period were consistent with PEPA for this single violation.

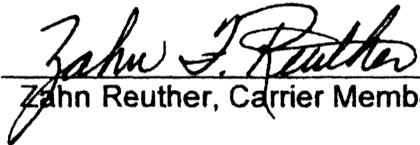
**Award:**

Claim denied.

**Order:**

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

  
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Gary Hart, Organization Member

  
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Zahn Reuther, Carrier Member



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I. B. Helburn, Neutral Referee

Austin, Texas  
February 12, 2014