

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No.: 28/ Award No.: 28  
Carrier File No.: 11-12-0249  
Organization File No.: T-D-4100-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 dismissal for violation of MOWOR 1.15 Duty Reporting or Absence and 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 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 dishonesty on Friday, March 23, 2012 at approximately 0815 hours when during conversation with Division Engineer Brian Ferencak, you did not answer truthfully regarding your whereabouts on Monday, March 19, 2012, when you failed to complete your shift on Monday, March 19, 2012, when you left work early without approval from proper authority, and your failure to accurately report your time for Monday, March 19, 2012." After two mutually agreed to postponements, the investigation was conducted on April 24, 2012. Claimant Barthel had been notified that he was being withheld from service pending results of the investigation.

**Carrier Position:**

There was a fair and impartial investigation. As other awards have stated, the Organization must raise objections at the hearing, not thereafter, in order to have them considered. The objection to Roadmaster Golding's failure to testify came after the hearing. Furthermore, the Carrier was not obligated to provide the Organization with

advance notice that Supervisor Engineering Support Jacob Schurman and Welding Supervisor Luke Babler would testify. There was no prejudgment of the Claimant as Rule 40B allows the Carrier to withhold employees from service for a serious infraction of rules, but even prejudgment does not preclude a fair and impartial investigation. The Claimant has admitted much of his errant behavior in this case, satisfying the Carrier's burden to prove the charges with substantial evidence. The Claimant admitted that he left work early and that he did not report this to the timeroll maker. Then the Claimant tried to cover this with a false story to Division Engineer Ferencak. This was the Claimant's second serious offense in six months. This latest offense involving dishonesty, standing alone, was grounds for dismissal in accordance with the Policy for Employee Performance Accountability (PEPA), Appendix B. Prior awards establish dishonesty as an offense justifying dismissal. In essence, the Organization is asking for leniency, but it is well established that leniency is the prerogative of the Carrier and not of the Board. However, should the Board find that the charges have not been proven, reinstatement must be in accordance with Rule 40G and the Carrier's back pay liability should be reduced by the Claimant's interim outside earnings as noted in prior awards. Finally, the Organization has been instructed to direct appeals to the Office of General Manager and not the individual holding the position. Changes in individual General Managers do not serve to waive Carrier rights in these matters.

**Organization Position:**

The investigation was not fair and impartial because the Carrier prejudged the Claimant's guilt when it withheld him from service and because this action was based on charges later amended in violation of Rule 40B. The Carrier did not prove dishonesty because Roadmaster Christopher Golding, who was present when Division Engineer Brian Ferencak interviewed the Claimant, did not testify to corroborate the Division Engineer's testimony. The incident came about because of a personality conflict between the Claimant and others. The Carrier was unhappy with the Claimant's use of Rule 19A and his contractual seniority rights. It would have been physically impossible for him to have worked on Monday and then to have reported to his new assignment on Tuesday. Since the Claimant was not the one who had entered his time for Monday, that could have been simply a mistake and not a dishonest act. The dismissal was overly harsh and therefore punitive as the Claimant had 19 years' tenure with a good work record.

**Findings:**

The May 14, 2012 letter of dismissal to the Claimant cited two reasons for the discipline. The first involved the Claimant's failure to "answer truthfully regarding your whereabouts on Monday, March 19, 2012" when he did not complete his shift "and left work early without approval from proper authority." The second involved the Claimant's "failure to accurately report your time for Monday, March 19, 2012." Regarding the failure to answer truthfully, during the investigation Division Engineer Ferencak recounted his March 23, 2012 discussion with the Claimant. In response to a question about how the move from St. Cloud to Hibbing went, the Claimant said that the move went well and was completed. When the Division Engineer next commented that the

Claimant's truck had not been moved from St. Cloud, the Claimant was said to have responded, "well, that's because I, uh, went up to Hibbing and carried people back to St. Cloud to, uh, shuttle the vehicles" (Transcript, p. 22). Thereafter, under the press of further questioning, the Claimant admitted to Division Engineer Ferencak that he had stayed in St. Cloud, cleared out his truck and left for home about 1330 hours without authority to do so. The Claimant in part confirmed Division Engineer's testimony when he stated that "I told him the move went great" and then confessed that he did not go to Hibbing on March 19, 2012 (Transcript, p. 49).

The Claimant was present throughout the investigation and presumably was alert to Division Engineer Ferencak's testimony. Yet at no time during his own testimony did the Claimant dispute Division Engineer Ferencak's recall of their discussion, nor is there anything in the record to indicate that the Organization disputes the accuracy of the transcript. Under the circumstances, Roadmaster Golding's testimony to confirm Division Engineer's recall of the March 23, 2012 meeting is unnecessary. Furthermore, the Organization could have called Roadmaster Golding as a witness if it believed that the Roadmaster's memory of that meeting differed from that of the Division Engineer. This charge has been proven by more than just substantial evidence.

As to the second charge, the Claimant admitted that on March 19, 2012 he went home early without obtaining proper authority and that he did not put any time in for the day and did not contact his Assistant Foreman, Karraker, to whom he had delegated timekeeping duties. In response to questioning, the Claimant acknowledged that he had a responsibility to tell the Assistant Foreman to reduce pay for the day if he left early. There is no record evidence indicating that the Claimant ever took action to ensure that his pay for March 19, 2012 was consistent with the hours that he actually worked. As an experienced Foreman with the ultimate responsibility for the time records of his gang, even though he properly delegated this work to Assistant Foreman Karraker, the Claimant had to have been aware of the imperative of accurately reporting hours worked by himself and his gang. He did not take appropriate action to protect his employer from paying for time not worked.

The Board understands that the Claimant's new assignment may have made it physically impossible to participate in the St. Cloud to Hibbing move on March 19, 2012 and then appear for his new assignment the following day. The proper response to that dilemma would have been to bring the matter to the attention of appropriate superiors in order to obtain a solution that was consistent with his Monday assignment and the operating rules and was known to the appropriate individuals. Instead, the Claimant unfortunately took matters into his own hands and engaged in two forms of dishonesty: his initial explanation of his whereabouts to Division Engineer Ferencak on March 23, 2012 and his willingness to accept payment for hours not worked. PEPA, Appendix B provides a "non-exhaustive list of violations which may result in immediate dismissal." Included in the list of "Stand Alone Dismissable Violations" is "(2) Dishonesty about any job related subject. . ." In addition, prior awards both on and off the property establish dishonesty as a dischargeable offense. The Carrier has elected to levy the most severe disciplinary measure available having considered the Claimant's prior record and tenure.

If leniency were to be exercised, it would have been at the Carrier's discretion as leniency is the Carrier's prerogative and not the Board's. There is no basis or precedent for the Board to exercise leniency in the face of the Carrier's decision not to do so.

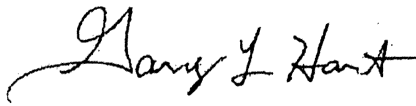
There are no procedural deficiencies that would justify setting aside the dismissal. The Organization cannot agree to Rule 40B, which allows the Carrier to withhold employees from service in cases of serious rules infractions and then argue persuasively that invoking Rule 40B invalidates the subsequent discipline because the Claimant has been prejudged. For the Board to allow the Organization's argument to prevail would have the effect of nullifying this portion of the parties' negotiated agreement. Furthermore, as other awards have stated, an initial judgment that an employee may be guilty of a rules violation does not mean that the investigation will not be fair and impartial. In the Claimant's case, he and his representative had the opportunity to present a full defense with the notice to appear at the investigation stating specifically the behavior of concern to the Carrier. That every facet of this concern may not have been verbally communicated to the Claimant when he was told of being withheld from service did not prejudice his right to a full and fair investigation.

**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