

BNSF Railway (Former Burlington Northern Railway)
- and -
Brotherhood of Maintenance of Way Employees

Public Law Board No. 7585
Case No. 15
Award No. 15
Carrier File No. 10-12-0346
Organization File No. C-12-D040-13
Claimant: Timothy Brunner

FACTS:

On February 16, 2012 Claimant Timothy Brunner, a Structures Carpenter, texted his foreman that he would not be coming in to work. He did not contact anyone else. The Personal Activity Tracking System Report showed him as not paid, not worked. On March 29, 2012, Claimant was issued a Standard 20-day Record Suspension with a one year review period for violation of MOWORs 1.13 (Reporting and Complying with Instructions), 1.15 (Duty Reporting or Absence) and 1.6 (Conduct) for failure to report to duty at the designated time and place.

Supervisor Stephanie Swanson testified that when she went to approve the time for the first half of February, she noticed Brunner had a time code 'not paid.' She said she asked Foreman Fankhauser about it and was told Brunner had not come to work that day. "He did not contact me or another supervisor to be excused that day," she said. She acknowledged that either she or his foreman could have excused him. She also admitted she did not ask his foreman whether Brunner called in and did not know whether Claimant told Fankhauser he would not be in.

Foreman Frederick Fankhauser testified that Brunner's phone was down but he texted that he would not be at work. He stated Brunner has either left him a voicemail or texted him when he was gone. He said absences can be designated as excused, unexcused or no work/no pay.

Brunner testified that in the past he used the same practice of notification and "there had never been a problem with that." He said he has never been told the way he was informing the foreman was wrong. "I did exactly what I had done in the past."

CARRIER POSITION:

Brunner was absent, the Carrier notes; he failed to report for duty. He did not contact Swanson or any other supervisor to ask to be excused. Though he told his supervisor he would not work, he did not receive a reply authorizing the absence. Since he had no authorization, the Carrier finds a violation.

MOWOR 1.13 requires employees to report to and comply with instructions from supervisors. MOWOR 1.16 requires that employees report for duty at the designated time and place. Brunner has admitted not being at work so in the eyes of the Carrier, no further proof is necessary.

ORGANIZATION POSITION:

The Organization maintains the Carrier failed to introduce any evidence that Brunner failed to comply with instructions. He followed procedures that were acceptable in the past. His absence was not deemed unapproved. As a result, discipline is completely improper.

DECISION:

It is axiomatic that an employer cannot reasonably discipline an employee for a rules violation when the rule in question is unclear or has not been consistently enforced by the employer. The fundamental purpose of progressive discipline is to give the employee a chance to correct improper behavior. But if the employee is unclear about the behavior is expected of him or her, that employee is in need of instruction, not discipline. There is nothing to correct where the employee has not been placed on notice that his or her behavior is unacceptable.

The Carrier's written rules require the employee to directly contact supervision about an absence. However, Brunner testified he has used the same way of notifying his foreman of his absence in the past without consequence. This testimony is wholly unrebutted. Indeed, Fankhauser himself stated that Brunner either left him a voicemail or text when he would be gone from work. This establishes that Brunner was not on notice that he could be disciplined for this conduct.

Fankhauser stated as follows: "I guess the reason I went no, no pay/no work is because of other things that had happened earlier and, uh, I've used unexcused and I've used excused before and, uh, after you get such a timeframe, then I decided I better put no work/no pay." This statement is difficult to decipher, but one thing is clear: Fankhauser made the determination that this was not an unexcused absence. Accordingly, Brunner was never told that his failure to report for duty could be a disciplinable offense. He was not afforded the opportunity to make the choice the Carrier accuses him of, that is, failing to come to work despite knowledge that this was a rules violation.

If Brunner is to be disciplined for failure to comply with instructions, then the Carrier must provide evidence that he was given a clear and understandable instruction, yet failed to comply. There was no such evidence. It follows that the discipline in this case was unjust.

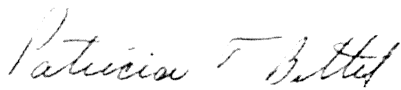
AWARD:

The claim is sustained. The discipline shall be removed from Claimant's record.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member



D. J. Merrell, Carrier Member