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

Public Law Board No. 7585
Case No. 18
Award No. 18
Carrier File No. 11-12-0183
Organization File No. S-P-1635-G
Claimant: Jordan Bailey

FACTS:

Claimant Jordan Bailey began work for the Carrier in 1994. At the time here concerned, he worked as a track inspector. On November 29, 2011, he texted his supervisor, Jack Ripplinger, stating "I won't be in today." The record does not indicate any other communication with supervision regarding his absence. He had previously received a verbal warning on August 19, 2010 for not reporting time or absence and on August 22 he was issued a written warning for this offense. Rule 1.15 requires employes to personally contact their Assistant Roadmaster or Foreman to discuss an absence, and Policy 22. 6.1 clarifies that leaving a voice mail message is not considered a contact with proper authority.

On Nov. 29 a Notice of Investigation issued setting the hearing date for Dec. 8. The alleged offense was failure to report for duty on Nov. 29. A Corrected Notice was sent on Dec. 5, 2011 setting the hearing date for Dec. 13 and changing the offense to failure to report for duty from Nov. 29 to Dec. 3. On Dec. 8, 2011, an Investigation Postponement was issued resetting the hearing date by agreement of the parties to January 17, 2012. On Jan. 16 a second Investigation Postponement reset the hearing by agreement to Jan. 24. On Jan. 13 the Medical and Environmental Health Department of BNSF issued a release for Claimant to return to work. This document listed his last day worked as Dec. 3, 2011.

The Union represented that Claimant was instituted for treatment in an intense in-patient program, which accounted for his absences as well as his failure to receive the notices issued by the Carrier. No objective, documentary evidence of this alleged fact was admitted into evidence. The Carrier produced both policy and an email confirmation that the EAP used by the Carrier is not authorized to and does not divulge employe confidential information, nor does it grant leaves of absence.

Claimant was not present at the hearing and the Union requested a delay so that it could drive out to his home 20 miles away and determine whether he could be brought to the hearing. The request was denied and the Union Representative departed. The hearing continued in the absence of Union representation, during which confirmation of letter delivery was confirmed for Dec. 3, Dec. 6, Dec. 12, 2011, and Jan 21, 2012.

In November of 2011, Claimant Bailey was working under a 30-day record suspension with a 36 month review period dated November of 2010 for his involvement in a vehicular accident.

On Feb 10, 2011 he was dismissed for failure to comply with absent from duty procedures.

CARRIER POSITION:

The Carrier argues an inference of guilt should be drawn from Bailey's failure to appear at the investigation. It notes the hearing was postponed twice and the date was requested by the organization. It maintains the request to postpone the case so the Union representative could drive to Bailey's house was unreasonable. All means were used to contact him in accordance with the address information he gave the Carrier. Nothing in the record substantiates any inability to attend, it asserts.

The Carrier views the text to Ripplinger as utterly inadequate under its applicable policies. In its assessment, he left his job for over five days without notifying his supervisor as to how long he would be gone. Further, it notes he failed to apply for a leave of any kind. Employes utilizing the EAP offered by the Carrier must nonetheless obtain an authorized leave of absence from their supervisor, it explained. It noted extended unauthorized absence is a stand alone dismissible offense, and Claimant was within a 36-month period from a prior violation. It concludes dismissal was proper.

ORGANIZATION POSITION:

The Organization maintains its request for a recess to try to locate Claimant Bailey was entirely reasonable, particularly when the severity of the discipline is considered. It protests that the Carrier changed the charges in the notice by improperly adding more serious charges after the original notice issued. It asserts the Fitness for Duty recommendation establishes Bailey's last day worked as Dec. 3 and further establishes that Claimant was in contact with the Carrier's Medical Department. In the Organization's assessment, Claimant was off for medical reasons and was not fit to return to work until Jan. 13. As a result, his absence could not have been improper and the policy does not apply. Claimant was dismissed for failure to comply with absent from duty procedure when the notice of investigation was for an entirely different offense.

DECISION:

The date and time of hearing was established by agreement of the Organization and the Carrier. As a result, the Organization is not in a position to claim that either were improper. There was no evidence that Claimant was medically or otherwise unable to attend. Notwithstanding these facts, in order to protect Claimant from any prejudice due

to the failure to postpone, it will be assumed that his testimony would have confirmed his participation in a residential treatment program from November 29 until Jan. 13.

The Carrier's policy and rules require that employes anticipating an absence must contact their supervisor directly. The Carrier's concern is both legitimate and business-related: it must know what its available manpower will be before it can schedule work. Without such knowledge, it is severely hampered in any effort to assign work to its employes. The only evidence of any notice to the Carrier of Claimant's absence was the text to Ripplinger.

The Carrier's case is not undermined by the Medical form which sets Claimant's last day worked as Dec. 3. This is most likely a clerical error; Claimant's text and the Carrier's responsive letter both predate Dec. 3.

The Organization asserts the Carrier has changed the charges against Claimant after the fact to increase the severity of the charge in the process. This argument is not persuasive. Claimant was absent Nov. 29. At that point, the Carrier had no idea whether or not he would return to work the next day. When he did not, the absence took on a different character and became more extended. The Organization's argument would lead to two charges and two investigations for the same extended absence, one for the early part of the absence and one after the absence became more extended. This result is impractical and of no utility to anyone. As a result, the Carrier did not breach its due process obligations when it altered the charge from a single day absence to a multiple day absence.

The Organization also contends the Carrier violated due process when it changed the charge from failure to report for duty at the designated time and place to failure to comply with absent from duty procedures. The Board finds no due process violation here. If an employe has being investigated for absence from duty, discussion and investigation into whether that employe reported the absence to his or her supervisor, and into whether there was a valid reason for the absence are inevitable and foreseeable topics of discussion in the investigation. It should hardly come as a surprise if the inquiry turns from whether the employe was at work to what he or she told the supervisor about the absence. It is all part of the same incident and should accordingly be investigated and handled as a single concern. It follows that Rule 40 was not violated and the five day notice requirement was met in this case.

The evidence establishes that the only notice of absence the Carrier received was of an absence on Nov. 29. This notification failed to follow the requirement that the supervisor be contacted personally. There is no assertion that Claimant was unaware of this requirement. Claimant's absence subsequently continued for at least four more days. During this entire time, the Carrier was hampered in its ability to effectively and efficiently schedule its available work force to perform the tasks that needed to be done. EAP information about employes is confidential and cannot properly be imputed to the Carrier. It follows that Claimant Bailey was in violation of the Carrier's rules regarding the proper procedure for reporting absences. The offense is aggravated by the fact that

Claimant's absence from work continued into a multi-day incident with no apparent effort at all to notify the Carrier that Claimant Bailey would not be returning to work.

Claimant has a rather lengthy disciplinary record and at the time here concerned, was under a Level S 30-day record suspension. He had already received two warnings in August regarding his absenteeism. Given the facts of this case, the Board does not find that the Carrier acted outside its authority when it dismissed Claimant Bailey.

AWARD:

The claim is denied.

August 30, 2013; Cleveland, Ohio

Patricia T. Bittel, Neutral Member

Gary Hart, Organization Member

D. J. Merrell, Carrier Member