

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

Public Law Board No. 7585
Case No. 19
Award No. 19
Carrier File No. 11-12-0192
Organization File No. B-M-2527-M
Claimant: Travis Falcon

FACTS:

Claimant Travis Falcon worked for the Carrier for 18 years with only one instance of prior discipline. On Friday, January 27, 2012, Falcon was working as a foreman responsible for submitting time so his employees would be properly paid. That day he recorded eight hours worked plus two hours overtime for himself and his crew, not only for Friday, but also over the coming weekend. He left work at 0715 am. His crew consisted of Elden Brunelle and Wes Oyloe. Neither worked either Saturday or Sunday, nor did Falcon. When Falcon returned on Monday, he submitted the time records to payroll. Because the records claimed pay for time not worked, Falcon was charged with dishonesty.

At hearing, the Carrier submitted documents which had not previously been provided to the Organization. There was no request for a postponement to address the issues raised in the documents.

The letter of termination was not written by the Hearing Officer Michael Frisinger, but was signed by Division Engineer Robert Rindy. It stated "It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWOR 1.15 Duty - Reporting or Absence and MOWOR 1.6 Conduct."

CARRIER POSITION:

The Carrier denies any due process violation by removing Falcon from service prior to the completion of investigation into the allegations against him. It notes that had Falcon been found innocent of the charge, he would have received lost wages for the period of time of his removal. It points out that he entered time for the whole day of Friday just as he was getting ready to leave. It further points out that he knew without question that he had not worked Saturday or Sunday but entered that time anyway. From these facts, it concludes that he intended to pay himself and his crew for time not worked. It does not find credible Falcon's assertion that he planned to change the records later. In fact, he never did change it, states the Carrier.

ORGANIZATION POSITION:

The Organization argues it was a violation of Falcon's rights to remove him from service prior to an investigatory hearing. In its view, fairness requires that the Conducting

Officer be the one to make the disciplinary decision. It notes Rindy's decision finds Falcon guilty of violating Rule 1.15 Duty Reporting or Absence. There is no evidence of such a violation, it maintains, arguing that the Notice of Investigation charged Falcon with dishonesty.

The standard of proof is quite high for an allegation such as dishonesty, the Organization argues. It asserts Claimant thought his crew worked Saturday and Sunday but was checking with Roadmaster Langloss. It also contends a number of accepted practices guided Falcon's actions in this matter: payment of overtime is accepted as compensation for working in higher pay classes; the Foreman is entitled to time whenever his crew works; and it is common practice to use the "pay all" system and then make changes to particular entries. In the Organization's view, no intent to be dishonest has been shown, and such intent is an element of proof in a case of dishonesty.

DECISION:

It is not a due process violation for the Carrier to remove an employee from service pending investigation, so long as the innocent employee is fully compensated for any time lost. The reasoning here is pure practicality: employers are faced with a variety of disciplinary situations and must have the flexibility to remove employees who pose a danger to the workforce or its business interests. Employees accused of dishonesty reasonably fall within this category, for no employer should be required to continue exposing itself to the possibility of unwarranted loss. The managerial discretion of the Carrier to protect itself was not abused in this case.

There is no provision for discovery in the collective bargaining agreement. The failure of the Carrier to respond to the Organization's request for information prior to the hearing was not prejudicial to Claimant; had the Organization needed time to prepare its response to new facts, they could have asked for a postponement; there was no such request. As a result, there was no denial of a fair and impartial hearing based on the Carrier's failure to produce documents until the hearing itself.

However, the Board is deeply concerned about the fact that the Hearing Officer was not the individual who issued the Dismissal in the case. This case involved serious determinations as to whether or not Falcon's explanation for not correcting his payroll submission was credible. Credibility decisions should be made by the person hearing testimony; only this person has the opportunity to observe witness demeanor and tone of voice. Further, a determination of intent is inherent in a finding of dishonesty. Such a determination can be deduced from testimony and does not have to be in the form of an admission. In that regard, it is similar to a credibility determination; it involves intense assessment of what is going on at the hearing in a much broader sense than just the words spoken.

In the view of this Board, Claimant Falcon has offered an explanation for his payroll submission which has been found lacking in credibility by a person who was not in

attendance at the investigatory hearing. This constitutes a procedural flaw that defeats the requirement under Rule 40 of a fair and impartial hearing. The Carrier's allegations require strong and persuasive proof of wrongdoing and Mr. Rindy was simply not in a position to make such findings.

This does not mean that Claimant Falcon is instantly to be found innocent of all wrongdoing. The evidence is uncontroverted that he submitted a payroll record paying himself for a Friday, then immediately left. It further shows that the following Monday he submitted this payroll without verifying the claims for compensation it carried. At the very least, the record establishes that he is guilty of negligence in his handling of the payroll records. No credibility decision is required in reaching this conclusion. This is a far less serious offense than dishonesty, and cannot support dismissal, particularly in view of Claimant's 18 years of service.

The parties are divided on the question of whether interim earnings should be deducted from back pay upon reinstatement. The Board finds without precedent that the facts of this particular case support a make-whole remedy, that is, a remedy which compensates Claimant for lost wages less a deduction for interim earnings.

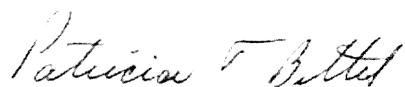
AWARD:

The claim is granted in part. The dismissal shall be revoked and replaced with a 30-day record suspension and 36-month review period. Claimant shall receive retroactive compensation and benefits, less any interim earnings received.

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.

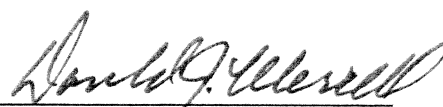
August 16, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member



D. J. Merrell, Carrier Member