Award No. 21
Case No. 21
NMB Case No. PLB-07602-000021

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION—IBT)
)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 11-11-0434
Organization File No. B-M-2438-M

Claimant — Troy Grote

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. Troy Grote by letter dated August 26, 2011, for alleged violation of MOWOR 1.19 Care of Property and MOWOR 1.6 Conduct, in connection with charges of improper use of company property for personal use, a leased Hitachi Compact Excavator, beginning on or about June 22, 2011 and continuing through June 23, 2011, while working as a 1st Class Carpenter on the Big Horn Subdivision.

2. As a consequence of the violation referred to in Part (1) above, Claimant Troy Grote shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant entered service with the Carrier on April 16, 2007. At the time of his termination on August 26, 2011, he was working as a First Class Carpenter on the Big Horn Subdivision.

The most important facts are not seriously in dispute. The week of June 20, 2011, Claimant was working in and around Sheridan, Wyoming, on a Structures Crew, mostly digging ditches. One of the machines the crew was using was a Hitachi Compact Excavator that the Carrier had leased. According to the Claimant, after he finished work for the day on June 22, at about 6:00 p.m., he transported the excavator from the job site to his personal residence, intending to do some trenching on his property. According to Structures Foreman Larry Legerski, on June 22, it was mid-afternoon when he arrived at the job site after several weeks at a different location. Claimant was not at work, and his co-worker, Travis Keller, who was present, stated that Claimant had gone to take care of personal business. Legerski and Keller drove out to the job site in Ranchester, Wyoming, but Claimant was not there. Legerski questioned Keller, who was unable to give him any satisfactory answers. Legerski looked for the mini-excavator but could not find it. Claimant returned to work about 4:45 p.m., but said nothing about where he had been. The three men discussed Keller's CDL test, which he was going to re-take that Friday, June 24, 2011. Legerski testified that he was "irked" that Claimant would leave a new employee alone for several hours, and he wondered what the Claimant had been doing.

The Claimant lives in Ranchester, near the job site, and the following day, June 23, 2011, Legerski decided to drive up to Ranchester to see if perhaps the excavator was on Claimant's property. He went to Claimant's home and saw the mini-excavator on the property. Legerski took photographs and returned to the office. Legerski got a phone call from Billings B&B asking about the mini-excavator. Legerski telephoned Claimant and asked him where the machine was; Claimant said it was at his house and they made arrangements to return it. Legerski testified that he had hoped to deal with the matter informally, but problems with equipment at the Billings end resulted in that crew's learning that Claimant had taken the machine. At that point, Legerski telephoned Manager of Structures Cory Knutson to report that he had a problem and did not quite know what to do about it. Claimant returned the machine to the job site in Ranchester on June 23 at about 3:00 p.m.

According to Claimant, he did not actually use the machine because when he arrived home with the excavator, he found that the contractor who was performing work at his property had already completed the dirt work. Mr. Grote also stated that he had never taken any equipment home before. He did not ask anyone if he could take the machine home. He was not under the impression that he could *not* take the equipment home, but neither had he ever seen anyone else take equipment home.

After several mutually agreed postponements, the Investigation was conducted August 9, 2011. Following the conclusion of the Investigation, the Carrier concluded that Claimant had violated MOWOR 1.19, Care of Property, and MOWOR 1.6, Conduct. It determined that dismissal was appropriate, and informed the Claimant of his termination from employment by letter dated August 26, 2011.

MOWOR 1.19, Care of Property, states: "Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so. Employees must not use railroad property for their personal use." MOWOR 1.6, Conduct, states: "Employees must not be: (1) Careless of the safety of themselves or others; (2) Negligent; (3) Insubordinate; (4) Dishonest; (5) Immoral; (6) Quarrelsome; or (7) Discourteous. Any act of hostility, mischief, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated."

The Organization contends that termination was not warranted by the facts of this case. The Claimant was entirely truthful throughout the course of the proceedings. He acknowledged that he had taken the excavator to his property—which was immediately adjacent to the job site—but he did not in fact make personal use of it and no one saw him using it. He had no intent to steal, commit theft or defraud. He returned the machine when requested, as set forth in MOWOR 1.19. The Carrier has not established any violation of MOWOR 1.6. Discipline is supposed to be corrective, not punitive, and termination for a single violation of Rule 1.19, Care of Property, is improper, unreasonable and excessive. Claimant made a poor decision, but he should not lose his job because of it. In addition, the Investigation was not fair and impartial. The Structures Manager failed to inform the Claimant that he had a right to union representation during the improper advance investigation that he conducted, or that Claimant's written statement about what had happened might be used against him. These are serious violations of due process. The Carrier failed to provide information to the Organization when requested. The person making the decision to terminate was not the Hearing Officer who conducted the Investigation; it was the same Structures Manager who initiated the complaint and violated Claimant's rights during the pre-investigation he conducted. This was hardly a fair and impartial proceeding. Finally, the letter of dismissal states that consideration was given to Claimant's personal record, but that appears not to be the case. His record is very good, with nothing in it to warrant termination. Claimant's Supervisor had determined prior to the Investigation that he should be terminated, and the ultimate decision merely affirmed that earlier determination. This case represents an abuse of the discipline process to the extent that this appeal should be allowed.

Per the Carrier, Claimant freely admitted that he had taken the excavator for his personal use. In conjunction with this admission, other evidence submitted by the Carrier has proved Claimant's violation of MOWOR rules by substantial evidence, and his violation warranted termination. The procedural objections raised by the Organization were neither proven nor shown to have prejudiced the Claimant in any way. Accordingly, they should be ignored and the case dismissed.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

MOWOR 1.19 prohibits employees from using Carrier property for personal use. The Claimant has acknowledged that on June 22, 2011, he did take the mini-excavator in question to his property overnight with the intention of using it to do some digging or trenching on a construction project at his home, but that he did not in fact use it because his contractor had already done the work. The Organization contends that Claimant demonstrated poor judgment and that he should not lose his job as a result. The record establishes that this was more than a simple mistake, however. There is no dispute that the Claimant took the mini-excavator from the job site to his property. However, it also appears from the record that, in contrast to what the Claimant testified about taking the machine sometime around 6:00 p.m., he in fact moved it earlier, during his workday: Claimant absented himself from work "to tend to some personal business" for several hours mid-afternoon while his co-worker studied to retake his CDL exam, and Foreman Legerski could not find the excavator when he looked for it at the job site later that afternoon. Nor is this a case where the Claimant took the machine home one night after work and promptly returned it the next morning—which is what one would expect, especially if he had realized that he no longer needed the excavator because the work had already been completed by his contractor. Instead, the Claimant left the machine on his property, so that it was not available to use on the job site when it was needed the next day. A search ensued. The Claimant ultimately returned the machine about 3:00 p.m., but not until after, Legerski testified, he and his crew had been embarrassed and made to look bad to the B&B crew who also needed the machine and were involved in efforts to retrieve it from Claimant's property. The key to Claimant's actions may be in Legerski's testimony, when he stated that he had been working at a different job site for several weeks and was not expected back at Claimant's work site for several days.

Considering the record in its entirety, this is not a simple case of poor judgment where an employee takes a drill home after work to use overnight and brings it back the next morning. This case involves a large piece of heavy construction equipment, an excavator, that Claimant took off from work mid-day to transport to his property and then left it there. Absent Legerski's unexpected return to the job site, there is no telling how long Claimant might have kept the excavator. By his actions, Claimant deprived the Carrier of the use of the machine that it had rented and impeded the flow of work. Claimant stated that no one told him that he could *not* take the machine home. This

was disingenuous. The Carrier's decision that Claimant's actions warranted dismissal was not arbitrary, capricious or unreasonable.

The Organization contends that a number of procedural violations warrant overturning the discipline regardless of its merits.

The Organization protests that no investigation can be fair and impartial, as required by Rule 40, if the Organization is not given information that it requests in advance in order to prepare for the investigation. In contrast, the Carrier has access to any and all information well in advance of the investigation, which gives it time to prepare. This puts the Organization at a serious comparative disadvantage. However, these are sophisticated parties who have a longstanding bargaining relationship. Rule 40, Investigations and Appeals, is extensive and detailed. Rule 40 does not require that the employee being investigated (or the Organization) be given any information in advance of the investigation other than written notice of the investigation itself, which must "specify the charges for which investigation is being held." (See Rule 40C.) Mandatory provision of information is addressed in a different paragraph: Rule 40.E requires that the employee and his or her representative be given a transcript of the investigation, along with all "statements, reports, and information made a matter of record." Thus, it appears that the parties have agreed that employees and the Organization will get all information *after* the investigation, not before. Given the express written terms of the parties' Agreement, it would not be appropriate for the Board to substitute other terms that the parties have not agreed upon.

The Organization also points out that the Claimant was not offered the opportunity to have Union representation when he was initially interviewed and asked to provide a written statement. This is a much more serious violation of due process. However, given the seriousness of Claimant's misconduct, on balance it does not justify overturning otherwise justified discipline.

The Organization complains that the same individual filed the charges against the Claimant and made the decision to terminate him. Were this a case where the facts of Claimant's misconduct were in any dispute, the argument would be more persuasive. However, in this case, there is no dispute that Claimant violated MOWOR 1.19 and the only issue is the level of discipline imposed. After reviewing the record, this Board also concludes that dismissal was reasonable under the circumstances. There was no abuse of process by the Carrier in making the decision it did.

The Organization also contends that the disciplinary process was not fair and unbiased because the letter of dismissal referred to Claimant's personnel record having been considered without that record having been made part of the investigatory record and without any explanation of how the personnel record affected the final decision to discipline. With respect to the personnel record being introduced into the investigatory record, employees' personnel records are what they

are and are, presumably, available at any time for the individual and the Organization representing him to review. So it is not necessary that the individual's personnel record be made a formal part of the investigation. However, the Organization's point about the Carrier's failure to explain the disciplinary decision is well-taken. Employees who are subject to discipline, especially dismissal, are entitled to a substantive explanation of why the Carrier made the decision that it did. Instead, they get standard form language that states: "In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)." In the absence of any individualized explication, employees are left wondering what role, exactly, their previous disciplinary record played in the final decision (especially if they had no prior discipline) and how, exactly, the conduct fit into the PEPA scheme. The Carrier need not provide an elaborate explanation, but it does need to provide *some* explanation. Otherwise, employees and the Organization both are left wondering why the Carrier took the action it did. This only fosters mistrust and discourages positive labor-management relations. In this case, for instance, the Carrier could say something along the lines of "despite your prior good disciplinary record, the Carrier concludes that your conduct in removing and retaining Carrier property for your personal use was sufficiently serious to warrant immediate termination." That being said, the oversight does not warrant overturning the Carrier's decision to terminate the Claimant.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

Andria S. Knapp

Andria S. Knapp, Neutral Member

Zahn Reuther

Zahn Reuther, Carrier Member

Gary L Hart

Gary Hart, Organization Member

February 12, 2014

Date