

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 435 – Award No. 435 – Claimant: Ragland

Carrier File No. 14-12-0509

Organization File No. 1082-13A1-1234.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 23, 2012, when Claimant, Willard J. Ragland (1752294), remained dismissed by letter dated October 7, 2012 for his absence from duty without authority from Monday July 16, 2012 through and including Monday, July 23, 2012. The Carrier alleged violation of MOWOR 1.15 Duty Reporting or Absence, MOWOR 1.6 Conduct, following dismissal on July 23, 2012 per Appendix 11.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 23, 2012, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Roy A. Ragland, had been employed by the Carrier since 2007. On July 25, 2012, following a request by the Organization for a Formal Investigation, the Carrier notified Claimant that an investigation had been scheduled "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged absent(sic) from duty without authority from Monday, July 16, 2012 through and

including Monday, July 23, 2012.” The letter stated that the Carrier received first knowledge of this alleged violation on July 23, 2012. The letter also stated that the investigation would determine possible violation of Maintenance of Way Operating Rules 1.6 Conduct and 1.15 Duty Reporting or Absence. Following the investigation, the Carrier sustained the dismissal letter it had issued Claimant on July 23, 2012.

The applicable Carrier Maintenance of Way Operating Rules provide, in relevant part:

1.6 Conduct

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, misconduct, 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.

1.15 Duty—Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

Appendix 11, Letter of Understanding to the parties’ Agreement provides, in relevant part:

[T]his will confirm our understanding that . . . to terminate the employment of an employee who is absent from duty without authority, the Company shall address such employee in writing at his last known address, by registered or certified mail, return receipt requested, with copy to the General Chairman, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may, within 20 days of the date of such notice, if he so desires, request that he be given an investigation under (Rule 13) of the current Agreement.

NOTE: Effective January 1, 1984, the above understanding is to be applied only in cases where the employee is absent from duty without authority more than five (5) consecutive work days.

The essential facts of this case are not in dispute. In particular, the record is clear that Claimant did not report for work from Monday, July 16 through Friday, July 20, 2012, nor did he report on Monday, July 23, 2012, when he was dismissed.

The background to this event is as follows. On or about July 12, 2012, the Carrier's Manpower Planning Office, which places employees in positions, informed Claimant that he had been assigned to a relief position as a machine operator in Saginaw, Texas, effective July 16, 2012. Claimant accepted the position, which was under the jurisdiction of Fort Worth, Texas Roadmaster Marlon Gaunt, although Claimant apparently did not know that at the time.

Shortly thereafter, Claimant learned that his commercial driver's license had been suspended, apparently as the result of his alleged non-payment of child support. Claimant testified without contradiction that not only did he need the license to travel to work, but he would have been in violation of Carrier Rules had he operated his machine without a valid license. Claimant testified that he notified the Manpower Planning Office of the situation later on July 12 and on July 13, 2012, and produced telephone records documenting calls to that Office. Claimant maintained that Manpower Planning Office told him to resolve the license situation and then they could put him in a relief Foreman position on the gang.

Claimant testified that he was aware he needed to let someone know where he was going to be and why he was not at work, but had not been told that he had to inform a particular individual. He explained that he had been dealing with the Manpower Planning Office as he moved from job to job, and informed the individual he had been dealing with in that Office of the situation.

By Monday, when he was to report to work, Claimant had not been able to resolve the situation with his driver's license. He testified that he sent a text message to Track Supervisor Kevin Brown at the yard he believed he was assigned to on the first day of his absence, asking him to have the responsible individual contact him, and never heard back from Mr. Brown. Claimant's phone records show a text to a number Claimant testified was Mr. Brown's, but does not include the content of the text. Claimant maintained that Manpower personnel told him they would let whoever was in charge know the situation and why he was not at work.

Mr. Gaunt stated that as Roadmaster he was the contact person for employees who wished to absent themselves from duty, and he had instructed the Foremen, on July 2, 2012, that he was to approve absences and Foremen did not have that authority. However, Mr. Gaunt could not say whether Claimant had been informed that he must contact Mr. Gaunt directly, and Claimant contended that had not been so informed until later in the week of his absence.

On Wednesday, July 17, 2012, at 8:05 a.m., Andrea Lewis, MOW Engineering Support Specialist, sent an e-mail to Mr. Gaunt informing him that Claimant would be back at work the next day. A minute later, Mr. Gaunt responded, asking whether anyone had authorized Claimant to be off work, as he was supposed to report on Monday and had no authority from his supervisor to be absent. Gregory Rickard replied that he had not, and Ms. Lewis replied that Claimant had not given any indication that he was authorized to be off. At 10:41, Mr. Gaunt responded, stating that he "want(s) to make sure no one in manpower planning gave him authority to be absent and that he was placed on (unapproved leave) effective Monday. Mr. Rickard responded that Ms. Faber had listened to the tapes and no one in her office had given Claimant permission to be off.

Claimant's problems with reinstating his license continued, and his telephone records show that he again called Manpower Planning at 8:36 a.m. on Thursday, July 19, 2012. He testified that at the time Ms. Lewis informed him that his assignment was under Mr. Gaunt's jurisdiction and he needed to get in touch with him.

Claimant maintained that he attempted to call Mr. Gaunt that morning but had poor cell phone service and could not get through. Therefore, he stated, he sent Mr. Gaunt a text message; a screen photo of the text message, at July 19, 2012 at 8:48 a.m., is included in the record. The message reads:

Roadmaster gaunt this is Willard Ragland. As manpower told you I am having trouble with getting my drivers licences (sic). I have them suspended. I will not be there all this week I talked to manpower. I am sorry but I have to get this licences (sic) thing right. If I get pulled over driving without them jail and big fine.

Claimant testified that he never received a response. Mr. Gaunt did not deny having received the text. Rather, he stated that Claimant had not called him to request authority to be absent. Early on the morning of Monday, July 23, 2012, Mr. Gaunt called Claimant to inform him that he was dismissed.

Claimant stated that he chose not to bid a job under Mr. Gaunt, and would not work relief under Mr. Gaunt, and that Manpower was aware he did not work for Mr. Gaunt because of certain issues. He maintained that he was not aware that he was assigned to work for Mr. Gaunt. He stated that Manpower asked him to relieve on the machine, and if he got his license issue resolved they wanted him to fill in as Foreman.

The Carrier states that this case is not complicated, as Claimant was absent from work without authority for more than five consecutive days beginning July 16, 2012. It is undisputed, the Carrier asserts, that Claimant failed to notify his Roadmaster, Marlon Gaunt, that he would not be coming to work, and Mr. Gaunt testified that Claimant neither requested to be absent nor reported for work. Although the Organization contends that Claimant had several conversations with Manpower Planners, the Carrier maintains that such conversations would not constitute requested approved absence from

a supervisor. Further, the Carrier notes, the record includes e-mails from the Manpower Planning Office stating that Claimant accepted the relief position and did not report, but that Office was not aware that Claimant was not going to report.

The Carrier points out that there is no dispute that Claimant was absent without authority on the days in question. While the Organization presented evidence showing that Claimant's license was suspended by court order as a result of his failure to pay child support, such evidence does not validate Claimant's conduct, and does not demonstrate that Claimant had approval to be absent as required by the self-executing provisions of Appendix 11.

The Carrier states that when it did not hear from Claimant it sent a letter of dismissal on July 23, 2012, an investigation was thereafter scheduled at the Organization's request, and the Carrier thereafter confirmed the dismissal. The Carrier argues that the Organization's excuses for Claimant's conduct are not persuasive, and his dismissal is supported by plain Agreement language and arbitral precedent. The Carrier urges that the claim be denied.

The Organization asserts that the Letter of Understanding in Appendix 11 is a means of last and drastic resort for extreme absenteeism, and dismissal in the instant circumstances was unwarranted, excessive and unjustified. The Organization points out that Claimant had five years' service with the Carrier and no previous history of absenteeism. The Organization contends that Claimant made every effort to ensure that his whereabouts were known to the proper Carrier authorities, and acted as he had on three previous occasions, with no challenge by the Carrier. The Organization asserts that once Mr. Gaunt was identified as Claimant's temporary supervisor, Claimant immediately contacted him by text message and received no response until Mr. Gaunt called him on July 23, 2012 to inform him he had been dismissed.

The Organization concludes that the Carrier failed to take into account the circumstances underlying Claimant's actions and has completely failed to justify the level of discipline assessed against him. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The Carrier found Claimant guilty of two Maintenance of Way Operating Rule violations, 1.6 Conduct and 1.15—Reporting or Absence and dismissed him by the self-executing provision of Appendix 11, although that is not cited in the dismissal letter. With respect to the former rule, the Carrier relied upon the language providing that "indifference to duty" will not be tolerated. Our review of the record shows that the Carrier has not met its burden of proving Claimant guilty of that offense. Whatever the cause, Claimant found himself in a situation where his driver's license was suspended, which prevented him both from traveling to work and from fulfilling the requirements of his assignment. As demonstrated by his testimony and phone records, he immediately notified the Carrier's Manpower Services Office of that fact, and continued to keep personnel in that office advised of his situation. When he could not resolve the matter in time to report to work on July 16, 2012, he attempted to contact a Track Supervisor, and, by e-mails the Carrier

placed into evidence, told the Manpower Services Office that he would report on Thursday. When he was still unable to resolve his situation, he again contacted Manpower Services, who informed him that he needed to contact Mr. Gaunt, and he immediately did so, by text, informing Mr. Gaunt of the particulars of his situation and the fact that it was indeed impossible for him to come to work, a text Mr. Gaunt did not deny receiving and never responded to. These are not the actions of an indifferent employee.

As for Rule 1.15, it provides that "continued failure by employees to protect their assignment will be cause for dismissal." The record does not demonstrate that Claimant, a five year employee, had any previous attendance problems or any previous discipline. He was absent, in one continuous incident, for five straight days. This falls far short of an ongoing, repeated absenteeism problem which the plain language of this Rule seeks to prevent. The Carrier has not proven Claimant guilty of violating this Rule.

This leaves Appendix 11, which, although not cited by provision number in the dismissal letter, represents the crux of the Carrier's case against Claimant: that he was absent for five days without authority. We first note that there is nothing in the record which details the exact procedure an employee is to use to request approved leave and nothing demonstrating that any specific instructions were communicated to Claimant about the appropriate individual to contact in these situations until Thursday, July 19, 2012, when Ms. Lewis told him he needed to reach Mr. Gaunt. There is nothing that specifies the exact method an employee must use, for example, whether the request must be by telephone call, e-mail or text.

The Carrier asserts that it dismissed Claimant after it did not hear from him, but the assertion that the Carrier did not hear from Claimant is simply untrue. The record indicates that Claimant repeatedly kept Manpower Services informed of his situation, and a fair reading of this record is that Mr. Gaunt was aware of it as well, notwithstanding that his communications with Manpower Services seemed designed only to make a record that Claimant did not have authority to be absent and set the stage for a possible dismissal. This was nothing near a "no-call, no show" situation.

Regardless of Claimant's communications at the beginning of his absence, he did contact Mr. Gaunt by text early Thursday morning, with two days remaining in the self-executing timeframe, and explained the particulars of his situation. Although he did not phrase his message as a request for approved leave, the substance of it can be read no other way.

Mr. Gaunt did not deny receiving the text and did not answer it. Thus, Claimant's leave remained "unapproved" only because Mr. Gaunt had not acted on his request. Claimant, at that point, had done all that was required of him; he could not work his assignment and he had requested leave from the appropriate supervisor. The Carrier cannot fail to act on an employee's leave request and then dismiss the employee for being absent without leave. Had Mr. Gaunt denied the request, and then dismissed the Claimant, the Organization could have challenged whether the denial was reasonable.

Here, however, Mr. Gaunt did nothing, let the clock run out on Claimant, and dismissed him at the very first opportunity. Despite Mr. Gaunt's denials, his conduct is completely consistent with some pre-existing animosity to Claimant.

In conclusion, we find that the Carrier has failed to prove the Rule violations alleged against Claimant. He was not indifferent to his job, and did not continually fail to protect his assignment. Moreover, while Claimant was in fact absent without approval for five days, we find that the Carrier, through Mr. Gaunt, handled his situation in an unreasonable and arbitrary manner. Claimant, a five-year employee with no previous discipline, was dismissed as a result. The claim will be sustained.

AWARD

Claim sustained.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID TANNER
Organization Member

Dated this *5th* day of *October*, 2013.