

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 452 – Award No. 452 – Claimant: Flores
Carrier File No. 14-13-0193
Organization File No. 180-13A1-135

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing April 8, 2013, when Claimant, Angel C. Flores (1614676), was disciplined with a Formal Reprimand for his alleged absence without permission on February 4, 5 and 6, 2013. The Carrier alleged violation of Engineering Instruction (EI) 22.6.1 BNSF Absenteeism and Layoff Policy and Maintenance of Way Operating Rule (MOWOR) 1.15 Duty—Reporting or Absence.
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, if applicable, with seniority, vacation, all rights unimpaired and wage loss commencing April 8, 2013, and 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, A.C. Flores, has been employed by the Carrier since 2004. On February 13, 2013, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged absence without authorization on February 4, February 5, and February 6, 2013 while working as a machine operator on the Needles Subdivision. The notice

stated that the investigation would determine possible violation of EI 22.6.1 BNSF Absenteeism and Layoff Policy and MOWOR 1.15—Duty—Reporting or Absence. Following the investigation, the Carrier found that Claimant had violated Carrier rules as alleged, and assessed him a Standard Formal Reprimand with a one-year review period.

MOWOR 1.15 Duty—Reporting or Absence provides, in relevant part:

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.

EI 22.6.1 BNSF Absenteeism and Layoff Policy provides, in relevant part:

Policy for Handling Unexcused Absences or Tardiness is as follows:

- 1) First violation will result in your Roadmaster or Foreman counseling you concerning the rules involved.
- 2) Subsequent violation of these rules will result in scheduling a formal investigation with appropriate disciplinary action being taken with respective collective bargaining agreement. If for some reason you need to be absent, it will be necessary that you contact your Assistant Roadmaster or Foreman to discuss the matter with the person. Leaving a voicemail message for the Roadmaster will not be considered contacting the proper authority.

The underlying facts of this case are not in dispute. Carrier Barstow, California Roadmaster Yuri Lopez testified at the investigation that at the time of the incident he was the responsible supervisor for Claimant and the Maintenance of Way group working out of Barstow, California, maintaining the Needles West Subdivision.

Mr. Lopez stated that on February 4, 2013, at 5:27 a.m., he received a call from Claimant, who informed him that he was not going to be at work that day. Claimant's shift started at 6 a.m. Mr. Lopez added he told Claimant that given the short notice and lack of proper notification, it would be considered an unexcused absence. Mr. Lopez explained that Claimant asked why it would not be excused, and Mr. Lopez replied that Claimant's shift was beginning in about 30 minutes, he had no way to obtain a replacement to cover Claimant's duties that day, and the shift would have to run short. Mr. Lopez added that although he asked for an explanation, Claimant really did not give him a reason for the absence, other than he had some personal concerns, including babysitter issues involving his children. Mr. Lopez stated that he asked Claimant whether this was a one-time event and if he would be in the next day, and Claimant replied in the affirmative. Mr. Lopez maintained that he told Claimant again that this was not an approved absence and they would discuss the matter in person the next day.

Mr. Lopez testified that Claimant called him at 5:43 the next morning, Tuesday, February 5, 2013. The gang was again scheduled to start at 6 a.m. Mr. Lopez stated that he reminded Claimant that he had assured Mr. Lopez the day before that he would be in on Tuesday, and Claimant replied that he would like to take a floating vacation day. Mr. Lopez replied that for a floating vacation day he needed proper notice, and this was short notice, so this absence would also be considered unapproved. He asked Claimant if he would be in the next day, and Claimant replied that he would, so Mr. Lopez told him they would discuss the matter further in person then.

The next day, Wednesday, February 6, 2013, Mr. Lopez testified, Claimant called at 1:17 a.m. and told Mr. Lopez he would not be able to make it in to work. Mr. Lopez asked Claimant what was going on, and Claimant replied that he had been having some personal issues and needed to go to the doctor. Claimant told him he could not sleep, and was having shakes and withdrawal problems from attempting to stop drinking. Mr. Lopez added that Claimant told him he was having panic attacks and needed to go to the emergency room. Mr. Lopez told him that he was not a doctor and did not know what was going on, so the absence would be noted as unexcused, but Claimant should bring in proper medical documentation because otherwise the absences would be unexcused due to the short notice.

Claimant came to work the following day, Thursday, February 7, 2013, and gave Mr. Lopez a document entitled Work Status Report, with a stamp indicating that it was from Barstow Community Hospital. It showed a time of 8:15 and had two boxes checked, one stating return to work no restrictions, and the other unable to work on February 6, 2013. Mr. Lopez stated that Claimant told him he went to the emergency room on Wednesday, and received some medication. Mr. Lopez asked Claimant about the other two days, and Claimant replied that this was the note the hospital had given him. Claimant told him that on Monday his ex-wife had just shown up and dropped off his children and he could not find anyone to take care of them, and regarding Tuesday Claimant simply stated he had some personal issues and left it at that. Mr. Lopez stated that he considered the note vague and it did not provide any excuse for Claimant's absences other than he had been at the hospital on Wednesday at 8:15.

Mr. Lopez testified that he told Claimant he did not have an excuse for being absent. Claimant asked why not, and Mr. Lopez replied that he had called the mornings of his intended absences, and there was not much Mr. Lopez could do over the phone at that point. Mr. Lopez stated that Claimant asked if Mr. Lopez could allow the foreman to pay him for a floating vacation day, and Mr. Lopez replied that he could not because he had three unexcused absences. He added that proper notice for a floating vacation day request was 72 hours, with the supervisor having discretion whether to grant it depending on the availability of manpower to staff the schedule. Mr. Lopez added that Claimant asked him to rethink the situation because he wanted to be paid for the three days and Mr. Lopez replied he could not do that.

Mr. Lopez testified that he and Claimant had had a previous discussion concerning Claimant's attendance record. The record includes a letter from Mr. Lopez to Claimant dated November 30, 2012. The letter states that it is to serve as "notice of (Claimant's) failure to perform the duties and obligations of his position, and notes that he had been absent without permission on November 28, 2012. The letter details Claimant's history of unexcused absences, notes Mr. Lopez's discussions with him concerning the matter, and states that any future failure by Claimant to contact his supervisor and obtain permission prior to being absent, or other excessive absenteeism, would result in discipline. The letter also instructed Claimant to contact Mr. Lopez, or the exempt supervisor, rather than the foreman, to secure prior permission for any absence. Claimant signed the document, indicating that he understood and agreed with the notice contained therein. Mr. Lopez stated that issuance of the document was the first step of the Carrier's Policy for Employee Performance Accountability (PEPA), for dealing with such issues.

Carrier Southern California Division Engineer Adam Richardson testified at the investigation that approximately two years earlier Claimant had had significant attendance problems. Mr. Richardson added that Claimant's return from a lengthy absence, Mr. Richardson met with him to explain the Carrier's attendance expectations.

Claimant acknowledged at the investigation that he had called in on the three days at issue, at approximately the times given by Mr. Lopez. Claimant maintained that Mr. Lopez just replied, "OK," when Claimant told him he would not be in, and did not specify whether the absences would be approved, just that they would talk the next day. Claimant acknowledged he did not ask for permission and simply told Mr. Lopez he would not be in, but maintained that the absences should be considered excused, as he had complied with the conditions set forth in Mr. Lopez's letter by calling him personally before the start of his assigned hours. Claimant also acknowledged that on the first day of his absence he told Mr. Lopez he would be in the next day, and that he did so again on Tuesday when he called to tell Mr. Lopez he in fact would not be coming in. Claimant maintained that he did not know whether there was any required notice time period for him to request a floating day off.

The Carrier states that this case is not complicated. Although Claimant did call in on two of the three days at issue, the Carrier notes that his start time was 6:00 a.m. and he called in right before his shift start time on two of the days, and at 1:17 on the third, leaving his Roadmaster no time to replace him. More importantly, the Carrier points out, Claimant did not have permission to be absent, leaving him with unexcused absences, a violation of Carrier Rules.

The Carrier states that the testimony of Roadmaster Lopez and Division Engineer Richardson establishes that Claimant has had attendance problems for years. Further, although the Organization objected to the introduction of a Coaching and Counseling letter issued to Claimant, the Carrier notes that the letter is not discipline, but evidence that the Carrier made every attempt to address Claimant's attendance problems, to no avail. Claimant's failure to work his assignment on February 4, 5 and 6, 2013 left the

Carrier short-handed and placed a burden on Claimant's fellow employees and the Carrier's production efforts. The Carrier stresses that it must be able to rely upon its employees to come to work on a regular basis, and Claimant could not seem to fulfill his obligation.

The Carrier adds that although Claimant testified he believed he had permission to be absent, his supervisor was adamant that he had informed Claimant the absences were not excused. The Carrier points out that it is the responsibility of the Hearing Officer, not this Board, to resolve such credibility conflicts.

The Carrier concludes that there is no doubt Claimant violated Carrier Rules as alleged, and it has met its burden of proving his guilt by substantial evidence. The penalty assessed, the Carrier continues, was issued in accordance with its Policy for Employee Performance Accountability (PEPA), with consideration given to his personal record. The Organization seeks leniency for Claimant but it is well-established, the Carrier notes, that the decision to grant leniency is solely the Carrier's. The Carrier urges that the claim be denied.

The Organization also asserts that the case is not complicated. While there is no dispute that Claimant called in on the days in question, the Organization contends that the Carrier chose to treat the situation as if Claimant had vanished for three days without letting anyone know his whereabouts, rather than evaluating the entire incident in its appropriate context. There was no justification for discipline, the Organization stresses, where the record clearly demonstrates that Claimant produced reasonable explanations for these absences. In particular, the Organization objects to the introduction and use against Claimant of a letter taken completely out of its intended context. The Organization concludes that the Carrier has failed to meet its burden of proof and, even if it had, the discipline was excessive. The Organization urges that the claim be sustained.

Claimant's personal record shows a 30 day record suspension, with a 36-month review period, issued in 2009 for failure to protect his assignment.

We have carefully reviewed the record in its entirety. There is no dispute that Claimant called in on the three days at issue, on two just prior to his shift start time. For Claimant to believe that these should be considered approved absences simply because he called represents an unrealistic view of the Carrier's needs in running its operations and its reasonable expectations for its employees to be available to fulfill those needs. As the Carrier asserts, the manner in which Claimant called in left it with no ability to adjust and required the shifts to be run short, affecting other employees and overall production.

In addition, we agree with the Carrier that Claimant provided virtually nothing that would provide a reasonable justification for his behavior. The medical documentation he offered is, as the Carrier notes, exceedingly vague and does not even cover two of the three days at issue. We find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence.

The record shows that Claimant has a history of absenteeism problems, and that the Carrier put him on clear notice that he would be subject to discipline if they continued. Given the casual attitude Claimant displayed here, we cannot say that the Carrier's decision to resort to discipline was unfair or arbitrary.

AWARD

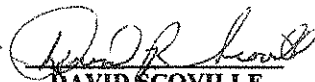
Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 31st day of Oct, 2014.