

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 458 – Award No. 458 – James  
Carrier File No. 14-13-0252  
Organization File No. 40-SF13A1-1311

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 7, 2013, when Claimant, Timothy James (1773829), was dismissed for his alleged absence without proper authority for more than five (5) consecutive work days beginning April 22, 2013 and continuing forward. The Carrier alleged violation of Maintenance of Way (MOWOR) 1.15 Duty Reporting or Absence.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime and vacation, commencing May 7, 2013, 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, Timothy James II, had been employed by the Carrier since 2008. On May 2, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged absence without proper authority for more than five (5) consecutive work days beginning April 22, 2013 and continuing forward, in possible violation of MOWOR 1.15 Duty Reporting or

Absence. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and dismissed him from employment.

The applicable MOWOR provides, in relevant part:

**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.

At the opening of the investigation, the Hearing Officer noted that Claimant was not present. The Organization representative requested a brief recess so he could attempt to locate Claimant, which the Hearing Officer granted. The Organization representative was unable to reach Claimant, and requested that the investigation be postponed. The Organization representative acknowledged that he had received the Investigation Notice, and that he had thereafter attempted, unsuccessfully, to contact Claimant. The Hearing Officer concluded that the Carrier had provided Claimant with the notice required under the labor agreement and the Organization had been unable to reach him. He ruled that the investigation would proceed.

Carrier Assistant Production Roadmaster Philip Scott Perusse testified at the investigation that he was the supervisor of Gang RP09, on which Claimant worked at the time of the relevant events. Mr. Perusse noted that he was the only exempt supervisor on the gang. Claimant, he stated, had been on vacation and was due to report back to work on April 22, 2013. Mr. Perusse explained that Claimant did not report back as scheduled, nor did he contact Mr. Perusse.

Records from the Carrier's personnel activity tracking system were entered into the investigation record; they show Claimant on unapproved absence for April 22, 23, 24, 25, and 26, with April 27 and 28 noted as rest days, and on unapproved absence on April 29 and 30, 2013. Mr. Perusse added that he had assumed his current position in early March 2013, and had never had any contact with Claimant since he had been the gang's Roadmaster. He stated that since he had not spoken with Claimant, he was not aware of any unusual or extenuating circumstances which would have prevented him from reporting to work.

The Carrier's Policy for Employee Performance Accountability (PEPA) sets forth, in Appendix B, a non-exhaustive list of Stand Alone Dismissible violations which may result in immediate dismissal. Appendix B includes "Unauthorized absence." Claimant's personal record shows a dismissal assessed May 31, 2013 for fraudulent use of Carrier corporate lodging. That action is before this Board in Case No. 457.

The Carrier first asserts that the Organization's contention the investigation should have been postponed rather than held with Claimant in absentia lacks merit. While the Organization contends the Carrier provided no proof that Claimant was even aware of the investigation, the Carrier notes that the Hearing Officer recessed the hearing to allow the Organization representative to attempt to locate him. Further, the Carrier points out, a United States Postal Service receipt demonstrates that the Investigation Notice was delivered to Claimant's last known address in the Carrier's records. A USPS Track & Confirm indicates that the searched-for item was delivered on May 4, 2013 in Valley Falls, Kansas, the location to which it was addressed. There was no procedural irregularity which denied Claimant his right to a fair and impartial investigation, the Carrier concludes.

On the merits, the Carrier states that Mr. Perusse's testimony demonstrates that Claimant did not report to work from April 22, 2013 up to the investigation, held on May 7, 2013, and that Claimant did not contact him during that entire time. Therefore, the Carrier asserts, it has proven that Claimant was absent without authority, or AWOL.

Claimant's conduct, the Carrier argues, is a clear violation of MOWOR 1.15 Duty—Reporting or Absence, and at no time has either Claimant or the Organization contended otherwise. Indeed, the Carrier notes, an extended unauthorized absence is also a stand-alone dismissible violation under its PEPA. The clear evidence and Claimant's personal record demonstrate, the Carrier maintains, that dismissal was the appropriate sanction. The Carrier urges that the claim be denied.

The Organization asserts that the investigation should have been postponed as the Organization requested, so Claimant could have had the opportunity to attend and defend himself. The Organization adds that the Carrier came forward with no proof that Claimant was even aware that he was scheduled for an investigation, as it provided no certified mail receipts. On this basis, the Organization urges that the discipline be removed from Claimant's record and the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we find no procedural error in the Hearing Officer's denial, at the opening of the investigation, of the Organization's request for a postponement of the hearing. The Organization representative acknowledged he had received notice of the hearing, and the Carrier's records show that it gave Claimant proper notice. There is nothing to indicate that any postponement was requested prior to the hearing, even though the Organization representative had not been able to reach Claimant.

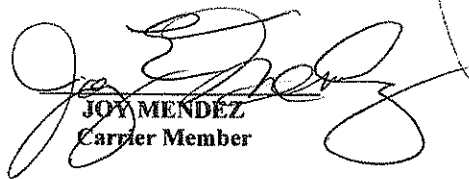
The Hearing Officer granted the Organization representative an opportunity to try to locate Claimant at the opening of the hearing, and again he was unable to do so. Moreover, given the Organization's extensive unsuccessful efforts to contact Claimant after its representative received notice of the charges, it is unlikely that a postponement would have served any purpose. We find no procedural irregularity which denied Claimant of his right to a fair and impartial investigation.

On the merits, the record is clear that Claimant essentially abandoned his position, going on vacation and never returning, with no notice or explanation to the Carrier. As the Carrier asserts, this is a clear violation of MOWOR 1.15. Given Claimant's conduct and his overall record, we see no reason to overturn the Carrier's determination that dismissal is the appropriate penalty.

**AWARD**

**Claim denied.**

  
DAN NIELSEN  
Neutral Member

  
JOY MENDEZ  
Carrier Member

  
DAVID SCOVILLE  
Organization Member

Dated this 31<sup>st</sup> day of October, 2014.