

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 459 – Award No. 459 – Barnett
Carrier File No. 14-13-0315
Organization File No. 20-SF13D2-1315

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 30, 2013, when Claimant, William R. Barnett (1119734), was dismissed for his alleged dishonesty when he falsified his Pay Code 55 receipts beginning approximately January 2013 and continuing forward. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct.
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 30, 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, William R. Barnett, had been employed by the Carrier for approximately 17 years. On May 30, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged dishonesty and falsification of Pay Code 55 receipts, beginning approximately January 2013 and continuing forward. The notice stated that the Carrier's first knowledge was May 29, 2013. The notice stated that the investigation would

determine possible violation of MOWOR 1.6 Conduct. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and dismissed him from employment.

MOWOR 1.6 Conduct, provides, in relevant part:

Employees must not be:

4. Dishonest

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Any act of hostility, misconduct, 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.

Carrier Deputy Chief, Special Investigation Team, Fort Worth, Kansas William E. Carruthers testified at the investigation that he works closely with the Carrier's corporate audit and timekeeping personnel concerning a type of travel reimbursement known as Pay Code 55. In these situations, employees are entitled to compensation for travel to and from a jobsite and their residences. They must submit a form entitled "Travel Home Allowance Log Sheet (PC55)" (log sheet) for each trip, along with a receipt from a business in the employee's residence city.

Mr. Carruthers explained that the Carrier's timekeeping operation conducts periodic reviews of these travel reimbursement requests, and he received a telephone call informing him that they had unusual receipts for Claimant. He added that Claimant had always submitted receipts, but they were from different towns and locations.

Mr. Carruthers stated that he learned Claimant's residence was in Gallatin, Missouri and noticed that some of the receipts were from more than 200 miles away. He asked one of his reports, Senior Special Agent Christopher Loftis, to investigate the matter and interview Claimant. Mr. Carruthers stated that although he did not conduct further investigation he did examine the submitted receipts at issue, and they appeared to be original, genuine documents, not hand-made or falsified.

Mr. Loftis testified at the investigation that he and Mr. Carruthers reviewed Claimant's log sheet and receipts, and then set a meeting with Claimant for late May.

Mr. Loftis entered into the investigation record numerous logs sheets, with supporting receipts, submitted by Claimant in early 2013. Mr. Loftis testified that he provided Claimant all of this information during their meeting.

The log sheet form has various boxes within which the employee provides certain information. The employee completes boxes for the date the form was submitted, the date of the travel home, and the zip code for the work site and the employee's home. The form has four different boxes for different types of travel and supporting documentation.

The box checked by Claimant for most of the trips at issue states, "Mark here if trip is greater than 500 miles and a receipt is attached. Remember—a valid receipt must be an original, contains a business name, the employer's home residence city name, and the date of purchase which must coincide with the date of he claimed trip." The form indicates that if a receipt is required, it should be attached to a separate page and faxed directly behind the form itself. Another box states that the employee is to, "Mark here if there is no valid receipt source physically located at your home residence and the receipt attached is from a source nearest in proximity to your home residence location that is on the route traveled." That box was checked on two log sheets. One log sheet had none of the four boxes checked.

At the investigation, Mr. Loftis reviewed the log sheets and supporting documentation in detail. The first sheet, dated January 7, 2013, was for travel home on January 4, 2013. The receipt was from a Quiktrip in Pleasant Valley, Missouri, on January 6, 2013. Travel home on January 18, 2013, was also supported by a receipt from a Quiktrip in Pleasant Valley, with a receipt dated January 20, 2013, as is travel home on February 7, 2013, with a receipt dated February 10, 2013. Mr. Loftis testified that this location was approximately 69 miles from Claimant's home, although Claimant had checked the log sheet box indicating that receipt was from his home residence.

A log sheet dated January 18, 2013, includes a receipt from a Quiktrip in Cameron, Missouri, which Mr. Loftis testified is 22 miles from Claimant's home. Another log sheet, dated January 27, 2013, for travel home on January 25, 2013, also had a supporting receipt from a gas station in Cameron. Claimant also had a receipt from the Quiktrip in Cameron, on February 4, 2013, for travel home on February 1, 2013, and for travel home on March 28, 2013, with a receipt dated March 29, 2013. Mr. Loftis explained that Claimant told him during their meeting that this was the closest gas station to his home from the south, so he stopped there to get fuel. Mr. Loftis testified that he had checked this and it did appear that this was the last gas station before Claimant's home town if approaching from the south.

For travel home on February 15, 2013, Claimant attached a receipt from Wellington, Kansas, dated February 18, 2013; Mr. Loftis testified that this location is 297 miles from Claimant's home. Mr. Loftis stated that Claimant told him, during their meeting, that he had forgotten to obtain a receipt near his home so he got one on his way back.

For travel home on March 1, 2013, Claimant checked the box indicating that there was no valid receipt source at his home residence so he had obtained a receipt from the nearest source on the route traveled. Mr. Loftis stated that Claimant told him that on this occasion he had forgotten to obtain a receipt so he obtained one from the McDonald's in Derby, Kansas where he had breakfast with his girlfriend. He attached a receipt from Derby, Kansas, dated March 2, 2013, which Mr. Loftis stated was 274 miles from Claimant's home.

For travel home on March 22, 2013, Claimant again checked the box indicating that his residence town had no valid receipt source, and attached one from Wichita, Kansas dated March 24, 2013. Mr. Loftis stated that this location was 270 miles from his home, and Claimant's explanation was that he stopped to visit his girlfriend and went home the next day.

For travel home on May 2, 2013, Claimant attached a receipt dated May 3, 2013, from Independence, Missouri, which Mr. Loftis stated was 74 miles from his home. Mr. Loftis testified that Claimant's explanation was that he returned home on a Friday morning, later went to a movie, did not go into town and did not stop for fuel.

For travel home on April 5, 2013, Claimant attached a receipt dated April 8, 2013, from his residence town of Gallatin, Missouri. He also had a receipt from Gallatin, dated May 18, 2013, for a trip home on May 17, 2013, and a May 17, 2013 receipt from Lathrop, Missouri. Mr. Loftis testified that this was not a duplicate, because timekeeping had rejected the first receipt as not from his home residence so Claimant obtained another one.

Mr. Loftis testified that there were locations in Gallatin, Missouri where fuel was available. He stated that during their interview Claimant explained his receipt sources by maintaining that he does not always travel all the way into his hometown, as his actual residence is 10 miles from Gallatin. He maintained that Claimant did not explain why he did not drive into his residence town to obtain a receipt. Mr. Loftis stated that Claimant told him he obtained a receipt in Wichita, Kansas because he visited his girlfriend and drove home the next day.

Mr. Loftis testified that he believed Claimant's dishonesty consisted of his representing that these receipts were from his hometown when almost all of them were not. He stated that there were no specific receipts he took exception to as more dishonest than others.

Carrier Division Engineer Ronnie Anderson testified at the investigation that an employee's failure to provide receipts from proper locations with the log sheets could affect the Carrier's interests and the amount the employee is reimbursed for travel. He acknowledged that errors in the documents could be simple mistakes, but other employees had been subjected to investigation for such errors.

Claimant testified at the investigation that at the relevant time he was working as a Machine Operator, a position which entitled him to what is referred to as a Pay Code 55 reimbursement. He acknowledged that he met with Mr. Loftis in Amarillo, Texas, on or about May 31, 2013, and that Mr. Loftis had shown him the same documents that were entered into evidence at the investigation. He maintained that he did not recall the questions Mr. Loftis asked him or their conversation.

Claimant explained his failure to obtain receipts from his home residence by stating that he never went into town when he was home, because he was busy at home

and had a brother in the hospital. He stated that he always obtained receipts on the way out, going back to work, and shopped around for the cheapest diesel and obtained receipts from those locations. He stated that he did not know if fuel receipts were required, but that was what he always obtained.

Claimant maintained that he had not received any training on the proper way to fill out the log form. He maintained that stopping and obtaining receipts in Pleasant Valley, Missouri or Cameron, Missouri was a matter of convenience for him, as he drove through these places on his way home. He explained that there was no reason, on a roundtrip of approximately 1600 miles, that he would get within 60 miles of his residence and not go home. He testified that he had no intention of defrauding the railroad.

Claimant's personal record shows at Level S 30-day record suspension, with a 36-month review period, assessed July 12, 2010 for failure to properly follow stopping procedures while operating machinery, and a Level S record suspension, with a 12-month review period, assessed on July 7, 2005 for failure to operate a tamper in a safe manner. His record also shows a formal reprimand in 1998 for absence without authority. 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, "Theft or any other fraudulent act, which may be evidenced by the intent to defraud BNSF or by the taking of BNSF monies or property not due."

The Carrier first asserts that the Organization's procedural objection, that the investigation notice is defective as it did not specifically reference the Travel Allowance Log Sheet, is without merit. The Carrier states that the Organization has not explained how the omission of the document's full title prejudiced its ability to prepare an adequate defense. In addition, the Carrier points out, Mr. Loftis interviewed Claimant prior to the hearing and he was well aware of the matters under investigation. The Carrier concludes that the Organization's procedural objections lack merit.

On the merits, the Carrier explains that Claimant was working as a machine operator at the time in question and regularly submitted his log sheets and receipts to be reimbursed by the Carrier for his Pay Code 55 travel. The Carrier adds that the weekend travel allowance is a negotiated agreement which pays Claimant for travel from his last work location to his home, with the amount due determined from the last work location zip code to his home residence zip code. The Carrier states that Claimant is required to submit a receipt as proof that he actually traveled to his home and is therefore entitled to payment from the Carrier. The procedure requires Claimant to obtain a receipt in his residence town unless there is no valid receipt source physically located there, in which case he so certifies his travel on the log sheet.

The Carrier points to Mr. Loftis' unrefuted testimony that the receipts appeared to have been obtained from unusual locations and outside the weekend travel allowance requirements. The Carrier notes that Mr. Loftis reviewed the receipts from January through May and discovered that they had been obtained from different locations, often

significant distances from Claimant's residence in Gallatin, Missouri. Ten dishonest, questionable receipts were entered into the investigation record, the Carrier maintains. Of these, the Carrier explains, four were from locations approximately 70 miles from Claimant's home, three 22 miles from his home, and three approximately 270 miles from his home.

The Carrier also notes that Claimant checked the log sheet box indicating that the trip was more than 500 miles. The Carrier urges this Board to discount the explanations Claimant offered at hearing for his failure to obtain proper receipts. In particular, the Carrier notes, for the receipt obtained 270 miles from his home, Claimant asserted that he had forgotten to obtain a receipt so picked one up on his way back to work. For another occasion, the Carrier states, Claimant maintained that he stopped to visit his girlfriend in Wichita, Kansas and went home the next day, but never provided any substantiating evidence that he did so, on that date or any of the others at issue.

The Carrier contends that Mr. Loftis established Claimant's dishonesty, because Claimant maintained the receipts were from his town of residence when they were not. Further, the Carrier states, Claimant failed to fulfill the weekend travel allowance requirements and claimed reimbursement for trips he did not make. Claimant and the Organization, the Carrier stresses, have not refuted the Carrier's evidence.

The Carrier maintains that it has met its burden of proving that Claimant was dishonest in his reporting, and this is a dismissible offense, under its PEPA and well-established arbitral precedent. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. In particular, the Organization argues, the charge that Claimant had committed "alleged dishonesty and falsification of Pay Code 55 receipts beginning approximately January 2013 and continuing forward," was too general and vague to enable Claimant and the Organization to prepare a defense, and therefore denied Claimant the due process guaranteed by the parties' Agreement.

On the merits, the Organization argues that the Carrier has failed to provide any evidence of Claimant's guilt of the charges. It is clear, the Organization maintains, that Claimant did not falsify receipts, as Mr. Carruthers and Mr. Loftis, both sworn law enforcement officers, testified that the receipts were original and unaltered. The Carrier simply cannot, the Organization stresses, connect the dots between the Notice charges, the testimony concerning those charges, and Claimant's resulting dismissal.

The Organization also maintains that Carrier witness Mr. Anderson's testimony establishes that the Carrier's timekeeping group tracks, validates and corrects employee requests for payment in the same manner that they review and approve employee entries for daily hours worked. If a payment request requires scrutiny, the Organization states, the employee is notified and the payment is withdrawn until the matter is resolved. The Organization attached to its claim nine such notices, issued in a 21-day period, informing employees that it appeared they were not entitled to claimed travel allowance. The

process works, the Organization states, and does not result in an employee's dismissal. However, the Organization stresses, there is no evidence that the Carrier followed its usual practice in the instant situation. Indeed, the Organization notes, there is nothing to demonstrate that Claimant had even been trained on the proper way to complete the relevant forms.

The Organization concludes that the Carrier has failed to prove its charges against Claimant by substantial evidence. Even if it had, the Organization stresses, the discipline assessed is excessive in proportion to the alleged misconduct. The Organization urges that the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. As the Carrier asserts, the Investigation Notice language, along with the fact that Mr. Loftis had earlier apprised Claimant of the matters at issue, makes it clear that Claimant knew exactly what was at issue in the investigation and the Organization had full opportunity to prepare a defense.

On the merits, we first note that the Carrier dismissed Claimant, an employee with more than 16 years' service for "Dishonesty about any job-related subject," as a stand-alone dismissible offense under its PEPA. The Carrier maintains in its response to the claim that Claimant's dishonesty was that he did not prove he made the trips he claimed, and he sought reimbursement for travel he did not make. Had the Carrier demonstrated, by substantial evidence, that this was indeed Claimant's violation, his dismissal might have been warranted, as his conduct would have essentially amounted to theft from his employer.

We first note, however, that the Carrier's witnesses at hearing never testified that they had evidence showing, or even believed, that Claimant had failed to make the claimed trips. Its primary witness, Mr. Loftis, testified that Claimant was dishonest because he checked the box stating that the receipts were from his home town when they were not. Mr. Anderson only testified vaguely that an employee's failure to provide receipts from proper locations with the log sheets could affect the Carrier's interests and the amount the employee is reimbursed for travel. The contention the Carrier now makes was simply not a focus of the investigation.

Moreover, and more importantly, there is no evidence that Claimant failed to make the trips at issue; indeed, the record strongly suggests otherwise. Although not completely specific, the record indicates that the round trips were approximately 1500 to 1600 miles. For the ten log sheets presented as evidence against Claimant, four had receipts from a location only 22 miles from Claimant's home, and three had receipts from a location 69 miles from his home. It seems extremely unlikely, given the overall length of these trips, that Claimant would travel so close to his home unless he was actually going there. Indeed, Mr. Loftis acknowledged that the first of these locations was on the route to Claimant's home and was in fact the closest gas station. As for the three trips where receipts were obtained from locations a substantial distance from his home, there

was no evidence as to where these locations were in relation to either the jobsite or Claimant's home, or anything to show that they were not on the route to his home, as, for example, that they were in the opposite direction. The mere fact that in three cases receipts were obtained a substantial distance from Claimant's home falls very far short of meeting the Carrier's burden of proving its assertion that Claimant did not make the trips for which he claimed reimbursement.

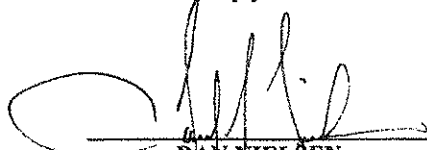
As for the log sheets themselves, Claimant checked the boxes stating that the receipts were from his home town when they were not, and he obviously, at least in some cases, did not make as much effort as he might have to obtain appropriate receipts. However, there is nothing to show that he intended to mislead the Carrier, as the fact that the receipts were not from his home residence was readily apparent to anyone who looked at the documentation he submitted. There is no explanation for the fact that no one ever informed Claimant, as had apparently been done for other employees, that his documentation would not be accepted and he would in fact have to obtain receipts from his home town.

At the end of the day, Claimant is guilty of, at most, minor misrepresentation on the face of his log form, a fact that was readily apparent from the forms himself. He is not guilty of the sort of dishonesty which would warrant substantial discipline, let alone dismissal. The Carrier has the right to enforce the pre-conditions for reimbursement, and it may deal with the log sheets presented in this investigation by disallowing the claimed reimbursement, just as it has in other cases. However, as to the discipline, we find no substantial evidence of dishonesty and therefore the claim is sustained.

AWARD

Claim sustained in accordance with Findings.

The Carrier is ordered to comply with this Award within 45 days.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 31st day of October, 2014.