

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 474 – Award No. 474 – Valentine
Carrier File No. 14-14-0303
Organization File No. 170-SF13D2-145

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 19, 2014, when Claimant, Keith A. Valentine (1653245), was dismissed when he was allegedly dishonest when he submitted expenses for an unauthorized trip to Seattle, Washington on February 14, 2014. The Carrier alleged violation of the BNSF Railway 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 the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing June 19, 2014, 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, Keith A. Valentine, had been employed by the Carrier since 2005. On or about June 18, 2014, while Claimant was working as an exempt Roadmaster, the Carrier dismissed him from service. Claimant then attempted to mark up as a Track Supervisor in Kingman, Arizona, but the Carrier withheld him from service.

On June 19, 2014, the Carrier directed Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection

with his alleged dishonesty when he submitted expenses for an unauthorized trip to Seattle, Washington on February 14, 2014. The Carrier claimed first knowledge on June 16, 2014. Following the investigation, the Carrier found Claimant guilty of dishonesty, in violation of Maintenance of Way Operating Rule 1.6 Conduct, and dismissed him from service.

MOWOR 1.6 Conduct provides, in relevant part:

Employees must not be:

4. Dishonest

Division Engineer Sheri Ellis testified at the investigation that on June 16, 2014, her supervisor asked her to audit the expense report for Claimant, who was then working as an exempt Roadmaster, for two specific dates. She explained that Claimant's expense report showed a questionable expense for an airline ticket to Seattle, purchased on February 16, 2014. She stated that she would have been responsible for approving this trip, and had not done so. She added that she determined the other suspect expense, an airline ticket purchased on February 13, 2014, for a trip from Phoenix to Denver, was for a business purpose, but the trip to Seattle was not authorized. She added that if the cost is the same or less, it would not be considered unauthorized for an employee to fly to a location different from where he originated. However, that exception did not apply to the Seattle ticket.

Claimant admitted at the investigation that he took an unauthorized trip from Denver to Seattle. He stated that at the time he took the flight he did not think it was unapproved. He explained that he understood that so long as the fare was comparable to the return to his home location, he could take the return flight somewhere else. He stated that the fare from Denver to Seattle was \$257.66.

Claimant added that before he learned that he needed to fly to Denver for a deposition on February 14, 2014, he had purchased a ticket from Seattle to Las Vegas for a personal trip departing February 13, 2014 and returning February 17, 2014. He stated that when he learned he would need to travel from Phoenix to Denver, he believed that instead of returning to Phoenix he could travel to Seattle in order to coordinate with his personal trip. He stated that he had deposition preparation on February 12, on Thursday, February 13, 2014 he gave a deposition, and he then drove to Phoenix and flew to Denver. On Friday, February 14, he interviewed for a position for which he had applied and then flew to Seattle instead of returning to Denver. On Saturday, February 15, he attempted to change the return on his personal ticket so that he could fly to Phoenix, but

learned he had lost the ticket because he did not make his first flight. So, he stated, he booked a one-way ticket back to Phoenix through Concord Travel, with the intent of expensing it as personal. On Sunday, February 16, he returned to Phoenix. He stated that he used Concord Travel, the Carrier's agent, because its fares were significantly lower than he could obtain on his own. He stated that the tickets were about \$900, but Concord was able to get him a flight for \$411.90.

Claimant added that on May 16, 2014, he prepared his expense report in an airport as he was leaving on vacation. His corporate card had been blocked and it had been necessary for him to put some expenses on his personal card, and he wanted to be reimbursed for those expenses. He maintained that he kept an expense notebook but did not have it with him at the time.

Although he recalled preparing it on May 16, the expense report including this charge is actually dated May 9, 2014. When questioned as to why it had taken him so long to submit his February expenses, he explained that he had just been lazy on keeping him expenses current.

Claimant maintained that when he looked at the Seattle to Phoenix airline ticket he could not recall the purpose of the trip. He expensed it as part of the interview because that was the only thing he could remember doing around that time. Claimant added that on June 10, 2014, he met with General Director of Line Maintenance for the Southwest Division John Lierberholdt and told him he was unsure about that expense and could not remember what it was for. Ms. Ellis testified at the investigation that she was present at the time of this meeting. She did not participate, but she believed its purpose was to investigate travel expense irregularities other than the ones at issue in this case.

On June 18, 2014, the Carrier terminated Claimant's exempt relationship due to dishonesty and he was informed he could exercise his seniority. He then sat down and retraced his steps, figured out the purpose of the plane ticket, and reimbursed the Carrier for the \$411.90. He sought to mark up into the bargaining unit, but was withheld from service and this investigation was scheduled.

Claimant had no previous disciplinary record.

With respect to the Organization's procedural objections to the discipline assessed Claimant, the Carrier first disputes the Organization's contention that the investigation was not held in a timely manner, in violation of Rule 13. The Rule, the Carrier states, provides that an investigation shall be set promptly "to be held not later than fifteen (15) days from the date of the occurrence . . . from the date information is obtained by an officer of the Company . . ."

The Carrier points out that Claimant met with Carrier General Director Maintenance John Wiederholt on June 10, 2014. He then asked Ms. Ellis to audit Claimant's expenses; the audit was completed on June 16, 2014, the Carrier's date of first knowledge. The Carrier adds that Claimant was terminated from his exempt status on June 19, 2014 and attempted to mark up as a scheduled employee on June 19, 2014, but the Carrier withheld him from service. The Investigation Notice was dated that day, June 19. The Carrier states that the investigation was then set to take place within the required 10 days, on June 25, 2014, and was later postponed by mutual agreement.

The Carrier also notes that arbitral precedent has held that even if a Carrier has inexcusably breached the time limits, that procedural violation alone is not sufficient to overturn dismissal. The Carrier asserts that the Third Division has held that, especially in light of Claimant's admission of guilt, this sort of procedural defect would not entitle Claimant to reinstatement.

The Carrier notes the Organization's contention that it has subjected Claimant to double jeopardy, but that procedural defense is not applicable here, the Carrier states. Claimant has had only one investigation, so, by definition, the principle does not apply. Further, the Carrier states, arbitral precedent holds that when the Carrier discharges an employee for cause, the employment relationship is permanently severed. Therefore, since the individual is no longer an employee, he cannot utilize the contractual protections of a covered craft even if he could have retained seniority in that craft. The Carrier could have terminated Claimant's employment and prevented him from returning to the Organization's craft, but chose a more lenient approach and did not do so.

On the merits, the Carrier states that the investigation determined Claimant was dishonest when he submitted expenses for an unauthorized trip to Seattle, Washington on February 14, 2014. Claimant was an exempt employee, working as a Roadmaster out of Williams, Arizona, at the time of the incident. Division Engineer Ellis conducted an audit of Claimant's expenses and discovered the trip at issue. Claimant admitted that he took the trip without authorization and, the Carrier states, it is well settled that such an admission is sufficient to satisfy its burden of proof.

The Carrier urges that the Board reject Claimant's excuses that he forgot the purpose of his trip and mistakenly submitted it to the Carrier, and that he did not recall the email alerts he was sent once the expense was over 30 days old. His explanation that he was lazy about submitting his expenses is meritless, the Carrier states, as he entered other later expenses on time. The Carrier points out that it is the responsibility of the Hearing Officer to evaluate credibility, and the Board should not disturb his conclusion that a personal charge of over \$400 on a company credit card is a significant event, one not likely to be simply forgotten.

The Carrier concludes that it is clear that Claimant violated Carrier Rules, and dismissal is the appropriate penalty for this type of serious misconduct. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. The Organization states that the Carrier has subjected Claimant to double jeopardy, as it dismissed him from his Roadmaster position on June 19, 2014, and filed charges against him under the collective bargaining agreement the same day, for the same violations. The Carrier then dismissed Claimant again for the same conduct.

The Organization notes that the Carrier dismissed Claimant while he was an exempt employee and such discipline would not be addressed under the collective bargaining agreement. When he exercised his right to return to his craft, the Carrier refused to allow him onto the property and issued an Investigation Notice. The Organization claims that the Carrier has no right to charge an employee under the collective bargaining agreement for conduct that may have occurred while he was exempt. In support of this proposition, the Organization relies upon the award in PLB 7394, Case No. 36. The Organization maintains that Claimant has the right to return to his scheduled status without intervention from the Carrier.

The Organization also maintains that the Carrier has failed to comply with the applicable time limits and cannot just claim first knowledge at a given date to justify that failure. When there is evidence of earlier knowledge, the Carrier should be held accountable for its non-compliance with the timelines.

On the merits, the Organization asserts that Claimant does not deny charging the flight at issue as a business expense, but did so only because he did not have his records available and needed to submit his expenses to the Carrier before going on vacation. The Organization notes that he contacted a supervisor on June 10, 2014, not June 16 as the Carrier asserts, and told him of the potential problem and that he would correct it when he returned from vacation. The Organization points out that the Carrier never gave him the chance to correct the error, even though he reimbursed the Carrier, and simply dismissed him from service.

The Organization concludes that the Carrier has failed to meet its burden of proof, and even if it had, the discipline assessed is excessive and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. There is no dispute that the Carrier dismissed Claimant for his conduct when he was an exempt employee, not subject to the BMW contract. The Carrier dismissed him for dishonesty and theft, one of the

most serious offenses an employee can commit and one which is universally recognized as cause for dismissal. The Carrier then allowed Claimant to exercise his seniority and return to the BMW craft, but immediately withheld him from service and scheduled this investigation.

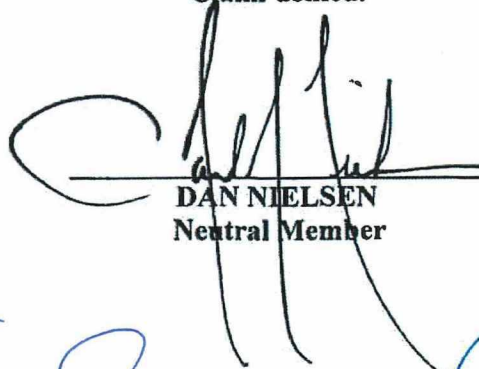
The Organization argues, based upon the award in PLB 7394, Case No. 36, that the Carrier cannot discipline an employee pursuant to the BMW contract for conduct that occurred when the employee was a non-bargaining unit member. Thus, the Organization contends, Claimant must be allowed to return to work in his previous craft position notwithstanding his dismissal as a Roadmaster.

That case, however, is readily distinguishable. In PLB 7394, Case No. 36, the employee reported for his exempt position while impaired. Carrier imposed conditions on him, which he satisfied. Then, when he returned to the bargaining unit, Carrier attempted to impose discipline upon the employee for having been impaired. He had never reported under the influence while a member of the bargaining unit, and the Carrier had imposed conditions on him in response to his misconduct, conditions which he satisfied before returning to the unit. It did not, when it imposed the conditions, impose any discipline on him. It was only when he returned to the unit that a suspension was imposed.

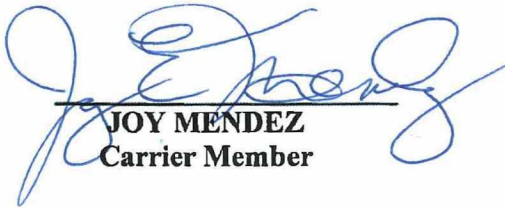
Here, the Carrier dismissed Claimant for cause while he was still an exempt employee. Even though the Carrier technically allowed him to exercise seniority and scheduled this investigation, the Carrier had already severed the relationship. It would be incongruous, to say the least, that because the Carrier allowed Claimant to use his seniority it was thereby obligated to retain an employee it had already found guilty of theft in its own inquiry, and then proved guilty of theft through this investigation. The Hearing Officer determined that Claimant's account of events was not credible and that he was guilty of the charges, and the Hearing Officer's determination of credibility had a substantial basis. Claimant had a full opportunity for a defense and the evidence clearly established that he was guilty of theft. We therefore conclude that the Carrier has satisfied its burden of proof. The penalty of termination is standard for this sort of misconduct.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 12th day of Oct, 2016.

S