

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 489 - Award No. 489 – Kelton
Carrier File No. 14-15-0168
Organization File No. 100-SF13N1-153

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 26, 2015 when Claimant, Kirk C. Kelton (1752575), was dismissed for failure to operate a company vehicle in accordance with company policy by driving the company vehicle from Houston, Texas to the Belton, Texas area on Friday, January 16, 2015 and from the Belton, Texas area to Houston, Texas on January 19, 2015 outside of assigned hours and over the 50 mile reasonable distance stated in the Vehicle Policy and Procedure Manual Section E. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.19 Care of Property, MOWOR 1.6 Conduct, and Maintenance of Way Safety Rule (MOWSR) 12.1.1 General Requirements and Vehicle Policy and Procedure Manual Section E.

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, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime, commencing March 26, 2015, 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, Kirk Kelton, had been employed by the Carrier since 2007. On February 25, 2015, the Carrier conducted an investigation to ascertain the facts and determine Claimant's responsibility, if any, in connection with his alleged failure to operate a Carrier vehicle in accordance with Carrier policy by driving the vehicle from Houston, Texas to the Belton, Texas area on Friday, January 16, 2015, and a return trip on January 19, outside of assigned hours and over the 50 mile reasonable distance stated in the Carrier's Vehicle Policy and Procedure Manual, Section E. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged, in violation of MOWOR 1.19 Care of Property, MOWOR 1.6 Conduct, and Maintenance of Way Safety Rule (MOWSR) 12.1.1 General Requirements, and dismissed him from service.

MOWOR 1.19 Care of Property provides, in relevant part, "Employees must not use railroad property for their personal use."

The facts of this case are largely undisputed. Carrier Houston, Texas Trainmaster Aaron Whitney testified at the investigation that at the time of the incident Claimant was the Foreman of a Surfacing Gang, and Carrier vehicle 27633 was assigned to that gang. He was Claimant's supervisor. An employee reported that he saw the vehicle traveling in the direction of Claimant's home. During the course of his investigation, Mr. Whitney stated, he obtained GPS information and learned that the vehicle in fact traveled to the Belton area on Friday, January 16 and back to Houston on Monday, January 19, about 190 miles, well above the 50 miles set forth in the Carrier's vehicle policy. Mr. Whitney explained that Track Supervisors in his territory do drive their vehicles home if it is within 50 miles of the territory.

Mr. Whitney also obtained records showing that Claimant fueled the vehicle, using his Carrier fuel card, at 3:21 p.m., on January 16, 2015 in Houston for \$39.04, and at 8:30 a.m. on January 19, 2016 in Temple, Texas, for \$35.48.

Mr. Whitney stated that he never gave Claimant permission to take the vehicle home over the weekend. He spoke with Claimant after he learned of this matter, and Claimant did not deny having taken the vehicle home for the weekend.

Claimant acknowledged at the investigation that he drove the vehicle home for the weekend. He admitted that he was familiar with the Carrier's vehicle policy, and that he knew about the 50-mile radius rule. He did not obtain Mr. Whitney's permission to drive the vehicle home for the weekend. Claimant also acknowledged that he obtained fuel as Mr. Whitney had described.

Claimant maintained that he had not been trying to be dishonest. He explained that he was working on a mobile gang at the time of the incident, and his gang made frequent moves to multiple subdivisions, at a minimum of every other week. He had only been on this job about two weeks, and he planned to sit down with his supervisor about taking the vehicle home, but had not yet had a chance to do so. It appears that he did not drive a personal vehicle to work, but rather took some sort of van.

Claimant also maintained that when he previously worked a Surfacing Gang on the Texas Division, up to nine or 10 months before this incident, the policy and common practice was that the Foreman would take the gang's truck home every weekend. He was granted permission to do this by several supervisors. That would save the Carrier money because he could just leave from the last jobsite rather than having to double back to the location where he had left his personal vehicle. Claimant acknowledged that at the time of this incident he was working in the yard and on the mainline.

Claimant stated that he took the truck home on this occasion solely for the Carrier's benefit. He explained that on his gang employees are entitled to weekend mileage of \$28 for every 100 miles, and he did not claim that compensation on this occasion.

Claimant's personal record shows a Level S record suspension, with a three-year review period, issued on May 22, 2012 for operating a Carrier vehicle in an unsafe manner and displaying unbecoming conduct, and a Level S record suspension, with a three-year review period, issued on May 8, 2012 for failure to properly operate a Carrier vehicle, in violation of, along with other rules, the Carrier's Vehicle and Procedures Manual.

The Carrier asserts that this case is not complicated. Claimant's Roadmaster testified that another employee told him he saw Claimant driving a Carrier vehicle from his work location in Houston, Texas toward Temple, Texas. Mr. Whitney obtained GPS information for the vehicle, and found that Claimant traveled from Pearland, Texas, which is near Houston, to a location between Temple and Belton, Texas on Friday, January 16, and back on Monday, January 19, 2015. The distance from Pearland to Temple, Texas is approximately 190 miles. The Carrier points out that Mr. Whitney also testified he learned Claimant had charged fuel on his Carrier fuel card.

The Carrier points out that when Mr. Whitney questioned Claimant about the matter, he admitted that he had not asked permission to drive the vehicle. It is well established, the Carrier states, that such an admission is sufficient to satisfy its burden of proving Claimant guilty by substantial evidence.

The Carrier urges the Board to discount Claimant's testimony that he was not intentionally dishonest. It is apparent from his hearing testimony that Claimant thought he could drive the vehicle home for the weekend without being caught. Further, although Claimant maintained he had been permitted to take a Carrier vehicle home for the weekend because it benefited the Carrier, he admitted that he currently works in the yard and on the mainline so his driving the vehicle home did not benefit the Carrier.

The Carrier states that the Hearing Officer determined Claimant's testimony was not credible, and that conclusion should not be disturbed by this Board. The Carrier argues that it has proven that Claimant was dishonest.

The Carrier points out that such dishonesty had been recognized as cause for dismissal even when the employee has no previous discipline. For Claimant, however, this was the third Vehicle Policy violation in 36 months. The Board should not disturb the Carrier's determination that dismissal was warranted.

The Organization states that Claimant violated no Carrier Rules. Previous supervisors had granted Claimant permission to take the vehicle home for the weekend. In his current assignment as foreman, he moved between numerous work sites and it benefited the Carrier that he did not have to return to a previous site to pick up a personal vehicle.

In addition, Claimant used the weekend time to perform maintenance. Claimant never tried to hide the fact that he took the vehicle home. Once there, he did not use it for any personal business. Had he driven a personal car back and forth, the Carrier would have had to pay him mileage, which he did not claim.

The Organization urges that the Carrier failed to prove that Claimant engaged in any misconduct. Even if it had, the penalty of dismissal is extreme, unwarranted and unjustified.

We have carefully reviewed the record in its entirety. First, we find no procedural error which deprived Claimant of his right to a fair and impartial investigation. On the merits, the record is clear that Claimant used the Carrier vehicle, and purchased fuel charged to the Carrier, for the sole purpose of providing him round trip transportation to his home over the weekend. While he maintained that this was a common practice that had been approved by several supervisors, none of whom he named, his statement that he had planned to sit down with Mr. Whitney to talk about doing it shows that he knew he did not have such permission on this job. Additionally, his explanation about saving the Carrier time and money because he did not have to double back to where he had left a personal vehicle makes no sense, as he was working in the yard and on the mainline at the time of the incident.

Claimant clearly appropriated Carrier property and funds for his own use, without permission, in violation of Carrier rules and the norms of workplace conduct. His guilt has been proven by substantial evidence. As the Carrier states, such conduct is generally viewed as justifying dismissal even for a first offense and, with the additional discipline on Claimant's record, we cannot say that the Carrier's decision to dismiss him was arbitrary or excessive.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member

MICHELLE McBRIDE
Carrier Member

DAVID SCOVILLE
Organization Member

Dated this 21 day of August, 2017.