

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 533 – Award No. 533 – M. Jones
Carrier File No. 14-19-0393
Organization File No. 2409-SL13A1-1929

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf Carrier File # RDV-MOW-2019-01623, Maurice Jones (0292920), Seniority date May 05, 2014, for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service. 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended. 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed from service commencing October 14, 2019, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

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, M. Jones, had been employed by the Carrier since 2014. On October 14, 2019, following an investigation, the Carrier found Claimant guilty of failing to report to his designated place of work beginning on September 5, 2019. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.15 Duty-Reporting or Absence, and dismissed him from service.

At all times relevant, Claimant was assigned to gang TSCX0084 out of Arkansas City, Kansas. Assistant Roadmaster Wesley Brown testified at the hearing that he was Claimant's immediate supervisor from September 5, 2019, through the date of the hearing on September 23, 2019. He entered into evidence a document from the Carrier's manpower operation showing Claimant's work history and assignments and explained that Claimant was assigned to do relief work on gang TSCX0084 from August 26, 2019, through December 31, 2019. The document shows Claimant's relief assignment to TSCX0084 as well as Claimant's permanent position as Foreman on gang TSEC1515 from June 10, 2019 through its abolition on September 6, 2019. Mr. Brown stated that Claimant had not reported for work on TSCX0084 at any point between September 5, 2019, and September 20, 2019.

Mr. Brown testified that Claimant texted him at 5:05 p.m. on September 6, 2019, about the following week. However, he explained that Claimant did not communicate with him between September 3, 2019, and September 6, 2019, nor did Claimant communicate with Mr. Brown that he would be absent beginning September 5, 2019. Mr. Brown entered the following text messages between himself and Claimant into evidence:

Mr. Brown (date and time not shown): Will you be at the designated place at start time tomorrow? If not it will be an Unapproved absence until you report.

Claimant (Monday, September 2, 10:11 p.m.): No sir told you about my car the best thing to do is call manpower to release me. And find new 19a relief or relief.

Mr. Brown (Tuesday, September 3, 8:16 a.m.): Today will be an Unapproved absence Be sure to reflect that when reporting time. Also holiday pay cannot be entered.

Claimant: Im in Frisco tx at work caught a ride with co worker.

Mr. Brown: The only position you can be paid on or report to is Foreman on Gang TSCX0084.

Claimant: I'll just let union deal with that because I told you and manpower about my car problems my permanent position is in texas[.] I don't know why you giving me a hard time especially when I told you and manpower 4 to 5 days ago but its all good I'll let them deal with it sorry for any inconvenience.

Claimant (Friday, September 6, 5:08 p.m.): Giving heads up my car still in shop will not make it next week union said since you wont release have to let you know.

Mr. Brown: You are expected to report to Ark City Kansas at 0600 on the 9th until your 19a is complete. Anything other than that is and will be an unapproved absence. Everyday you do not report to gang TSCX0084 do not pay anything other than an unapproved absence.

Claimant: Ok already talk to union if anything change with my car I'll keep u updated.

Claimant (Wednesday, September 11, 10:01 a.m.): Vehicle still in shop they waiting on other parts to come [...]

Mr. Brown testified that Claimant did notify him about the week of September 16 through September 20, 2019, although those text messages are not reflected in the images provided. Mr. Brown did not know whether Claimant reported to work anywhere else between September 5 and September 20, 2019. Mr. Brown further testified that Monday, September 2, 2019 was a holiday, but Claimant did notify him that day that his car was still out of service.

Claimant testified at the hearing that he was assigned to gang TSCX0084 on September 5, 2019, but that he did not know where he was assigned as of the date of the hearing because his permanent position was abolished on September 6, 2019. He acknowledged that he did not report for work on gang TSCX0084 at any time between September 5 and September 20, 2019. Claimant explained that he had been in constant contact with Mr. Brown from August 30 through September 23, 2019, about his inability to report to the Arkansas City jobsite. Claimant testified that he would text Mr. Brown either at the beginning or end of the week to tell him that his car was still being repaired, that his situation had not changed, and that he could not report to the jobsite for work.

At the hearing, Claimant asserted that the text messages presented by Mr. Brown were missing communications between them, specifically one where he told Mr. Brown that he had an investigation on September 4, 2019. Claimant entered text messages into evidence, which stated:

Claimant (September 2, 7:54 p.m.): No luck on car yet so just wanted to give a headz up and Wednesday I have to attend investigation that was reschedule.

Claimant (September 2, 7:55 p.m.): Union Fwd: I just want to confirm with everyone, your investigation has been postponed to Wednesday September 04, 2019, Sherman Depot at 0900. Bnsf was suppose to notify each of you. I apologize for any confusion. Be safe and have a good weekend. I will touch base with you on Tuesday.

Mr. Brown (September 2, 8:23 p.m.): Will you be at the designated place at start time tomorrow? If not it will be an Unapproved absence until you report.

Claimant stated that he continued to report to his permanent position on gang TSEC1515 in Frisco, Texas, to which he was able to commute with a coworker, until that position was abolished on September 6, 2019. He further testified that all his assigned days since September 6 were unapproved absences, based on what Mr. Brown told him. Claimant explained at the hearing

that the only reason he did not report for work was because he needed repairs on his car's transmission, which required special, foreign-made parts to be ordered. That, he stated, is why he was without a car and unable to report to work for so long. He stated at the hearing that he had just recently gotten his car back.

On May 31, 2019, Claimant received a formal reprimand with a one-year review period for unapproved absences on April 22 and 23, 2019. That same day, he also received an S-level 30-day Record Suspension with a one-year review period for leaving work early and failing to notify his supervisor. On August 19, 2019, Claimant received a 10-day Record Suspension with a one-year review period for failing to report for his assigned position and failing to notify his supervisor beforehand.

The Carrier asserts that it provided substantial evidence that Claimant was unwilling to make alternative arrangements to report to the assigned jobsite and simply did not want to work. Claimant was absent from his work assignment from September 5, 2019, through his dismissal on October 14, 2019. Additionally, on September 3, 2019, when he should have reported to Arkansas City, Claimant instead reported to Frisco, Texas, demonstrating that he attempted to exchange his duties or abandon his assignment without authority. Simply sending a weekly text message that his car was still in the shop does not excuse Claimant from reporting to his proper assignment nor does it allow him to report to a different job choice. Claimant clearly violated Carrier Rules as alleged, and his actions warrant dismissal. The Carrier urges that the claim be denied.

The Organization argues that the Carrier failed to meet its burden of proof, as Claimant did not violate any Rules. The messages between Claimant and his supervisor clearly show that Claimant's car was still in the shop for repairs, and he was unable to report to the out-of-State worksite as he had no means of getting there. Claimant's supervisor, Mr. Brown, admitted at the hearing that Claimant told him each week that he would not be able to report to work. This is confirmed by text messages entered into evidence by both Mr. Brown and Claimant, and by Claimant's testimony. Indeed, Claimant had let Mr. Brown know in advance that he would not be present and Mr. Brown accepted Claimant's notice. Given Claimant's communication about his inability to report to the jobsite, Claimant did not violate any Rules. The Organization requests that the claim be sustained, with Claimant reinstated and made whole for his losses.

We have carefully reviewed the record in its entirety, and find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The essential facts are not in dispute. The Carrier eliminated Claimant's permanent assignment and instructed him to report to a relief assignment at a different location. Quite simply, Claimant refused to do so, contending that his car was in the shop for repairs for an extended period and he was therefore unable to report as ordered. While the record does show that Claimant contacted his supervisor in advance of each week to notify him that he would not report to the assigned jobsite, the record is also clear that the supervisor replied that these absences were not approved.

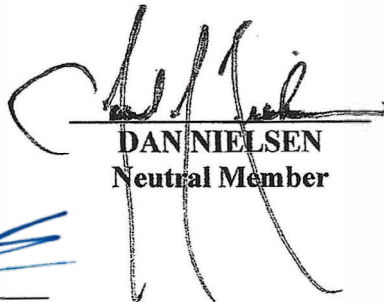
There is no indication that Claimant attempted to obtain alternate transportation or that he attempted to work matters out with his supervisor. Indeed, his messages show that he simply believed his asserted car trouble was a valid excuse and the Carrier should make other

arrangements. This attitude shows a fundamental lack of understanding of what an employer might reasonably expect of an employees. He is clearly guilty of the charges against him.

As for the penalty, Claimant was a relatively short term employee who demonstrated a cavalier attitude towards his employment. His personal record shows three similar violations in the months leading up to this incident. Under these circumstances, we cannot say that the Carrier's decision that dismissal was warranted represents an unfair, arbitrary or discriminatory exercise of its discretion to determine the appropriate disciplinary sanction.

AWARD

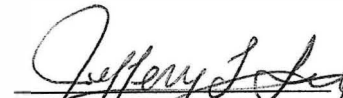
Claim denied.



DAN NIELSEN
Neutral Member



LOGAN MCKENNA
Carrier Member



JEFFERY L. FRY
Organization Member

Dated this 31 day of August, 2023.