

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 578
Carrier File No.: 14-22-0027
Organization File No.: 2418-SL13A1-2129
Claimant: A. Perez

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

STATEMENT OF CLAIM:

We Present the following claim on behalf of Alexander Perez, Emp ID 0380212, for the removal of the Claimant's discipline for Violation of MWOR 1.15 Duty-Reporting or Absence. We request all record of discipline be removed from the Claimants record. The Claimant shall be made whole as a result of the Carrier's actions.

CARRIER POSITION:

During the week of November 29, 2021 through December 5, 2021, Assistant Roadmaster J. Martinez filled a vacation vacancy for Claimant's supervisor, Barstow Roadmaster T. Utu. On December 1, 2021, Claimant did not show up for work, nor did he call and notify Martinez that he was not going to come to work that day. Because this was an AWOL ('no call/no show') incident, it did not fall within Engineering Instructions G.4 attendance guidelines for handling unexcused absences or tardiness.

An "unexcused absence" was explained by Martinez at the Investigation as a situation where an employee contacts proper authority about a requested absence and the request is not approved by supervision. EI G.4 only applies to situations that involve tardiness or unexcused absences where some form of notification to supervision has taken place.

When an employee fails to notify proper authority at any time prior to or during their regular tours of duty that they will not report to work, PEPA classifies this type of incident as an unauthorized absence (AWOL) in Section IV (C):

IV. Policy Requirements. * * *

C. Serious Violations (Level S)

1. Serious violations include but are not limited to: * * *
- d. An unauthorized absence (AWOL). * * *

The Carrier contends it was not required to offer Claimant counselling under the circumstances. It maintains the discipline of a 30-day Record Suspension with a 12-month Review Period was the appropriate penalty.

ORGANIZATION POSITION:

The Organization points out that Claimant was charged with having violated Rule 1.15, which makes no mention of being AWOL. In its assessment, because Claimant was charged with Rule 1.5, the Carrier is limited to punishments applicable to that offense and cannot be allowed to expand the alleged offense to some other rules violation with a heavier penalty.

As the Organization sees it, the Carrier has not followed the BNSF Absenteeism Notification and Layoff Policy. The Organization contests both the Carrier's decision and the level of discipline levied against Claimant Perez. It asserts Claimant's Level-S with a One (1) Year Review Period is extreme and unjust, in flagrant abuse of BNSF managerial discretion.

DECISION:

The Carrier Notice of Investigation stated as follows in pertinent part:

An investigation has been scheduled at 1100 hours, Wednesday, December 15, 2021, at the Santa Fe Conference Room, 740 Carnegie Drive, San Bernardino, CA, 92408, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged absence without acquiring prior authority from your immediate supervisor on December 1, 2021 while working as trackman on the Needles Subdivision. You failed to protect your employment and job assignment when you did not report to work at your prescribed start time and location nor did you notify your immediate supervisor of your absence.

This investigation will determine possible violation of MWOR 1.15 Duty-Reporting or Absence.

The Letter of Discipline issued to Claimant stated as follows in pertinent part:

As a result of investigation held on Wednesday, December 15, 2021 at 1100 hours at Santa Fe Conference Room, 740 Carnegie Drive, San Bernardino, CA, 92408 you are hereby assessed a Level S 30 Day Record Suspension for your absence without acquiring prior authority from your immediate supervisor on December 1, 2021 while working as trackman on the Needles Subdivision. You failed to protect your employment and job assignment when you did not report to work at your prescribed start time and location nor did you notify your immediate supervisor of your absence.

In addition, you are being assessed a One (1) Year Review Period that commences on January 11, 2022. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.15 Duty-Reporting or Absence.

MWOR 1.15 provides as follows:

MWOR 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. (Emphasis added)

The Carrier's disciplinary policy states as follows:

Employee Performance Accountability Policy * * *

IV. Policy Requirements * * *

C. Serious Violations (Level S)

1. Serious violations include, but are not limited to * * *
 - d. An unauthorized absence (AWOL)

2. An employee who commits an initial Serious Violation will receive a 30-day Record Suspension with a Review Period of 36 months * * *

b. If an employee commits an additional Serious Violation within the Review Period, he or she may be subject to dismissal.

Engineering Rule G.4 states as follows:

BNSF Absenteeism Notification and Layoff Policy

Manpower Planners do not authorize work absences. If an employee needs to be absent from work, that employee's primary contact for notification and absence approval should be the Exempt Supervisor in charge. It is preferred that the employee requesting the absence approval contact the Exempt Supervisor before the start of the shift to have a voice to voice discussion of the matter. If direct conversation by telephone to the Exempt Supervisor is unsuccessful, a text message, e-mail, or voice mail in advance of the start of shift to the Exempt Supervisor may be considered sufficient notification of the absence. The Supervisor will then notify the Manpower Planner of the absence if the position needs to be filled.

Note: An employee notice to their Exempt Supervisor about work absence does not necessarily "Approve" the absence. Time entries of Approved or Unapproved Absence will be left to the Supervisor's discretion. Supervisors will review the employee's work history and will address systemic patterns of absenteeism.

The Policy for handling unexcused absences or tardiness is as follows:

1. First violation will result in the Exempt Supervisor counseling the employee concerning the rules involved.
2. Any subsequent violation(s) of these rules will result in scheduling a Formal Investigation with the appropriate disciplinary action being taken, according to the appropriate Collective Bargaining Agreement(s).

At the Investigation, Claimant admitted he did not come to work and did not notify supervision of his absence: "ALEXANDER PEREZ: Um I didn't call or uh text Jay Mart [phonetic]. I didn't notify anybody; um I just forgot to. Um I was feeling sick with my stomach and I just forgot to call in." (TR 14)

The Carrier is correct that Claimant was AWOL because he failed to notify his acting supervisor that he would be absent. MWOR 1.15 is a broad rule, and covers all types of absences. The Organization is correct that this rule does not specifically mention "AWOL" The Rule does not undertake to distinguish different types of absences but simply sets forth that discipline can be

invoked for absenteeism and employees must protect their jobs. PEPA gives more specifics about how to do this. MWOR 1.15 is not deficient in not defining AWOL. Employees are on notice of the prohibition against and consequences of a failure to notify their employer of absences; PEPA addresses the consequences to be expected from this.

The Carrier is not prohibited from issuing variable penalties for different types of absences under MWOR 1.15. In making its case before this Board, the Carrier must not only establish that Claimant violated the rule he was charged with, but also that the penalty imposed under PEPA falls within proper managerial discretion, that is, it is not arbitrary, capricious, discriminatory or unreasonable. The Carrier has established that Claimant violated MWOR 1.15 in that he was absent. He had no authorization for this absence because he failed to request it. The Carrier has shown that Claimant's violation under MWOR 1.15 was maximally serious because he failed to notify his supervisor that he would be absent. The reason being AWOL is so much more serious than being absent despite denial of approval is that in the case of AWOL, the Carrier has no opportunity to cover for the absence, placing operations at risk. This is a reasonable distinction.

AWARD:

The claim is denied.

Dated: January 7, 2024



Patricia T. Bittel, Neutral Member



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member