

6-2469-6

PUBLIC LAW BOARD NO. 6102

Award No. 12

Case No. 12

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the current Agreement when dismissing Mr. L. A. Alvey for allegedly violating Rules S-28.4, S-28.6 and S-28.14, when he allegedly claimed compensation for time not worked and was allegedly absent without authority on April 8, 1998.
 2. As a consequence of the Carrier's violation referred to above, Claimant be reinstated to service, he shall be paid for all time lost in accordance with the Agreement and the discipline shall be removed from his personal record."
- [Carrier's File MWC980623AC. Organization's File B-2469-6]

FINDINGS AND OPINION:

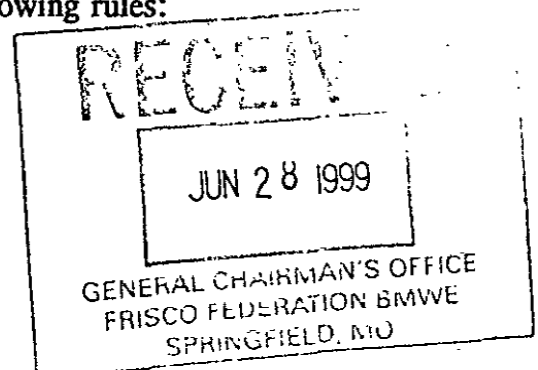
Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. L. A. Alvey, was employed by the Carrier as a Switch Foreman. His primary duty was the maintenance of switches in the St. Louis, Missouri area. His date of hire was June 12, 1989.

On April 16, 1998, the Claimant was notified by Certified Mail, over the signature of the Carrier's Division Engineer, that he was dismissed from the Carrier's service, effective immediately, "as a result of your claim for compensation for time not worked on Wednesday, April 8, 1998." The Union's General Chairman timely requested an investigation and advice of the precise charge, in accordance with the Discipline Rule in the Parties' Agreement. An investigation was afforded the Claimant on May 7, 1998, in which he was competently and forcefully represented by his Union's Vice General Chairman.

The Claimant was charged with violation of the following rules:

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"S-28.4 Carrying Out Rules and Reporting Violations

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad."

"S-28.6 Conduct

Employees must not be:

4. Dishonest"

"S-28.14 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.

Employees must not be absent from duty without proper authority. Except for a scheduled vacation period, authorized absence in excess of ten (10) calendar days must be authorized by formal leave of absence, unless current agreement differs."

The Carrier found that all charges were substantiated at the investigation and the Claimant's dismissal should remain in effect. A timely appeal was filed by the Union, and progressed finally to this Board.

The record indicates that the Claimant entered his own payroll time by computer, when he reported for work, showing that he worked eight (8) hours on Wednesday, April 8, 1998. His assigned work hours were 7:00 a.m. until 3:30 p.m., with time off for a meal. His supervisor attempted unsuccessfully to contact the Claimant's mobile telephone at about 2:20 p.m. Another employee, who appeared as a witness at the investigation, stated that the Claimant's assigned Carrier vehicle was parked at the site where he goes on and off duty at about 12:10 p.m., and the Claimant's personal vehicle was gone. The Claimant admitted that he left work as early as 1:00 p.m. on April 8, and did not work again prior to his dismissal on April 16. At the investigation, he explained,

"I had been under a doctor's care for depression and hypertension for quite a while now. On that Wednesday afternoon, I tried to call Ron McDonald's office. He was not present. I also tried calling Randy Smith and he was not present. Because of my illness and situation that occurred earlier in the week with the investigators, there was major tension from my coworkers. I felt I could not take it any more stress, and after two attempts at contacting, trying to contact Randy and Ron, I left that afternoon approximately 1:00."

The "situation that occurred earlier in the week with the investigators" was not explained in the record. He stated that he planned to correct his time report the following day, Thursday, but was told by his doctor not to work. He further stated that he left a voice mail message on Thursday morning for his supervisor, explaining his absence, and gave no further thought at that time to the full eight-hour day reported on Wednesday. Friday was a holiday. He was notified of his dismissal on the following Thursday, April 16.

It is the Carrier's position that the Claimant absented himself from work without permission; that he never contacted a supervisor to request permission, nor did he advise anyone of his leaving; that he had previously left work during his assigned working hours, and had been disciplined for such actions; and that he did not take steps to correct his payroll entry for eight hours on April 8.

The Employees assert that the Claimant was suffering from stress and found it necessary to leave work at 1:00 p.m.; that he attempted to contact two supervisory officers and could not reach either of them; that he left a voice mail message for one of them the following day, explaining his absence; that he contacted the payroll accounting office by telephone several days later and attempted to correct his payroll entry; and that he did not cash the payroll check which covered the hours he did not work. (The record does not disclose whether this check was ever cashed).

The Employees also argued that the officer who conducted the investigation improperly allowed testimony with respect to previous instances when the Claimant allegedly left work before his assigned quitting time. A letter of formal reprimand, dated January 23, 1998, bearing the Claimant's signature attesting its receipt, and which cites violation of Rule 28.14, was entered as an exhibit at the investigation, over the objection of the Claimant's representative. The Employees further argued that the Division Engineer, the officer who confirmed the Claimant's dismissal, based on the findings of the investigation, was the same officer who wrote the letter of dismissal on April 16, 1998.

With regard to the entry of the letter of reprimand for violation of Rule 28.14 (and other rules not pertinent in this case), the general arbitral rule holds that an employee's past record may not be used to determine an employee's guilt in a current case, but may be

considered to determine the quantum of discipline, if he is found guilty. In this particular case, however, the subject letter also contains a warning: "[Y]ou must develop a written joint action plan to solve the current problems and prevent future occurrences." [Underscoring added]. The Board notes that the Claimant's personal record file identifies this letter as a "Performance Review," rather than a disciplinary entry. The Board considers it a warning, notwithstanding it is internally characterized as a "formal reprimand."

With regard to the Division Engineer rendering the decision based on the findings of the investigation, the Agreement's Discipline Rule 91 requires that a decision shall be rendered by the Carrier. The signatory officer is the Carrier's representative in the matter. If that were the end of the appeal chain, the Employees might well object to the decision being rendered by the same officer who wrote the letter of dismissal which started the disciplinary process. However, the Board notes that the Agreement provides for successive appeals, which were followed in this case. The first officer's decision was reviewed and ruled upon by two higher ranking officers, the last being the highest officer designated by the Carrier to handle such cases. Furthermore, the officer who conducted the investigation presented an unchallenged statement that he personally determined what discipline to assess, and the Division Engineer merely wrote the letter advising the decision following the investigation. The Board finds that this procedure is not in violation of Discipline Rule 91, nor did it deprive the Claimant of his due process rights under the Agreement.

Although the Claimant testified that he contacted at least two officers with regard to his leaving work, and that he contacted at least two persons with regard to his payroll entry of eight hours, not one of the witnesses indicated receipt of his calls, nor any computer entry for the payroll changes he said he attempted to have made. The Board finds it incredulous that not one of the persons he said he contacted has any record of even one call. It seems extremely unlikely that every one of them would have lied. The Claimant's immediate supervisor categorically stated he received no voice mail communication regarding the Claimant's absence. The Claimant asserted that his voice mail message was erased by its intended recipient, but presented no motive for such an act.

Other employees who appeared as witnesses at the investigation indicated that the Claimant may have been absent as early as 12:10 p.m. on April 8. He states he left about 1:00 p.m. Although the exact time may be in question, the fact remains that he admitted leaving work without permission.

The Claimant's employment record is not unspotted. He was counseled and assessed a 12-hour suspension in 1990 for alleged insubordination, failure to follow instructions, and negligent work practices. More to the point, he was suspended for five days in 1994 for missing work and failure to call his supervisor before the starting time of his position. Then, there is the warning in January 1998.

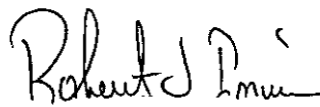
On its face, a leap in progressive discipline from a five-day suspension to a warning letter to complete dismissal from service seems somewhat excessive. If absence alone were the only issue, permanent dismissal could indeed be excessive. However, claiming time not worked is an act of dishonesty. The Claimant, like many railroad employees, unlike the typical factory setting, worked independently of continuous supervisory oversight and reported his own payroll data. Under those circumstances, the Carrier must have the utmost trust in his reliability and his integrity. Even if the Board accepts the Claimant's account of his actions to correct his payroll report, it appears by his own admission that he only became concerned after he was notified of his removal from service for claiming compensation for time not worked.

Although there is more than a little conflict in the testimony offered by the Claimant and others appearing at his investigation, the conducting officer is best able to judge their credibility, having observed their personal demeanor. The Board cannot resolve such conflicting evidence. The Claimant was unable to provide any supporting evidence or corroborating witnesses on his own behalf.

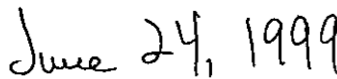
The Board determines that there was compliance with the applicable provisions of Discipline Rule 91, that substantial evidence was adduced at the investigation to prove the charges made, and that the discipline assessed is not excessive. The Claim is denied.

AWARD

Claim denied.



Robert J. Irvin, Referee



Date