

Case No. 406
Award No. 406
BNSF File No.14-22-0242
BMWED File No.1547-SL13C5-2218

Public Law Board No. 7048

PARTIES) **Brotherhood of Maintenance of Way Employees Division**
) **ATSFF System Federation**
TO)
) **and**
DISPUTE:)
)
) **BNSF Railway Company**

Members of Board:

Jeanne M. Vonhof, Chairman and Neutral Member
Michelle McBride, Carrier Member
Jeffery Fry, Employee Member

Statement of Claim:

This letter is our appeal to you concerning the Dismissal issued to Trinity Elsea (0138362) on Wednesday, September 7th, 2022, by BNSF Roadmaster Wesley Brown. The company states that Mr. Elsea (The Principle) was in violation of MWOR 1.18 – Unauthorized Employment, MWOR 1.6 – Conduct, and MWSR 12.14.5 – Commercial Motor Vehicle Hours of Service as cited in Carrier File Number RDV-MOW-2022-00534.

Findings:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board. The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or

working conditions, nor have authority to change existing agreements or to establish new rules. The Board shall have jurisdiction over the disputes assigned to this Board and such other disputes as may be added during the life of the Board by mutual assent of the parties.

The Claimant, Trinity Elsea, began working for the Company in 2012. He was notified of an investigation in connection with his alleged dishonesty regarding his need to be absent from work June 10, 2022 when he was allegedly found to be engaged in unauthorized secondary employment outside of BNSF Railway, and allegedly falsifying his DOT Hours of Service relating to June 10, 2022. He was notified that he was being investigated for possible violations of MWOR 1.18 Unauthorized Employment; MWOR 1.6 Conduct; and MWSR 12.14.5 Commercial Motor Vehicle Hours of Service. The Carrier concluded after the investigation that the Claimant was in violation of the rules charged and the Claimant was dismissed via a letter dated September 7, 2022.

Roadmaster Mark Russell testified at the investigation that the Claimant had asked off on June 8, 2022 for June 10, in order to attend a doctor's appointment. Russell approved that absence. Russell testified further that, along with Assistant Roadmaster Andrew Barvinek, he observed the Claimant at about 7:30 AM on June 10 working at a Lowe's store. They said they observed the Claimant operating a forklift and loading material into a truck. They said they then observed the Claimant drive the DOT-regulated truck to a home in Frisco, TX., after which Claimant unloaded the pallets of material which they had seen him loading into the truck at Lowe's. Russell and Barvinek presented pictures at the hearing which they said depicted the Claimant performing these activities. Russell stated that the Claimant did not report his time spent driving the Lowe's truck to BNSF, in violation of the Carrier's safety rules.

The Claimant testified that he was normally working only evenings and weekends at Lowe's, but they had asked him to come in that day to get qualified on the forklift, which had to be done during weekday hours. The Claimant testified that he did not ask for the day off to attend a doctor's appointment, but rather simply asked for the day off without giving a reason. He testified that he never gives a reason when he asks for a day off, as he is not required to do so. He stated that Russell knew that he was working at Lowe's because Russell had filled out an employment form for him from Lowe's on June 9. The Claimant testified that he did not report his hours working at Lowe's, and particularly those driving a truck, because he did not believe that he was required to do so, under exemptions from federal law for short hauls. He also said that he did not think he was violating any BNSF rules, but when questioned on June 17 about June 10, he offered to quit working at Lowe's so as not to endanger his job with BNSF.

MWOR 1.8 Unauthorized Employment permits employees to engage in work outside the Railroad, but only if such outside work does not "create a conflict of interest with their employment on the railroad or ... interfere with their availability for service or the proper performance of their duties." The Claimant was scheduled to work for BNSF during the hours when he admitted that he worked at Lowe's on June 10. Working for an outside employer during the Claimant's scheduled hours at BNSF interferes with the Claimant's availability for service to the Carrier, absent clear authorization from the Carrier permitting Claimant to do so.

The Claimant contends that he did receive approval to be off work that day. The Claimant's Roadmaster testified that the Claimant requested leave for a doctor's appointment on June 10. The

Roadmaster also said that when questioned on June 17, the Claimant claimed he was at the doctor's office in the morning and working at Lowe's in the afternoon of June 10.

The Claimant denied that he told his Roadmaster that he was going to a doctor's appointment when he asked for leave for June 10. However, he did not specifically deny that when asked on June 17 about his absence, he said he had been in the doctor's office on June 10. As the Roadmaster testified, when considering whether to accommodate an employee's request for leave, there is a give-and-take between the reason for the request and the arrangements that must be made to perform the employee's work while absent. The Roadmaster testified convincingly that he is more likely to accommodate a doctor's appointment than other reasons for requesting leave.

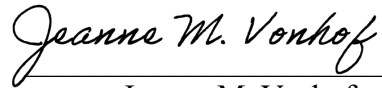
Under these circumstances, the Board concludes that there is substantial evidence that the Claimant violated MWOR Rule 1.6 Conduct by being dishonest about the reason for his leave request for June 10. There is substantial evidence that the Claimant requested leave for a medical appointment, and then said he went to the doctor's on June 10. However, even if it were true that he gave no reason at all for his leave request, the Board concludes that he was under an obligation to provide the truth that his request for leave was prompted by his desire to work for another enterprise during his normally-scheduled hours of work for BNSF, considering the requirements of MWOR 1.18 Unauthorized Employment, which generally prohibit such activity. There is substantial evidence that Claimant violated MWOR 1.18 by allowing his other job to interfere with his availability for service to the Carrier, without clear authorization from the Carrier that he was permitted to be absent from work at BNSF to perform another job. The signing of the form from Lowe's by his Roadmaster does not demonstrate such approval. Even if the Roadmaster's signature may be regarded as general approval by the Carrier for outside employment, it does not serve as authorization that he authorized the Claimant to be absent on June 10 to work for Lowe's when he was scheduled to work for BNSF.

The evidence regarding whether the Claimant violated MWSR 12.14.5 is less clear. The Carrier's rule states, "All commercial motor vehicle drivers (unless exempted by regulation) must properly complete an hours of service logbook and have it ready and available in the vehicle in the BNSF approved electronic logging device." The Carrier argues that the Claimant violated this rule by not including the miles he drove for Lowe's in a BNSF logbook. The Carrier states that it has good reason to require employees to keep track of all hours worked for any employer, even if the employee is not required to do so by the federal regulations, to ensure that employees do not go over the federal limits. The Organization argues that the Claimant was exempted from this requirement by several federal regulations, primarily one which excludes short hauls of less than 150 miles. MWSR 12.14.5 specifically states that drivers who are "exempted by regulation" need not comply with this rule. There is not substantial evidence on this record of a violation of that rule, on this record.

However, there is substantial evidence that the Claimant violated the Rule 1.6 Conduct and MWOR 1.8 Unauthorized Employment when he was not honest that he was taking a day off from his scheduled work at BNSF to work for another employer. The Board cannot conclude that the penalty of dismissal is arbitrary or extreme for this conduct.

AWARD

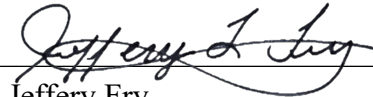
Claim denied.



Jeanne M. Vonhof
Neutral Member and Chairperson



Michelle McBride
Carrier Member



Jeffery Fry
Employee Member

Award Date: **January 8, 2025**