

## PUBLIC LAW BOARD NO. 7544

**Brotherhood of Maintenance of Way  
Employees Division - IBT  
Rail Conference**

and

**SOO Line Railroad Company (CP)**

### Case No. 59

**Award No. 59**

**System File No. D-181-16-600-16**

## Background

On September 15, 2016, the Carrier issued to Claimant S. Kulzer a notice of formal investigation and hearing. The notice stated, in part, the following:

**"The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged failure to report for work at your designated start time on Tuesday, September 13<sup>th</sup>, 2016, and for not notifying your manager to advise him that you would be late. This indicates a possible violation of, but is not limited to, the following rules:**

### **GCOR 1.13 - Reporting and Complying with Instructions**

**GCOR 1.15 - Reporting or Absence"**

The investigation and hearing convened, as scheduled, on September 22, 2016, wherein Claimant and his representative were afforded the opportunity to present testimony and five (5) exhibits as well as examined the Carrier's witness and four (4) exhibits.

On October 4, 2016, the Senior Manager Track notified Claimant that the record of the proceeding established Claimant's rules violations as charged. Based on the rules violations, severity of the incident and Claimant's past disciplinary record, he was assessed a ten (10) day actual suspension.

On October 7, 2016, the Organization and the Carrier agreed to progress Claimant's discipline dispute for resolution before this Board using the shortened procedure provided for in Paragraph (K) of the PLB Agreement.

## Findings

Public Law Board No. 7544, 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.

Consistent with the PLB Agreement for this Board, the evidentiary record in this proceeding is comprised of the following: (A) notice of investigation, (B) transcript of investigation and all related exhibits, (C) discipline assessment letter and (D) on-property correspondence related to progression of the claim.

At the outset of the hearing, the Organization objected to the Carrier recordation of the proceeding with the transcriptionist physically situated at a remote location. The Board finds the transcript of the proceeding complete, accurate and sufficient for the Board to render a decision.

The Organization also objected to Claimant's removal from service which, BMW asserts, violates Rules 20 and 21. This shows that the Carrier has denied Claimant due process by prejudging his culpability without providing a fair and impartial hearing. The Board notes that the Organization acknowledges Rule 20 authorizes the Carrier to remove an employee from service for serious rules infractions although BMW contends there are no serious infractions in this situation. The Board finds that when a fair and impartial hearing shows due process has been denied or discipline is not warranted, the collective bargaining agreement accords Claimant an array of benefits and pay with a make whole remedy. The Board finds that the complete and accurate transcript of this proceedings shows Claimant received due process with a fair and impartial hearing.

Claimant is a machine operator with five (5) years of service. On September 13, 2016, Claimant was a member of a utility crew with a foreman and reporting directly to the Assistant Roadmaster (AR). Start time on September 13 was 7:00 a.m.; Claimant was not present at start time and did not contact the AR (as he did not have the AR's telephone number) but informed the foreman by text message at 5:03 a.m. that he was ill and not reporting. The foreman agreed to inform the AR of Claimant's absence.

When the AR arrived on September 13, he observed Claimant was not present. The foreman arrived at 7:27 a.m. but did not interact with the AR until 8:00 a.m. when the AR inquired about Claimant. The foreman informed the AR of Claimant's illness whereupon the AR contacted Claimant at the motel and confirmed his illness. The AR stated to Claimant "Just get yourself better and be to work tomorrow morning." Claimant timely reported to work on September 14, 2016. The record shows that during Claimant's five (5) years of service he has not been a late report or absent without cause.

As of September 13, the AR had been supervising the crew for three (3) weeks but that day marked the first time he met the crew. Claimant is qualified on GCOR 1.13 and GCOR 1.15. Claimant's prior three (3) supervisors interpreted and applied these rules in a manner that Claimant was to contact his supervisor or foreman when reporting late or absent. The AR was Claimant's fourth supervisor and had not provided any instruction to Claimant contrary to Claimant's knowledge and experience with these rules. In this situation Claimant had a reasonable expectation that the rules would continue to be interpreted and applied as under his prior three (3) supervisors. That is, contacting the foreman approximately two (2) hours prior to start time was sufficient notice for compliance with the rules. The AR acknowledges if the foreman timely reported to work on September 13 and informed the AR of Claimant's absence, that would have been "correct" and acceptable. Through no fault of Claimant, the foreman reported late.

Based on the results of a fair and impartial hearing, the Board finds that Claimant complied with GCOR 1.13 and GCOR 1.15. Therefore, the discipline is arbitrary and an abuse of discretion. The claim is sustained and the Organization's requested make whole remedy is granted.

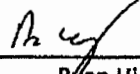
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Award

Claim sustained.

  
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Patrick Halter  
Neutral Member

  
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Anthony Mosso  
Carrier Member

  
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Ryan Hidalgo  
Organization Member

Dated on this 24<sup>th</sup> day  
of January 2018