

PUBLIC LAW NO. 7564

Case No. 11 (*formerly Case No. 1*)/ Award No. 11

Carrier File No.: 10-11-0591

Organization File No.: C-11-D070-12

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Statement of Claim:

The Carrier violated the Agreement when, on September 9, 2011, Claimant Francis H. Harrison was dismissed for violating EI 21.2 Showing Proper Conduct, EI 21.3 Staying Two to a Room, EI 21.4 Making Reservations, EI 23.1.2 Foreman's Roles, Responsibilities & Expectations , and MOWOR 1.6 Conduct.

As a consequence of the contractual violation noted above, the Carrier should reinstate the Claimant and make him whole for all lost wages and benefits, including seniority, attributable to the dismissal and remove the notation of dismissal from all records.

Facts:

By letter dated July 20, 2011, Claimant, a Welder Foreman, was instructed to attend a July 29, 2011 investigation "for the purpose of ascertaining facts and determining your responsibility, if any, in conjunction with your alleged violation of BNSF Corporate Lodging Policy when you authorized single occupancy rooms for Gang TRWX0271 during the month of June, 2011 at various locations. . .First knowledge of alleged violation was made known to Officers of the Company on Friday, July 15, 2011." After agreed-upon postponements the investigation was conducted on August 15, 2011. The Claimant thereafter received a discharge notice dated September 9, 2011.

Carrier's Position:

A fair and impartial hearing established that the Claimant, a Welder Foreman, knowingly violated EI 21.3 and related rules by allowing members of his crew, Gang TRWX021 to make their own reservations for single rooms during the month of June 2011. The Claimant acknowledged responsibility for complying with the rules but instead ignored them and acted on a contrary job briefing received two years earlier and

did not ask for clarification. The Organization's evidence in the form of statements cannot be taken seriously. The Claimant committed a form of theft, which is a stand-alone violation set forth in Appendix B of PEPA—a violation that itself justifies dismissal. If there is to be leniency, precedent establishes that such leniency is the prerogative of the Carrier and not the Board. If, for the sake of argument, a procedural violation occurred because of the timing of the investigation, the violation does not entitle Mr. Harrison to reinstatement for this offense. The Board must accept the finding of the investigation, including credibility findings, and not substitute its judgment for the Carrier's unless there has been an abuse of discretion. If the dismissal was to be found unjust and the Claimant is to be made whole, outside earnings must be deducted from wages due.

Organization's Position

The investigation was not fair and impartial because the Organization did not receive information it had requested before the investigation but, instead, was "snowed under" by exhibits produced by the Carrier at the investigation. The Carrier has allowed violations of EI 21.3 Staying Two to a Room and now seeks to apply the policy with no prior explanation of enforcement expectations and the implications of violating the policy. Mr. Young seeks to avoid responsibility for enforcing the policy while leaving enforcement to the foreman. The Carrier violated Rule 40 because surely it learned of the violation more than 15 days before the investigation. Also, the Carrier added a violation of the Conduct Rule to the charges although that violation was not noted in the letter to attend the investigation. The Company has not shown whether or not only single rooms existed when the alleged violations took place, whether other circumstances required the use of single rooms and what the cost to the Carrier really was. The Carrier unsuccessfully has tried to discredit statements supplied by the Organization because the statements show that the Carrier knew of violations of the Corporate Lodging Policy and is now trying to make an example of the Claimant

Findings:

The investigation was fair and impartial. The Organization has produced no evidence, only speculation, to contradict the Carrier's statement that it first learned of the alleged violation on July 15, 2011. The Agreement between the parties does not provide for discovery that would require the Carrier to provide exhibits to the Organization prior to the hearing. Each Organization request for a recess to review exhibits was granted.

The evidence establishes a violation of the Corporate Lodging Policy. The Claimant acknowledged that he was aware of the policy and allowed crew members to make their own reservations for single rooms although the Policy calls for the foreman to make reservations for double rooms except in limited circumstances. The Carrier's exhibit also establishes the violation of the Corporate Lodging Policy. Even if at times circumstances called for single rooms, Mr. Harrison did not make the reservations or

obtain the necessary waiver to justify the single rooms. It is unreasonable to believe that each instance of a single room in June 2011 was due to special circumstances, nor did the Claimant contend that that was the case.

While the evidence establishes a violation of the Corporate Lodging Policy, the evidence also establishes a prior pattern of violations that went unpunished by the Carrier. The Claimant testified to the briefing he received in 2009 from Mr. Kerr and to his experience as a member of Mr. Kerr's crew. The statements provided by the Organization that show other violations of the Corporate Lodging Policy, are deemed credible and cannot be ignored, as the Carrier seemed to have done. Simply because the Claimant did not know the authors of the statements or their locations is not sufficient reason to ignore them or dismiss them as untruthful.

This is not a theft case when it is viewed in the context of an environment in which the Claimant did something that others had done without incurring Carrier discipline. While the Claimant's application of the Corporate Lodging Policy cost the Carrier because of additional expenses, the evidence shows no intention on the Claimant's part to misappropriate Carrier funds. There was no attempt on Mr. Harrison's part to hide what he was doing.

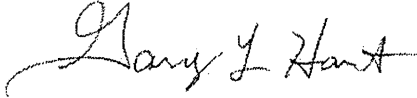
The Carrier has a right to enforce its policies, but it must do so consistently in order to send the message that policy is to be taken seriously. Where policy has not been enforced consistently in the past, it cannot be enforced going forward without adequate notice to the work force that consistent enforcement will be the order of the day. The Carrier's failure to consistently enforce the Corporate Lodging Policy sent the message to the Claimant that the Carrier was not concerned about the Policy. Under the circumstances, Mr. Harrison seems to have been singled out. The discharge was the kind of abuse of discretion that requires the Board to substitute its judgment for that of the Carrier and to negate the dismissal.

Award:

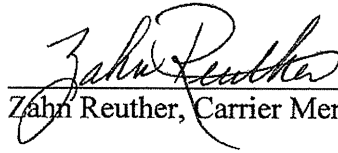
Claim Sustained.

Order:

This Board, after consideration of the above-noted dispute, hereby orders that an award favorable to the Claimant be made so that the discharge is set aside and expunged from the personnel records and the Claimant is reinstated and made whole for lost wages, benefits and seniority, with back pay to be reduced by outside earnings. The Carrier is to make the award effective on or before 30 days following the date the award is adopted. This case is not intended to set precedent but may be returned to this Board only if necessary to resolve problems associated with the implementation of the Award.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas
February 28, 2013

SPECIAL BOARD OF ADJUSTMENT NO. 7564

Case No. 55/Award No. 55
Carrier File No. 10-11-0591
Organization File No. C-11-D070-12
Claimant: Francis H. Harrison

Interpretation No. 1 for Award No. 11 (formerly Award No. 1)

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Facts:

On February 28, 2013 the Board sustained the claim of Francis H. Harrison and issued the following Order:

This Board, after consideration of the above-noted dispute, hereby orders that an award favorable to the Claimant be made so that the discharge is set aside and expunged from the personnel records and the Claimant is reinstated and made whole for lost wages, benefits and seniority, with back pay to be reduced by outside earnings. The Carrier is to make the award effective on or before 30 days following the date the award is adopted. This case is not intended to set precedent but may be returned to this Board only if necessary to resolve problems associated with the implementation of the Award.

On July 27, 2015 the Organization notified the neutral member of the Board by letter that the parties disputed the implementation of the Award "because the Carrier has refused to make the Claimant whole for the overtime wages he lost during the period he was improperly withheld from service by the Carrier." An interpretation of the Award was requested. On October 19, 2015 the Organization informed the National Mediation Board that an interpretation was requested with the undersigned Neutral Member to be authorized to work on the proposed interpretation. Ultimately the undersigned Neutral Member was authorized to do the work and a hearing was conducted on July 29, 2016.

Carrier Position:

The Claimant should receive overtime in accordance with the Board's order, but at the straight time rate because the issue of overtime wages was never raised by the Organization, because overtime is not part of "wages," because such hours are speculative and constitute "a

punitive rate payable only to employees who actually perform service or work” and because punitive awards such as the Organization requests “are beyond the jurisdiction of boards of adjustment under the Railway Labor Act.”

Organization Position:

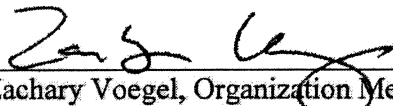
The Claimant, a foreman, is entitled to overtime pay at the foreman’s penalty rate. The matter has been decided in a series of NRAB Third Division Awards and interpretations of NRAB Third Division Awards involving the parties to the instant dispute such that the matter has been settled on the property.

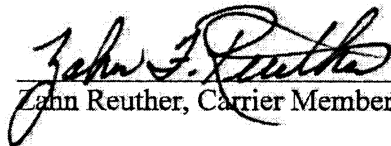
Findings:

After reviewing the record evidence and considering the contentions of the parties, the Board concludes that the Claimant is entitled backpay for any lost overtime hours to be paid at the overtime rate of pay.

Order:

This Board, after consideration of the above-noted dispute, hereby orders that the Claimant receive pay for the difference between the straight-time and penalty (overtime) rates on or before 30 days following the date this interpretation is adopted.


Zachary Voegel, Organization Member


John Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
August 23, 2016