

PUBLIC LAW BOARD NO. 7564

Case No. 111/Award No. 111
Carrier File No. 11-20-0190
Organization File No. T-D-6268-M
Claimant: Steven B. Grundmann

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

Statement of Claim:

By letter dated November 20, 2019 Machine Operator Steven B. Grundmann was assessed a Standard Formal Reprimand and a one (1) year review period for an alleged violation of MWOR 1.15 Duty-Reporting or Absence and EI G.4 BNSF Employee Absenteeism Notification and Layoff Policy. The January 16, 2020 claim from the Organization, John A. Mozinski, Jr., then Vice Chairman Secretary Treasurer, appealing the discipline asks that:

. . .due to this excessive and prejudged discipline, Mr. Grundmann must be immediately paid for his lost time and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Grundmann be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on November 22, 2019 letter from Joshua Fluck.

Facts:

By letter dated September 27, 2019, the Claimant was informed that “An investigation has been scheduled at 1200 hours, Thursday, October 10, 2019 at the Superior Yard Office . . . Superior, WI, 54880, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report for duty on September 27, 2019 while working as a Machine Operator on RP06.” By mutual agreement, the investigation was postponed until 1030 hours, October 24, 2019, at the Holiday Inn Express & Suites, 2607 Broadway Avenue, Yankton, SD, 57078.

At 0317 hours on Friday, September 27, 2019 Claimant Grundmann called Assistant Roadmaster S. Muellner and left a voicemail message that he had a family emergency and was heading home. The Claimant also texted his Foreman and Assistant Foreman and informed the van driver that he would not be at work that morning, start time for the shift being 0700 hours. The record does not indicate a reason for the absence beyond “family emergency” or “accident.”

The Claimant did not talk or communicate further with his Supervisor until the start of the shift the following Monday, although the Supervisor tried with two (2) calls at 0404 hours and a message at 0409 hours to reach the Claimant. At 1000 hours, presumably having reclassified the absence from approved (by the Foreman and Assistant Foreman) to unapproved, the Assistant Roadmaster initiated the investigation process.

Carrier Position:

The Carrier urges the Board to deny the claim because the investigation was fair and impartial. Since there were no credibility issues, it is not problematic that the Conducting Officer did not issue the notice of discipline. The Claimant had received a Coach & Counsel letter in 2018, therefore the Carrier was not obligated to issue such a letter annually before moving to formal discipline. The Claimant had failed to comply with the layoff procedures in EI G.4. Assistant Roadmaster Muellner had the discretion to rule that an absence was approved or unapproved. Discipline was in accordance with the Policy on Employee Performance Accountability (PEPA). Finally, the Carrier views the request for damages as excessive because the Claimant suffered no loss of funds and incurred no expenses.

Organization Position:

The Organization asserts that the claim should be sustained because the Claimant complied with relevant rules and policy, calling in roughly four (4) hours before the start of his shift. His Foreman, with the authority to do so, approved the absence, only to have Assistant Roadmaster Muellner unjustly label it unapproved. The investigation was not fair and impartial and the Claimant was prejudged. ADMP Fluck, the pre-investigation contact for the Organization, signed the notice of discipline. The Carrier failed to call Foreman Carlson and Assistant Foreman Pistorius, who were material witnesses.

Findings:

This is the 111th case that has come before this Board and far more often than not, the Organization has alleged a violation of the Rule 40.A. mandate that the investigation be fair and impartial and that the Claimant not be prejudged. The Board has generally, if not almost universally, dismissed these allegations with little explanation. This case is the exception. From start to finish the record contains violations of Rule 40.A.

In his January 16, 2020 claim on Mr. Grundmann's behalf, Vice General Chairman Mozinski wrote that ADMP Fluck "who we had to negotiate with and would not offer anything but a Levels (sic) S 3 Year Review Period" had already prejudged the Claimant. This statement was not challenged in the on-property correspondence and is accepted as fact by this Board. Even though the ultimate discipline was at a lower level than that originally offered by ADMP Fluck, the Board cannot ignore the implication that prior to the investigation, the official who signed the

notice of discipline had already decided that the Claimant had violated a rule or policy. In other words, the disciplining official had demonstrated a lack of impartiality. This Board is on record as agreeing with other Boards stating that not only must there be fairness and impartiality in the disciplinary process, but also that there must be a perception of fairness and impartiality.

The Board notes that the disciplinary letter signed by ADMP Fluck states the Carrier's conclusion that the Claimant violated MWOR 1.15 Duty-Reporting or Absence, and EI G.4. Again, this Board is on record that it will not find a fair and impartial investigation when a Claimant is found guilty of violating a Rule that was not mentioned and placed in the record during the investigation. The notice of investigation need not include specific reference to the Rules and Policies alleged to have been violated, but these Rules and Policies must be identified and included in the record during the investigation. The Claimant and his or her representative must be made aware with specificity of the relevant dictates allegedly violated so that they can defend against the allegations if they so choose. Moreover, this Board must have the relevant language so that it can fully and properly assess the dispute before it. Were this Board to rule on the merits in this case, which it will not, it could not find the Claimant guilty of a violation of MWOR 1.15 since he was not given the chance to defend against that allegation and the Board would not have the relevant language to consider.

Several actions taken by Assistant Roadmaster Muellner concern this Board. As prelude to the continuing discussion, the relevant policy is set forth.

G.4 BNSF Absenteeism Notification and Layoff Policy

Manpower planners do not authorize an absence. If for some reason you need to be absent, an employee's primary contact for notification should be your supervisor and/or Foreman. It is preferred that you personally contact your Supervisor to have a voice to voice discussion of the matter with that person. If your Supervisor/Foreman cannot be reached by phone, a text message or e-mail sent to them is sufficient to notify them of your 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 Foreman and/or Supervisor about work absence does not necessarily "Approve" the absence. Time entries of 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 your supervisor or Foreman counseling you 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).

There is no dispute that the Claimant informed both his Supervisor and his Foreman well before the start of his shift that he had a family emergency and would not appear for his 0700 hours shift. He did not have a voice to voice discussion with Mr. Muellner, apparently because the Assistant Roadmaster did not answer his phone. Three hours into the shift, with no additional information and seemingly having classified the absence as unapproved, Mr. Muellner initiated the investigation process. During the investigation the Assistant Roadmaster acknowledged that the Claimant was not required to call him back and that he did not give the Claimant time to call. The Assistant Roadmaster further testified initially that he was unable to reach the Claimant over the weekend and thereafter acknowledged that he did not try to reach him. While the Assistant Roadmaster testified that he was concerned about the Claimant, the Board finds that his actions were inconsistent with his expression of concern.

The analysis ends where it began, that in this Board's experience this case represents the exception. In the face of demonstrated unfairness, partiality and even prejudgment, all in violation of Rule 40.A. the Board has no choice but to sustain the claim.


The discipline must be expunged from the Claimant's records. The Formal Reprimand did not deprive him of wages or benefits but he suffered a loss of wages related to his attendance at the investigation which, in essence, constituted a brief, unpaid suspension. Consistent with on-property precedent, the Claimant is to be reimbursed for such wage loss and for any overtime that he likely would have worked but for the investigation. Moreover, if the Claimant incurred expenses that were solely and directly related to his attendance at the investigation rather than to his ongoing assignment, he is to be reimbursed for those expenses providing they are properly documented.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made in accordance with the Findings. The Carrier is to make the Award effective on or before thirty (30) days following the date the Award is transmitted to the parties.


Zachary C. Voegel, Organization Member
Joe R. Heenan, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
October 20, 2021