PUBLIC LAW BOARD NO. 7564

Case No. 123/Award No. 123
Carrier File No. 11-21-0100
Organization File No. S-P-2383-F
Claimant: Michael Wesley Collier

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

Statement of Claim

By letter dated October 29, 2020, Michael Wesley Collier received notice of a Level S 30-day Actual Suspension and a One-Year Review Period effective September 24, 2020, through October 23, 2020, for "misconduct between the dates of August 31, 2020 through September 22, 2020 … when you were assigned as a First Class Carpenter, Gang I.D. BBCX-0636 on the Seattle Subdivision" in violation of MWOR 1.6 Conduct and MWOR 1.15 Duty-Reporting or Absence.

The Organization's claim dated November 6, 2020, from Calvin Farley, Vice General Chairman, appealed the discipline, alleging procedural and substantive violations regarding the investigation and characterizing it as excessive and without merit. The Organization requested that the discipline outlined in the Carrier's October 29, 2020, letter be "removed from [Claimant's] record and he be made whole in compensation for the time he was withheld from service, and appropriate days are credited him for retirement and vacation computation."

Facts

By letter dated September 24, 2020, the Claimant received notice to attend an "[I]nvestigation… at 1330 hours, Friday, October 2, 2020, at … Seattle, WA … for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with alleged violations that occurred between the dates of August 31, 2020 through September 22, 2020, on or about 1330 hours, at or near MP 57.7, on the Seattle Subdivision, resulting in a report of your dishonesty and falsely reporting time that was not worked, when you were assigned as a First Class Carpenter, Gang I.D. BBCX-0636. Alleged violations include but are not limited to your

dishonesty and falsifying records when reporting time worked." The investigation, postponed by mutual agreement on one occasion, was held on October 1, 2020, at 0900 hours.

Carrier Position

The Carrier avers that the investigation was fair and impartial, and the record proved by substantial evidence that Claimant violated MWOR 1.6, Conduct and MWOR 1.15 Duty-Reporting or Absence and that his discipline was in accordance with the Carrier's Policy for Employee Performance Accountability ("PEPA").

Organization Position

The Organization asserts that the Carrier denied Claimant a fair and impartial investigation in violation of Rule 40 of the collective bargaining agreement ("CBA"). Based on the Carrier's procedural and substantive errors, Claimant's dismissal is excessive and unwarranted. Moreover, the Carrier failed to meet its burden of proof because the record lacks sufficient facts and evidence.

Findings

Claimant hired in 2015, is a five (5) year Carrier employee. At the time of the allegations, Claimant was a first-class carpenter on a mobile structures gang. According to the Carrier, Claimant's assignment consisted of four (4) ten-hour shifts per week, Monday through Thursday, 0600 to 1600 hours. Claimant's supervisor, Mr. Van Deven, alleges that a GPS data search instigated an investigation demonstrating that Claimant and other gang members failed to work the entire shift. Claimant was withheld from service pending the investigation and charged with violating MWOR 1.6 Conduct, and MWOR 1.15 Duty-Reporting or Absence.

MWOR Rule 1.6 Conduct precludes the following:

> Employees must not be:
>
> 4. Dishonest
>
> Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.[1]

MWOR 1.15, Duty-Reporting or Absence provides:

> 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

[1] Carrier Exhibit 18.

> for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.[2]

Over thirty (30) hours of claimed compensation could not be accounted for by Claimant during the investigation.[3] The evidence demonstrated that Claimant was either at the hotel or a private residence during assigned work hours. He was not performing approved work at these locations or completing Web-based Training ("WBT") as he asserted.[4] Claimant's defense that he was following the foreman's instructions and that he is not responsible for payroll entries fails to mitigate Claimant's failure to perform his duties as required. Claimant's other defenses were unsubstantiated by the evidence.

Despite the Organization's claims regarding the Carrier's procedural errors, Claimant received due process and was neither impaired nor prejudiced by the proceeding. CBA Rule 40(B) permits an employee to be held out of service pending investigation "in cases involving serious infraction of rules."[5] It is the Carrier's prerogative to withhold employees committing serious crimes or offenses from duty pending investigation.[6] Further, the notice issued to Claimant did not lack specificity and complied with CBA Rule 40(C). The timeframe and nature of the alleged misconduct and the date, time, and place of the investigation were all included in the notice received by Claimant.

Although Claimant is a long-term employee of the Carrier, unless the Carrier's actions are deemed arbitrary, capricious, or an abuse of discretion, it is axiomatic that it is not the function of the Board to substitute its judgment for that of the Carrier in a disciplinary matter. Claimant's Level S 30-day Actual Suspension and a One-Year Review Period discipline was appropriate and in accordance with the Carrier's Policy for Employee Performance Accountability ("PEPA").

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[2] Carrier Exhibit 19.
[3] Exhibits 6, 8, 9, 10, 13, 16. References to the Investigation Transcript shall be denoted by ('Tr.") Tr. 19-39, 104-105.
[4] Tr. 104.
[5] Exhibit 7. CBA Rule 40(B) provides "In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor."
[6] *See* Public Law Board 3460, Award No. 11, Public Law Board 2746 Award No. 17.

Award

Claim Denied.

Order

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.

Zachary Voegel, Organizational Member

Joe Heenan, Carrier Member

Melinda Gordon, Neutral Referee

DATED: June 20, 2023