

PUBLIC LAW BOARD NO. 7564

Case No.43/Award No. 43
Carrier File No. 11-13-0354
Organization File No. T-D-4279-M
Claimant: Cary L. Pickrel

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

Statement of Claim:

1. The Carrier violated the Agreement on August 20, 2013 when it dismissed Claimant, Cary Pickrel for violation of MWOR 1.6 Conduct, MWOR 1.19 Care of Property and 10A Fuel-Purchasing Company Vehicle Policy and Procedure Manual in connection with misuse of a BNSF fuel purchase card that took place in Texas on February 13, 2013, February 24, 2013, and March 14, 2013.
2. As a consequence of the violation referred to in Part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

Facts:

By letter dated July 17, 2013, the Claimant was informed of an investigation on July 25, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of company fuel purchase card that took place in Texas during February and March of 2013. The date BNSF received first knowledge of the alleged violation is July 12, 2013." A July 22, 2013 corrected Notice rescheduled the investigation for July 24, 2013 by mutual agreement. Both notices advised the Claimant that he was being withheld from service.

Carrier Position:

There are no procedural issues that require an award in the Claimant's favor. He admitted the charges and suffered no prejudice. A technical violation of procedural rules is not cause for reversal. The Claimant received a fair and impartial investigation with requested recesses granted, the opportunity to question the Carrier witnesses and the opportunity to offer evidence. The investigation took place within 10 days of the date that Claimant was withheld

from service and there is precedent for withholding an employee from service for dishonesty. The Claimant did not receive disparate treatment.

The dismissal was supported by substantial evidence and was in accordance with the Policy for Employee Performance Accountability (PEPA). Fuel purchases were shown to have been questionable and made off hours. The Claimant admitted using the Carrier van and making the purchases, but took no responsibility for violating Carrier policy prohibiting these practices. The Board is not to substitute its judgment for that of management or to usurp management's right to decide on leniency. Should the Claimant be reinstated, back pay must be offset by interim earnings.

Organization Position:

Rule 40 has been violated because the investigation was held over five months from the onset of the incident and more than 10 days after the Carrier learned of the alleged dishonesty. Moreover, the Notice of Investigation did not specify charges. The investigation was not fair and impartial because withholding the Claimant from service without compelling reason was both punishment and prejudgment of guilt. Also, the Conducting Officer testified and offered rules into evidence. The Claimant was disparately treated in comparison to Mr. Ken Hill.

The Carrier has not met the higher degree of proof that it must meet in theft cases. The Claimant did not use the gas card for his personal vehicle, there was no "screen shot" proof that he used the card to buy gas, MPG evidence does not prove theft and the Claimant was not charged with improper use of the Carrier's van. The Claimant's admitted use of the van to obtain food was consistent with past practice dating to 2008 and practical in a situation where not all gang members had their own vehicles. The Claimant believed that he was following past practice as the policy change "may not have completely settled in." There was no intentional wrongdoing. The Claimant had the Roadmaster's permission to use the van. If anything, there was simply a misunderstanding. The dismissal was not fair and impartial and was punitive rather than corrective. The Claimant, with six years' tenure and a clean record, was truthful and is a valued employee.

Findings:

The Board finds the timeline argued by the Organization to be faulty. The critical date is July 12, 2013, which is the date on which the Carrier first learned of the Claimant's alleged violation. The investigation was initially scheduled for 10 calendar days later in accordance with Rule 40 and postponed by mutual agreement. This did not violate the Agreement. The Carrier followed precedent when it withheld the Claimant from service because of his alleged dishonesty. Rule 40.B allows the Carrier to withhold an employee from service "pending investigation in cases involving serious infraction of rules," which this was. As this Board has stated in several past awards, the Organization cannot agree to Rule 40.B on the one hand and on the other attempt to nullify the rule by almost without fail arguing prejudgment of guilt whenever a Claimant is withheld from service.

A comparison of the cases of the Claimant and Mr. Hill does not support the Organization's contention of disparate treatment. , Assuming Mr. Mozinski's information is correct, Mr. Hill received a Letter of Reprimand for driving a Carrier van after hours. There is no mention of using a BNSF fuel purchase card. Consequently, the disciplines are not comparable, and neither are the charges, with the allegations against the Claimant being far more serious.

The Claimant clearly misused the BNSF fuel purchase card. Whether the required burden of proving the charge by substantial evidence is considered, or even when a more stringent burden of proof is considered, the Carrier's burden has been met by the Claimant's admission that he used the van and made the purchase. The absence of "screen shot" evidence and consideration of MPG data become irrelevant in the shadow of the Claimant's admission. The Board agrees that Assistant Roadmaster Emerson testified credibly that at the start-up of the gang's work, he instructed that Carrier vans were to be used only when gang members were on the clock except for Carrier safety dinners.

The Claimant's testimony that he believed that he had permission to use the van off hours is not deemed credible. But even if the Claimant were to be given the benefit of the doubt and the Organization's contention that he used the van to obtain food were to be accepted, there is more to consider. The Claimant testified that he asked Assistant Roadmaster Emerson for permission to use the van off hours, but did not mention sporting events. Yet the Claimant by his own testimony went to baseball games 20-25 miles from his hotel and probably went to wrestling matches as well. The Board believes that he would not have mentioned wrestling matches if he had not gone. Thus the investigation has established that not only did the Claimant use the van off hours to go for a meal or possibly make a "food run" for fellow gang members, he used the van for personal business—attendance at sporting events. He did not have permission to use the van to obtain food or access to sporting events. Therefore, when the Claimant used the BNSF fuel card off hours, in essence he misappropriated Carrier funds in violation of the policy and for personal use. This is an industry in which employees are not consistently closely supervised, thus the Carrier must rely on their attention to duty and their integrity. The Claimant violated the trust placed in him. Except in very unusual circumstances, dishonesty is not mitigated by tenure and prior discipline history. The application of PEPA was appropriate in this case.

Award:

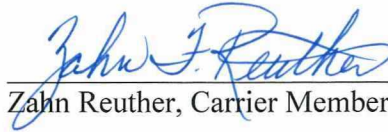
Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
November 30, 2015