

PUBLIC LAW BOARD NO. 7564

Case No. 44/Award No. 44
Carrier File No. 11-13-0281
Organization File No. B-M-2684-E
Claimant: Michael Gordon

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

Statement of Claim:

1. The Carrier violated the Agreement on July 12, 2013 when it dismissed Claimant, Michael Gordon for violation of MWOR 1.15 Duty Reporting or Absence in connection with Claimant's failure to report for duty on gang I.D. TINS 1129 on the Great Falls Subdivision beginning on June 3, 2013 and continuing.
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 June 10, 2013, the Claimant was informed of an investigation on June 17, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report for duty on gang I.D. TINS 1129 on the Great Falls Subdivision beginning June 3, 2013 and continuing." By mutual agreement the investigation was postponed until June 25, 2013. The original Notice of Investigation (NOI) and the postponement notice advised the Claimant that he was being withheld from service.

Carrier Position:

The Organization did not formally request a waiver, but refusal of a waiver request would not have violated Rule 40.A. The Agreement does not include discovery provisions; therefore the Carrier was not obligated to list witnesses on the Notice of Investigation. The Conducting Officer being nine minutes late for the investigation did not violate Rule 40. Division Engineer Samples issued discipline only after reviewing the investigation transcript and exhibits.

The Carrier produced substantial evidence of the rules violation because the Claimant admitted his extended, unauthorized absence. Nothing more was needed; the admission mooted claims of prejudice. The Conducting Officer ran a fair and impartial investigation. Even if the absence is viewed as a serious (Level S) violation, this second Level S violation within seven months still would have resulted in dismissal under the Policy for Employee Performance Accountability (PEPA). Leniency is management's prerogative, not the Board's. However, if the Claimant is reinstated, back pay must be offset by interim earnings.

Organization Position:

The investigation was not fair and impartial because the Carrier never directly answered the inquiry about a waiver and because witnesses were not identified in the Notice of Investigation. Both of the deficiencies compromised the Organization's ability to prepare a defense to the charges. Additionally, Division Engineer Sampson, the Charging Officer, also signed the dismissal letter although he did not attend the investigation and could not judge Roadmaster Ogan's credibility. In fact, Roadmaster Ogan was not truthful. Rule No. 40.J was violated when the investigation started late without mutual agreement. The Claimant's transcript was improperly included with the Carrier's declination. This was new evidence that deprived the Organization of the opportunity to contest the transcript's accuracy.

The Claimant could not report as scheduled because of illness, but reported as soon as he could. The dismissal, following violation of the Claimant's due process, was excessive as he had only one Standard formal reprimand on his record. After missing only five days in eight years, the Claimant lost time due to extenuating circumstances.

Findings:

While it would have been considerate of Division Engineer Samples to have responded to the Organization's waiver request, if only to make explicit the implicit denial of the request, the Board does not find that the lack of a response violated the Agreement or prejudged the Claimant. And, as this Board has written in numerous prior awards, neither Rule 40 nor any other rule in the Agreement mandates discovery. Therefore the Carrier is not obligated to provide the Organization prior to the hearing a list of witnesses or documents that it intends to proffer as evidence. The absence of this information is not seen as compromising the Organization's ability to defend the Claimant against the allegations. Furthermore, the Board would observe that Carrier supervisors and officers involved in the incident under investigation are generally known to the Claimant, if not the Organization, without being so listed.

The Board believes that having the Conducting Officer also issue the discipline is a best practice. There may be cases that turn on credibility determinations when the source of such a determination is in doubt because the officer issuing discipline is other than the Conducting Officer. However, the Board also notes that there is no requirement in the Agreement that the Conducting Officer must also issue the discipline and there is ample precedent in on-property awards for not finding a violation when discipline is issued by other than the Conducting Officer. Moreover, this case is not one that turns on a credibility determination and Roadmaster Ogan has been found credible.

The Organization's contention that the Claimant could not report because of illness seemingly misrepresents the facts and is without evidentiary support. Illness, if serious enough, may involve a visit to a doctor or even to a hospital, but it does not involve incarceration except in the very rare cases where the symptoms may be mistaken for the effects of too much alcohol or illicit drugs. The Organization has presented no evidence in the form of prescriptions, a doctor's note, or hospital documents of treatment for any illness whatsoever. The substantial evidence indicates that the Claimant's prolonged absence was entirely due to his incarceration and not to illness. He could not meet his obligation to be at work because of an unspecified incident or unspecified behavior that landed him behind bars. In other words, the extenuating circumstances claimed by the Organization were not involuntary but were of the Claimant's own doing.

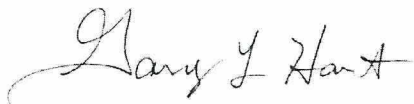
Even if the violation of MWOR 1.15 Duty Reporting or Absence were to be considered serious rather than a dismissal offense on its own, the result would be the same because of the Claimant's serious violation seven months earlier. The Board is well aware of the prior awards finding that leniency is the Carrier's prerogative, not the Board's, and stands by that precedent 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