

PUBLIC LAW BOARD NO. 7564

Case No. 50/Award No. 50
Carrier File No. 10-14-0191
Organization File No. C-14-D070-5
Claimant: Josh Havorka

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

Statement of Claim:

1. The Carrier violated the Agreement on May 1, 2014 when it dismissed Claimant, Josh Havorka for violation of MWOR 1.6 Conduct, MWOR 1.15 Duty Reporting or Absence, MWOR 1.13 Reporting and Complying with Instructions and EI 21 Lodging Procedures in connection with Claimant remaining at the Carrier-provided lodging facility while absent from service without authority March 31, 2014 through April 4, 2014, failure to comply with instructions from Roadmaster to report for duty, and misconduct displaying discourteous and quarrelsome behavior towards Roadmaster, Concordia, KS, at approximately 1430 hours on April 1, 2014.
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 April 7, 2014 the Claimant was informed of an investigation to be conducted on April 14, 2014 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged remaining at the Carrier-provided lodging facility while absent from service without authority March 31, 2014 through April 4, 2014, failure to comply with instructions from Roadmaster to report for duty, and misconduct displaying discourteous and quarrelsome behavior towards Roadmaster, Concordia, KS, at approximately 1430 hours on April 1, 2014." The letter also informed the Claimant that he was being withheld from service pending the results of the investigation.

Carrier Position:

The investigation was fair and impartial as the notice clearly identified the charges and Roadmaster Klingberg's testimony clarified the times and dates. The Carrier's burden to produce substantial evidence was met as the Claimant admitted not working on April 1 and 2, 2014. The blatant refusal to work occurred while staying at Carrier-provided lodging. The Claimant's discourtesy toward the Roadmaster rendered him unfit for further service. The dismissal was consistent with established policy and theft stemming from the unauthorized use of Carrier-provided lodging while refusing to work justifies summary dismissal. The Board's function is to interpret the rules and not to substitute its judgment for that of management unless the Carrier has abused its discretion. Neither should the Board provide leniency, which is the Carrier's province. However, if the Claim is sustained, the Claimant is due only that provided for in Rule 40G, with back pay liability to be reduced by interim earnings.

Organization Position:

The investigation should have been cancelled because the notice to the Claimant was faulty in that the charges were not specific and there were discrepancies between dates and times contained in the notice and the testimony of Roadmaster Klingberg. The Claimant did not admit violating any of the rules alleged, the above-noted discrepancies showed that the Carrier did not prove the charges and no details of the Claimant's discourtesy were provided other than his comment that this was the worst gang ever. It should be noted that Roadmaster Klingberg characterized the Claimant's behavior as discourteous but not as quarrelsome. The Claimant was honest and forthcoming and apologized for his behavior. He clearly was struggling, but rather than receiving assistance he was harshly treated with a dismissal, which should be set aside.

Findings:

Charges contained in the Notice of Investigation were specific enough to allow the Claimant and the Organization an understanding of what they had to defend against. The discrepancies between the dates and times in the Notice and the testimony of Roadmaster Klingberg did not prejudice the Claimant or hamper his defense.

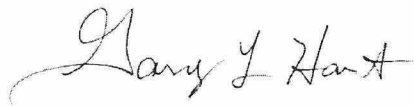
The evidence shows that the Claimant worked on March 31, 2014 and therefore was authorized a room at Carrier expense that evening. The evidence is equally clear that the Claimant neither reported for duty nor called to say that he would not report on April 1 and 2, 2014. The only call the Claimant made to his Roadmaster on April 2, 2014 was to tell Roadmaster Klingberg that he would not report the next day. Additionally, contrary to the Organization's contention that all the Claimant said was that this was the worst gang ever, the Claimant told Roadmaster Klingberg that he was the "worst f-----g Roadmaster ever" and that the Roadmaster could not do "s---t" about the Claimant's not coming to work on April 3, 2014. The Claimant did not deny using the gutter language. Whether one characterizes use of the language as discourteous, quarrelsome or both is irrelevant, as both are prohibited by MWOR 1.6 Discipline. While the Claimant called to apologize on April 4, 2014, a rest day, the apology is viewed as "too little, too late." By then the Claimant had violated each of the rules set forth in the dismissal notice. Substantial evidence leaves no room for dispute about the violations.

While the Claimant may well have been struggling, it was the Carrier's decision as to whether respond with assistance or discipline. In light of the Claimant's prior history, which shows three disciplinary actions for failures to report, the Carrier's decision to dismiss the Claimant should come as no surprise. He simply has not shown the ability to be the kind of reliable employee upon which the Carrier can rely.

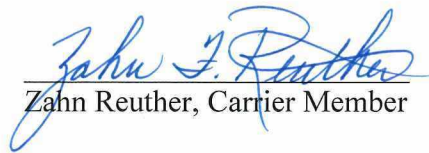
Award: Claim denied.

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