PUBLIC LAW BOARD NO. 7564

Case No. 71/Award No. 71
Carrier File No. 11-16-0080
Organization File No. T-D-4820-M
Claimant: Scott T. Richardson

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

Statement of Claim:

By letter dated October 22, 2015 Mr. Scott T. Richardson was dismissed for an alleged violation of MWOR 1.6 Conduct. The December 21, 2015 claim from the Organization, John A. Mozinski, Jr., Vice Chairman Secretary/Treasurer includes the following:

> Therefore, due to this excessive and prejudged discipline, Mr. Richardson must be immediately returned to service paid for his lost time. Paid for the 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. Richardson be made whole for any and all benefits, healthcare included, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on October 23, 2015 letter from Donald Hiatt.

Facts:

By letter dated September 17, 2015 the Claimant was informed that "An investigation has been scheduled at 0900 hours, Friday September 25, 2015, at the Holiday Inn Maple Grove, 11801 Fountains Way N, Maple Grove, MN, 55369, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged theft/misuse of corporate visa card for alleged personal usage and failure to comply with the instructions of BNSFs Corporate Rule; Travel and Entertainment Expense with supporting policies." The Claimant was further advised that he was "being withheld from service pending results of investigation."

A letter dated September 22, 2015 noted that by mutual agreement, the investigation had been rescheduled for September 24, 2015 with the time and location unchanged.

Carrier Position:

The Carrier asserts that the Claimant's admission provides substantial evidence that proves the allegations. The Claimant's use of the Carrier credit card to charge certain dinners constituted misuse/abuse of the card and amounted to theft. The dismissal was in accordance with The Policy for Employee Performance Accountability (PEPA) Appendix B, as no amount of theft is excusable. This is not a case of double jeopardy, as there was only one investigation. The Organization now asks for leniency, which is the prerogative of the Carrier, not the Board. There is no requirement that the Conducting Officer and the individual who signs the discipline letter be the same person. If the claim is sustained, the Claimant should receive only that called for in Rule 40G. Any outside earnings of the Claimant should be deducted from back wages owed. The Board is not authorized to include health premiums, which are covered in a nationally negotiated document.

Organization Position:

The Claimant did not receive a fair and impartial investigation, having been disciplined twice. He was removed from his exempt position and then dismissed. The Notice of Investigation (NOI) was untimely, as was the investigation, coming without the required five (5) day notice. The date of first knowledge was earlier than noted by the Carrier. The NOI did not contain specific charges. The Claimant was not allowed to exercise displacement rights and his guilt was predetermined when he was withheld from service. There was improper contact between the Conducting Officer and Carrier witnesses. The charges require a higher degree of proof than just substantial evidence as well as a showing of intent, which is absent in this case. The policies allegedly violated do not contain prohibitions against claiming expenses for meals, alcohol or the presence of a spouse at meals. The Organization has not requested leniency. The Policy for Employee Performance Accountability is not relevant for exempt employees. The make-whole remedy should include lost overtime and the cost of health insurance.

Findings:

Because this is the unusual case where a former exempt employee has been dismissed from his exempt position, returned to the Organization's bargaining unit and then investigated and dismissed for conduct as an exempt employee, the Board begins consideration by sorting through the implications of the Claimant's change in status. A reading of the Policy for Employee Performance Accountability (PEPA) does not show explicit language that clarifies whether the Policy is intended to apply to exempt and non-exempt Carrier employees or only non-exempt employees. The Board does not find that PEPA applied to the Claimant simply because he paid seniority retention fees. Ultimately, the Board finds that PEPA is meant to apply to non-exempt employees only, with other policy statements, such as the Travel Policy, clearly applicable to the entire work force.

There is no dispute that the negotiated Agreement does not apply to exempt employees, which means that the timeliness requirements of Rule 40 did not apply while the Claimant was an exempt employee. But Rule 40 did apply as of September 17, 2015 when the Claimant was returned to the Organization's bargaining unit and withheld from service. The investigation was initially scheduled for September 25, 2015 and moved up to September 24 by mutual agreement. The Claimant received the necessary five (5) day notice, having been verbally informed of the investigation on September 17. Contrary to the Organization's contention, the Claimant was allowed to use his seniority, as his Employee Transcript shows that on September 17, 2015 he was demoted from his exempt position to an Inspector (BMWE) position. He did not work as an Inspector because he was withheld from service, which the Carrier had a right to do because of the seriousness of the dishonesty/theft alleged violation of MWOR 1.6 Conduct.

Two additional preliminary matters remain. The Board acknowledges that the "substantial evidence" standard that is widespread in the railroad industry finds a somewhat diminished consensus in cases involving dishonesty/theft. In such cases there are referees/Boards that have applied a more stringent evidentiary standard. This Board finds the "substantial evidence" standard appropriate in this case, but it also finds that dishonesty/theft cannot be proven without proof of intent. We do not find this to be a case of double jeopardy. The Carrier has the right to decide who shall be an exempt employee. The Board is required to decide whether the negotiated Agreement has been violated, but the Board is not authorized to judge actions taken against exempt employees, who are not protected by the negotiated Agreement.

Because the allegations against the Claimant stem from requests to be reimbursed for meals, sections of two Carrier policies are relevant. The first is a document titled "Corporate Rule – Travel and Entertainment Expense." Under Corporate Rule Requirements, Section III.L. Meals includes the following:

2. Expenses for meals involving other BNSF Railway Employees are reimbursable if they are incurred under circumstances generally considered to be conductive (sic) to business discussions. . . .

3. Meal expenses for non-BNSF Railway employees are reimbursable if the expense is directly related to BNSF Railway business.

The second document is labeled "Corporate Policy – Travel and Entertainment Expense." Section IV, Policy Requirements, A. General, 1. States that "BNSF Railway reimburses employees for actual expenses incurred while conducting BNSF Railway business that are (sic) reasonable and appropriate." Under B. Expenses, the policy states at point 4 that "If it is determined that an employee was paid for an expense that is not eligible for reimbursement, the responsible employee must reimburse BNSF Railway immediately upon notification." This second document contains nothing more specific to meal expenses.

During the investigation, Human Resources Director Morgan acknowledged what is obvious from a careful reading of the above-noted documents: 1) the policies do not specifically require the exclusion of alcoholic beverages when dinner expense reimbursements are requested; 2) the policies do not require that a restaurant be a certain distance from the residence of the employee seeking reimbursement; and 3) the policies do not specifically prohibit a spouse from having a company-sponsored meal. The Claimant testified without contradiction that prior to July 2, 2015 he had submitted requests for reimbursement for expenses similar to those that the Carrier now objects to and that those requests were approved. There is nothing in the record of the investigation that indicates that the Claimant has been required to reimburse the Carrier for expenses found to have been inappropriate.

With the above as context, the Board turns to the reimbursement requests that the Carrier alleges constitute dishonesty/theft. On July 2, 2015 the Claimant requested reimbursement of $26.88, including $20 for alcohol, $1.88 for taxes and $5 for a tip. This was for a meal eaten by the Claimant, apparently alone, at Rockwood's Bar and Grill, which is less than two (2) miles from the Claimant's residence. On July 6, 2015, the Claimant requested reimbursement of $30.05, including $5.95 for food, $18 for alcohol, $2.10 for taxes and $4.00 for a tip for a meal eaten alone at Rockwood's. On July 7, 2015 the Claimant requested reimbursement of $21.20, including $5.95 for food, $9 for alcohol, $1.25 for taxes and $5 for the tip for another meal eaten alone at Rockwood's. On July 9, 2015 the Claimant dined at Rockwood's with his wife and Brandon Chandler, listed as an employee of Chemtron, a Carrier supplier. The Carrier has established that Mr. Chandler was no longer an employee of Chemtron at the time, having resigned on June 18, 2015. The Claimant requested reimbursement for $66.95, including $35.90 for food, $17 for alcohol, $4.06 for taxes and $10 for the tip. On July 14, 2015 the Claimant requested reimbursement for dinner with Structures Supervisor Mike Anderson at HC Hajime. The amount requested was $40.03, with no breakdown of expenses provided. In evidence is an e-mail from Supervisor Anderson stating that he was not at lunch with the Claimant on the day in question. The Claimant's explanation for the discrepancy is that given the passage of time, he is not sure of the dates that he ate with others. On July 15, 2015, the Claimant requested reimbursement of $45.89, including 5.95 for food, $27 for alcohol, $2.94 for taxes and $10 for the tip. The Claimant had visited Rockwood's with Carrier Laborer Mike Smith. Carrier records indicate that there was no Laborer Mike Smith in the district at the time in question.

The Claimant's admission and the Carrier's exhibits provide substantial evidence that the Claimant submitted the reimbursement requests detailed above. Furthermore, it is impossible for the Board to conclude that these expenses complied with the "reasonable and appropriate standard" contained in the Carrier policy. "Dinner" by oneself less than two (2) miles from home where the majority of the expense claimed was for alcohol does not qualify as the conduct of Carrier business. Nor can dinner with one's spouse and the former employee of a Carrier supplier be viewed as for the Carrier's benefit. And, the Claimant was clearly mistaken that he had dinner with Supervisor Anderson and Laborer Smith, at least on the dates noted. There is more than substantial evidence

that the Claimant is, at a minimum, guilty of inexcusable bad judgment and sloppy record keeping as well, even considering that reimbursement requests submitted prior to July 2, 2015 were not questioned.

However, the Board does not find intentional dishonesty. The Claimant testified without contradiction that he requested similar reimbursements prior to July 2, 2015 and had not been questioned about those requests. Thus, he had no specific indication that the requests violated relevant policies. Moreover, there is no indication that the Claimant attempted to falsify the reimbursement requests submitted for July 2, 2015 and later expenses or to hide what he was doing. These were not the actions of an individual who was intent on being dishonest and stealing from his employer. He is guilty of sloppy record keeping and very bad judgment, but not dishonesty or theft. In addition, the investigation transcript indicates that the Claimant's direct supervisor, Manager Track Welding Donald L. Hiatt was willing to agree to a Level S 30-Day Record Suspension in exchange for the Claimant's waiver prior to the investigation. This was the uncontradicted assertion of the Claimant's representative. Despite the fact that Manager Hiatt later signed the dismissal letter, the Board believes that prior to the investigation Manager Hiatt must have had familiarity with the relevant details and would not have agreed to less than dismissal if he believed at that point that the Claimant had been intentionally dishonest and was guilty of theft.

For the reasons set forth above, and because the Board views the Claimant's thirty-seven (37) years with the Carrier with one prior conditional suspension eight (8) years ago and one formal reprimand as mitigating, the dismissal is viewed as arbitrary and excessive. The Claimant is to be returned to work with his seniority intact to a Maintenance of Way position consistent with his qualifications and seniority. He is not to recover wages and other benefits.

Award:

Claim partially sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award to the Claimant be made consistent with the Findings above. The Carrier is to make the Award effective on or before thirty (30) days after the Award is adopted.

Zachary Voegel, Organization Member

John T. Reuther, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
January 31, 2018