

**PUBLIC LAW BOARD NO. 7564**

Case No. 74/Award No. 74  
Carrier File No. 10-16-0097  
Organization File No. C-16-D070-2  
Claimant: Kelly L. Bowen

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYEES DIVISION )  
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**Statement of Claim:**

By letter dated December 11, 2015 Machine Operator Kelly L. Bowen was dismissed for an alleged violation of MWOR 1.15 Reporting and Complying with Instructions, EI 22.6 Absence from Duty Procedures and MWOR 1.6 Conduct. The January 13, 2016 claim from the Organization, George L. Loveland, Vice General Chairman appealed the "arbitrary, capricious and excessive discipline" and asked that it be overturned and that the Claimant be "reinstated immediately to his former position, . . . be compensated for any time lost, made whole for any losses associated with the outcome of this investigation, whether they be financial, medical, personal etc., any future losses that may arise as a result of this investigation being used for progressive discipline until he is returned to work and that this dismissal be removed from and no mention of this be placed on his personnel record."

**Facts:**

By letter dated October 19, 2015 the Claimant was informed that "An investigation has been scheduled at 1000 hours, Friday, October 30, 2015 at the West Quincy Yard Office, General Conference Room, 600 Depot Road, Taylor, MO, 63471, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged absence without authorization on October 19, 2015, while assigned as Machine Operator on the Hannibal Subdivision." By letter dated October 26, 2015, the Carrier corrected the previous Notice of Investigation (NOI) to add that the Claimant was being "withheld from service pending results of investigation" and to extend the alleged unauthorized absence from October 19 to October 19-23, 2015.

**Carrier Position:**

The Carrier asserts that it has provided the required substantial evidence to show that the Claimant neither appeared for work nor called in for the dates of October 19-23, 2015 and,

therefore, his extended absence violated the above-noted Rules and Instruction. The Vacation Change Request Form submitted by the Organization clearly had been altered. The Board must defer to the Conducting Officer's credibility determination. The Organization now asks for leniency, which is the province of the Carrier and not the Board. If the claim is sustained, the Claimant is due only reinstatement and back wages, less outside earnings. Health benefits are controlled by the Railroad Employees National Health and Welfare Plan and the Board is not authorized to award what is not in the CBA. The Claimant was not prejudged and the original NOI provided the required five (5) day notice of the investigation.

**Organization Position:**

The Organization insists that the Claimant did not receive a fair and impartial investigation or the due process required. Withholding him from service was premature and the Conducting Officer was neither respectful nor civil. It was a hassle to obtain a recess and the investigation proceeded without the Claimant. The Employee Transcript was not provided to the employee for his review. Not only did the Carrier not provide substantial evidence, the Conducting Officer assisted Carrier witnesses.

**Findings:**

The Board finds that the investigation was fair and impartial. While the postponement of the investigation arguably was more difficult to obtain than it might have been, the Board notes that ultimately there was agreement on the postponement. The postponement eliminated any question that might have arisen over the timing of the NOI. And, since the Claimant attended the October 30, 2015 first hearing day, presumably he could have advised his representative that he could not be available for the agreed-upon second day, if that were the case. Under the circumstances, the Board believes that any hope for a second postponement was unrealistic.

There is no dispute that the Claimant was absent and did not call in during the October 19-23 period and that the Carrier shows the absences as unauthorized. The only question is whether or not the five days were covered by the Vacation Change Request Form so that the Claimant should be considered legitimately absent. The Board concludes that substantial evidence supports the designation of the absences as unauthorized. The Request Form obviously had been altered. The altered form indicates the "from" date as 10-23-15 and the "to" date as 10-19-15. The dates are backwards. The date on which the form was allegedly submitted is shown as 10-26-15, which was after the absences took place. The reason for the change is shown as "doctor appointments." With no other information, the need for five (5) days of doctor appointments is open to serious question. When the request form in evidence is considered as a whole, it does not make a lot of sense. The Board believes Roadmaster Hartz's testimony that, while his signature is very likely on the form, that is not the form that he signed. In addition, Roadmaster Hartz testified without contradiction, that when he asked the Claimant on October 26 why he had not called, the answer

he was given was that the Claimant's phone had fallen behind his bed and thus he was prevented from calling. The Board has no reason to discredit the Roadmaster's testimony and finds the excuse for not calling unpersuasive in the extreme and very likely untruthful.

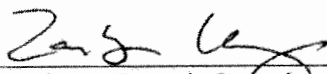
The Board finds it distressing to deny the claim of an employee with thirty-eight years' tenure who is two (2) years away from retirement. Had the lapse of judgment resulted only in the extended absence, perhaps an alternative to dismissal may have been appropriate. Perhaps the Carrier itself would have seen fit to discipline short of dismissal. But there is substantial evidence that the Claimant altered the Vacation Change Request Form. His dishonest act violated MWOR 1.6 Conduct as well as the Rule and Engineering Instruction set forth in the dismissal letter. The Board is left with no choice.

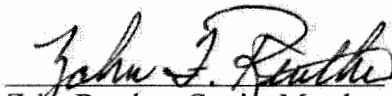
**Award:**

Claim denied.

**Order:**

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

  
Zachary Voegel, Organization Member

  
John Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
January 31, 2018