

PUBLIC LAW BOARD NO. 7585

Case No. /Award No. 74
Carrier File No.: 10-17-0358
Organization File No.: C-17-D040-28
Claimant: A.R. Kuretich

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization alleges that BNSF violated the Agreement when Claimant was disciplined for violating MWOR 1.15 "Duty - Reporting or Absence" for failing to report for duty at the designated time and place on June 29, 2017.

CARRIER POSITION:

On June 29, 2017, Claimant Kuretich, a foreman, did not report for duty. About an hour and a half into the shift, Assistant Roadmaster David Dunn was told Claimant had texted Assistant Foreman Shane that he would not be in to work that day. Dunn testified that Eric Smith was the Roadmaster where Claimant was working, "along with myself was helping with the Tie Gang." (TR 4) The Carrier provided a statement from Smith to the effect that Claimant did not contact him regarding an absence on the day in question.

The Carrier considered Dunn as Claimant's supervisor at the time, and categorized the assistant foreman as non-supervisory. Because Claimant failed to contact supervision, this was deemed a failure to report for duty. Claimant was issued a formal reprimand with a 12-month review period. The Carrier emphasizes that it need only provide substantial evidence of a violation and asserts it has done so.

ORGANIZATION POSITION:

In the Organization's view, the discipline was excessive and arbitrary. It contradicts any characterization of Dunn as Claimant's supervisor, arguing there is substantial proof

that Dunn was only there in the role of an observer. The gang travels from one territory to another with supervision changing accordingly, and with the gang being self-sufficient at different times.

The Organization notes that when Dunn arrived for the gang's job safety briefing, he did not identify himself as the gang's supervisor. Rather, Dunn clearly testified that he was sent to the Claimant's gang to: 1) Attend the gang's job safety briefing; 2) Observe safety and production; 3) Be on hand if they needed anything; and 4) Assist for the week. The Organization argues Claimant should have been given instructions on whom to contact regarding absenteeism. It was standard practice for Claimant and Shane to report absences to each other; Claimant merely followed this standard practice and was not told to do otherwise. The gang was working without roadmaster support and Dunn was only there as an observer; he never represented to the gang that he was there in a supervisory role.

DECISION:

Dunn testified that he was the supervisor on the day in question, and should have been advised of attendance issues. Though this may very well be true, Claimant cannot be held accountable for knowing Dunn's status without some evidence that he was told. There is no such evidence. The Investigation provided the following testimony:

DAVID DUNN: 1 That week uh Division Engineer uh Martin Feighner
2 had asked me to go down and just uh be with the tie gang. They did
3 not have a Roadmaster that was permanently attached to the gang. So
4 uh Mr. Feighner just asked me to go down and just be with the gang
5 that week, stay at the hotel in uh McCook that week. And just go
6 out to the job safety briefings. Um just observe the gangs, see how
7 they were as far as uh safety and and production and be on hand if
8 they needed anything, assistance from myself for that week. (TR 7)

* * *

DAVID DUNN: I don't think I gave them any expectations. I
10 met them Monday morning and I partly was where gang was Monday
11 morning, went to their briefing. Um I did not give them any
12 expectations for the week, no. (TR 9)

Claimant testified that he let his assistant foreman know he was ill and could not come in, as was his usual practice. He explained that Dunn did not represent that he was there in a supervisory role. He stated the established practice was for employees reporting absences to contact either the foreman or assistant foreman.

The supervisory situation with this gang was constantly changing and anything but clear. In this instance, the role to be played by Dunn when he arrived was not explained to Claimant. Dunn was not introduced as supervision but as an auxiliary "helper." This

occurred in a context where Claimant was accustomed to reporting his absences to the assistant foreman, and vice versa.

An employee cannot be reasonably disciplined for failure to comply with an obligation that has not been plainly communicated to him by his employer. In this instance, Claimant followed the same procedure his independent gang routinely used as it moved from territory to territory. There is no persuasive evidence that Dunn identified himself as functioning in a supervisory role or was introduced that way. It follows that Claimant had no clear basis for changing operative gang procedures for handling absenteeism. The Carrier lacks substantial evidence to support a finding of rules violation in this case.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident.

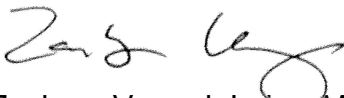
ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

May 1, 2019



Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member



James Rhodes, Carrier Member