

BEFORE PUBLIC LAW BOARD NO. 7590

CASE NO. 60

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

V

BNSF RAILWAY

(Former ATSF Railway)

BNSF FILE NO. 14-16-0348

BMWED FILE NO. 2405 SL13C5 169

Claimant: B. Krause

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Southwest District 700 Benjamin Krause (0125302) Seniority Date April 16, 2012 for reinstatement with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1.) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service; 3.) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service; 4.) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service commencing April 13, 2016, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7590 has jurisdiction over the parties and the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant received a letter dated June 7, 2016:

An investigation has been scheduled at 1000 hours, Tuesday, June 14, 2016, at the Roadmaster's Office, 115 East 5th Street, Newton, KS 67114, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged falsification of payroll records on May 24, 2016 and May 25, 2016, while holding a Trackman/Flagman position in Newton, KS. The date BNSF received first knowledge of this alleged violation is June 1, 2016.

This investigation will determine possible violation of MWOR 1.6 Conduct.

An investigation was held following a postponement. Claimant was notified in a letter dated July 27, 2016:

As a result of investigation held on Wednesday, July 6, 2016 at 1000 hours at Upstairs Conference Room, 115 East 5th St., Newton, KS, 67114 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for falsification of payroll records on May 24, 2016 and May 25, 2016, while holding a Trackman/Flagman position in Newton, KS.

This letter will be placed in your personnel record.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.6 Conduct.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

This letter will be placed in your personnel record.

The Carrier argues that Claimant violated Rule 1.6 by not working but putting in for pay as a Flagman. According to the Carrier, Claimant texted that he would not be to work, nobody saw him at work, and Claimant did not perform any flagging duties. The Carrier argues that it is a question of witness credibility and deference must be giving to the hearing officer's determination of credibility.

The Organization argues that nothing was proven. Claimant worked as a Flagman and was not assigned to a work group. He received assignments as they came and then went to the flagging work. He waited in the Car Shop parking lot on the two days at issue.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

MOWOR Rule 1.6 provides:

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome or
7. Discourteous

The Board has reviewed the evidence. There are no procedural violations which void the discipline. On the merits we find that there is no substantial evidence in the record to support the discipline.

A review of the evidence shows that the Roadmaster was on vacation. Upon his return, two employees who shared supervisory duties in his absence mentioned that Claimant had not been to work on two days. Thinking nothing of it, the Roadmaster was surprised to see that Claimant put in for a Tuesday and Wednesday as a Flagman. The investigation ensued.

Carrier places significant weight on two texts – one stating that Claimant would be late due to the need to get paperwork signed and another that Claimant might not be in to work due to cattle running loose at his father's farm. Claimant explained that he was able to arrange getting the paperwork signed after work and that the loose cattle turned out to be minor and he arrived on time for work. Neither of Claimant's assertions were refuted.

Carrier also placed weight upon the testimony of Assistant General Car Foreman O'Brien. Claimant had been doing flagging for a leaking Hazmat car and asphalt contractors the prior week. Claimant contacted him, according to Mr. O'Brien, to verify that Claimant had been working as a flagman on the two days. Mr. O'Brien refused because he did not see Claimant flagging.

Claimant's flagging duties with the Car Shop had ended the previous Friday. Claimant testified that he waited for his flagging assignments near the Car Shop Facility and was asking Mr. O'Brien to verify that he saw Claimant sitting in the lot in his pickup. Claimant testified that he saw Mr. O'Brien enter the lot, but that Mr. O'Brien must not have seen him. According to Claimant, he did not ask for a fraudulent statement that he had been working as a flagman, rather than he had been waiting in the lot. This testimony is also unrefuted.

The evidence shows that Claimant was sitting in the Car Shop lot like he had done during his prior shifts working as a Flagman. Mr. Willingham was on vacation and Claimant was communicating with the two employees who were handling supervisory duties in the Roadmaster's absence, as well as Roadmasters covering the area during Willingham's absence. At most, the evidence shows unclear communication between Claimant and the employees sharing the supervisory duties. Unclear communication is not evidence of falsifying payroll. However, Claimant needs to be mindful that the parking lot is not his designated assembly point and simply pulling into the lot is not the same as reporting for duty. He has an obligation to make his physical presence known to the supervisor. There is no substantial evidence of dishonest conduct by Claimant.

Award:

Claim sustained.



Organization Member



Brian Clauss
Neutral Member



Carrier Member