

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 11-13-0303
Organization File No. T-D-4262-M

Claimant — William O. Johnson

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on July 11, 2013, when it dismissed Claimant, William O. Johnson, for violation of MWOR 1.6 Conduct and MWOR 1.15 Duty — Reporting or Absence, in connection with Claimant leaving work before the end of his shift without prior approval from his supervisor, falsifying time, and for dishonesty at or near the Brainerd Subdivision.
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.

BACKGROUND:

The Claimant entered service with the Carrier on May 23, 1994. At the time of the incident that resulted in his dismissal, he was working as a Section Foreman for a crew that was based in Carlton, Minnesota, on the Brainerd Subdivision.

On Wednesday, June 5, 2013, Claimant was assigned as Foreman of a four-person material crew¹ that was working near Kimberly, Minnesota, which is about 40 miles from

¹ The other crew members were Ben Cluckuss, Keith Rasmussen and Darren Dums.

the crew's base in Carlton. The crew had already been working in Kimberly for several days, reclaiming rail to use in other projects. Roadmaster Randy Movchan conducted a 7:00 a.m. conference call, which the Claimant participated in. The purpose of the conference calls is to conduct a job safety briefing and to go through each work group's tasks for the day. Claimant said nothing about needing to leave work early.

That afternoon, Movchan received an e-mail sent at 1:11 p.m. by Ben Peterson, Roadmaster on the Brainerd Subdivision, asking Movchan if he knew that "Billy took off early?" Claimant's crew was scheduled to work eight hours a day, five days a week, starting at 7:00 a.m. Movchan telephoned Peterson right away; Peterson reported that he had been in Kimberly talking to the crew and noticed that Claimant was not there. Movchan then called the Claimant at about 1:14 p.m. and asked him "where he was at." Claimant responded that he was at Kimberly and described the work the crew was doing. He did not say that he was not at work with the rest of the crew. Movchan was left with the impression that Claimant was still at work. He called Peterson back. Peterson told Movchan that he had been in the Kimberly area for a while but had not seen the Claimant, and the other crew members told him that Claimant had left. Movchan did not call the Claimant back. The next day, Movchan looked at Claimant's time report and saw 8 hours entered for June 5. Claimant's payroll record shows that he was paid 8 hours at straight time for June 5, 2013.

MWOR 1.15, Duty—Reporting or Absence, sets forth the Carrier's expectations regarding employee's attendance at work:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

The protocol for employees who need to leave work early for personal reasons is to get permission from a supervisor and amend the pay records to reflect time actually worked.

On Friday, June 7, 2013, Movchan and Peterson met with Claimant after the morning conference call to inform him that there would be an investigation into his alleged misconduct and that he would be held off work pending the outcome of the investigation. Claimant was sent a formal Notice of Investigation that same date, indicating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, when you allegedly left work before the end of your shift at approximately 12—hours on June 5, 2013, without prior approval from your supervisor,

falsified your time when you entered 8 hours of time, and were allegedly dishonest when you told Roadmaster Randy Movchan you were working at Kimberly and it was confirmed by Roadmaster Ben Peterson that you were not at Kimberly at approximately 1200 hours on June 5, 2013, while working as a Foreman on the Brainerd Subdivision. The date BNSF received first knowledge of this alleged violation is June 6, 2013.”

The original hearing date was mutually postponed and the investigation was held June 21, 2013. At the hearing, Randy Movchan testified as set forth above. Ben Peterson described his involvement in the incident. He went to Kimberly to look at a frog that had been replaced, arriving sometime between 12:00 and 12:15 p.m. Peterson spoke to crew member Keith Rasmussen, who showed him the work he had been doing. Neither Claimant nor the other two crew members were present in the immediate vicinity. Peterson saw Ben Cluckuss and Darren Dums a short distance away but after a while he realized that he had not seen Claimant. At about 1:00 p.m., he got the three crew members together and asked them about Claimant’s whereabouts. They told him that Claimant had had to leave early to attend his child’s kindergarten graduation. Peterson sent the e-mail to Movchan that alerted him to Claimant’s absence. Crew members Keith Rasmussen and Darren Dums testified that Claimant had told them he would not be at work the entire day in order to do some work on the computer and to attend his daughter’s kindergarten graduation.² They stated that Johnson had not been at the Kimberly work site at any time on June 5, 2013. The Claimant testified that he did not go out to Kimberly that morning in part because of bad fog; there was another Foreman in the area who could get track authority for them. He was doing other work in Carlton and had planned to leave early that day to attend his daughter’s kindergarten graduation. Claimant acknowledged that he had not notified his supervisor, Randy Movchan, but he had told his crew and the surfacing crew foreman, John Pitts. Claimant testified that he worked for about 5½ hours that day in the Carlton area lining up materials for the next job. He further testified that there is no requirement that he be physically present with his crew as long as they are performing their assigned duties and he is performing his as Foreman. Every job is different; some require him to be on site with the crew, others do not. Because the surfacing crew foreman was going to be on site, the crew was performing the same job that it had done for the past several days, and he had other tasks to perform in town, he decided not to go to Kimberly himself. He finished working at about 12:30 p.m. and went to his daughter’s kindergarten graduation. He stated that he now realizes he should have told Movchan about the graduation. He did not enter his hours into the payroll system for June 5—Ben Cluckuss, who had been doing it for the crew, did. Johnson did not ask him to input his time for June 5, 2013. He had told Cluckuss that he would not be working the entire day but they did not discuss how many hours he would be

² The third crew member, Ben Cluckuss, was not called to testify.

working. When Movchan telephoned him, Claimant testified that Movchan asked “where are *you guys* at?” Claimant understood Movchan to be asking about the crew, not himself individually, and he answered accordingly. Finally, Claimant testified that he did not intentionally do anything wrong.

By letter dated July 11, 2013, the Carrier notified Claimant that he had been found in violation of MWOR 1.6, Conduct and MWOR 1.15 Duty—Reporting or Absence, for leaving work early without permission, for falsifying his time card, and for dishonesty during his telephone conversation with Roadmaster Randy Movchan when he told Movchan he was at Kimberly. The discipline assessed was dismissal, effective immediately.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Carrier found Claimant in violation of MWOR 1.6, Conduct, which states “Employees must not be ... dishonest...” and MWOR 1.15, Duty—Reporting or Absence, which states, in part “Employees must not leave their assignment ... without proper authority.” Claimant’s violation of MWOR 1.15 not really in dispute: he left work early on June 5, 2013, without obtaining permission from his direct supervisor or anyone else in management. Claimant is an experienced employee. He knew or should have known that if he wanted to take time off from work to attend his daughter’s kindergarten graduation, or for any personal reason, he would have to notify his supervisor and get his authorization. There is nothing in the record to indicate that such a request would not have been approved. Regarding the penalty for leaving work without authorization, Rule 1.15 itself states “Continued failure by employees to protect their employment will be cause for dismissal,” which suggests that a first violation of the rule would not necessarily result in termination.

The more serious charge against the Claimant is dishonesty. The record establishes certain facts about Claimant’s conduct on June 5, 2013:

—The Claimant did not tell his supervisor, Randy Movchan (or anyone else in management), that he planned to leave work early.

As noted above, this is a violation of Rule 1.15. But was it “dishonest”? It was certainly deceptive, and Claimant’s subsequent conduct when Ben Peterson discovered that

he was not at the Kimberly work site supports the conclusion that he was deliberately trying to hide the fact that he was not at work with his crew and that he planned to leave work before the end of his shift.

—The Claimant did not tell Movchan that he was not going to the assigned work site in Kimberly.

As a Foreman, Claimant had responsibility for directing the work of the crew he supervised. Normally, that supervision would occur on site. There may be times when a Foreman has other tasks that need to be performed off-site. But one would expect Claimant to discuss with his supervisor his intent to leave his crew working unsupervised, so that alternate plans for their supervision could be made. Claimant testified that he discussed the matter with the Foreman of the surfacing gang that was working in the same area, who was amenable to keeping an eye on Claimant's crew. That is not the same as notice to one's supervisor. As the Roadmaster, Movchan has responsibility for coordinating the work of a number of crews, and it is important that he be kept informed about where different employees under his supervision are working. If Claimant had tasks that needed to be done off-site, he had a duty to raise the issue with Movchan before not showing up on-site. Movchan may have felt that the crew did need on-site supervision and directed Claimant to be present in Kimberly. He might have assigned someone else to be Acting Foreman in Claimant's absence. The two men could have discussed how Claimant might complete the tasks that required him to be off-site while ensuring that Claimant's crew had adequate supervision. One of the purposes of the daily 7:00 a.m. conference call is to discuss each crew's daily assignment and work plan. That includes who is going to be doing what, and where they are going to be doing it. If Claimant was not planning on going to Kimberly, he could, and should, have raised the matter then, so that he, Movchan and the other three crew members could discuss and coordinate how to accomplish everything that needed to be done. Foremen have responsibilities in a chain of command, and their absence has an impact not only on their work but on that of the crews they supervise. Claimant's silence on where he planned to be working on June 5, coupled with his failure to notify his supervisor of his desire to leave work early that day, supports the inference that he was trying to hide what he was doing from his supervisors.

—When Movchan asked him "where are you?" or "where are you guys?," the Claimant did not tell Movchan that he was not with his crew. Instead he left Movchan with the impression that he was in Kimberly with the crew.

After Peterson informed Movchan that Claimant was not at the Kimberly work site, Movchan telephoned Claimant shortly after 1:00 p.m. to ask where he was. That was an

opportunity for the Claimant to explain what was going on. Claimant stated that he assumed Movchan was asking about the crew and he answered accordingly. But he was not working with the crew at Kimberly and he had a duty to inform his supervisor of that fact: for example, “Rasmussen, Cluckuss and Dums are on the job in Kimberly and they know what to do. I have confidence that they can get the job done without me so I decided to take the opportunity to catch up on some work on the computer that needed to be done here in Carlton.” Claimant testified that he worked five and one-half hours on June 5, or until about 12:30 p.m. If Movchan telephoned shortly after 1:00 p.m. (which the record supports), the Claimant was not working at all. His description to Movchan of what was happening at Kimberly was not only misleading; it was a complete fabrication, because Claimant had not been to Kimberly that day. It is impossible to avoid the conclusion that the Claimant was deliberately hiding his conduct from his supervisor.

—When Ben Cluckuss input eight hours at straight time into Claimant’s time record for June 5, 2013, Claimant did not amend the record to accurately reflect his actual hours worked, five and one-half.

On June 6, 2013, when Movchan checked on Claimant’s time entry for June 5, eight hours had been recorded. Claimant defended the entry by saying that the crew’s time was input into the system by Ben Cluckuss, who had entered the full amount of time without talking to Claimant about it. That may be what happened. What Claimant’s position ignores is his responsibility as an employee to make sure that his time records are correct. Claimant testified that he and Cluckuss had not discussed how much time to enter into Claimant’s record for June 5. But if the two men did not discuss it, Cluckuss had no way of knowing how many hours Claimant planned to work on June 5, and it was Claimant’s duty to either tell him in advance how many hours to input or to amend the hours that Cluckuss entered.

Claimant testified at the investigation that he had not intentionally done anything wrong. But taken all together, Claimant’s actions on June 5, 2013, establish that he hid his intention to leave work early and he deliberately misled his supervisor when Movchan contacted him to ask where he was. In short, he was dishonest, and the Carrier’s conclusion that Claimant had violated Rule 1.6 is supported in the record.

The Organization argues that termination is too harsh a penalty for a long-time employee like the Claimant who has served the Carrier well over the years. The Organization is correct that the Carrier did not have to terminate the Claimant; it could have subjected him to a lengthy suspension or some other lesser discipline. But dishonesty is one of the few infractions for which immediate termination is considered appropriate. Foremen not only act as first-level supervisors, they are also role models for their co-workers, which


makes conduct like the Claimant's all the more serious. In addition, where employees work in the field without ongoing supervision, an employer has to be able to trust in their honesty and integrity with respect to reporting their time worked. Employers tend to make an example of employees who are caught playing fast and loose with their time and attendance, in an effort to send a warning message to other employees who may be tempted to do the same thing. The Carrier determined that termination was appropriate in this case, and the Board will not disturb it.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.


Andria S. Knapp, Neutral Member


Nathan Moyyad, Carrier Member


Zachary Voegel, Organization Member

11-2-16

Date