

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 62

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 11-16-0376  
BMWE FILE NO. B-M-2959-E  
Claimant: T. Greene

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STATEMENT OF CLAIM

We are filing a claim appealing the discipline of dismissal, issued to maintenance of Way Employee Todd Greene supposedly as a result of an investigation held May 13, 2016. This Discipline was assessed in letter dated June 7, 2016, from Roadway Equipment Manager Mark Spratler.

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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 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter advising him to attend a formal Investigation:

Investigation has been scheduled at 1000 hours, Tuesday, April the 12th, 2016, at the BNSF 2nd Floor Conference Room, 235 Main Street, Havre, Montana, 59501, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with the BNSF Maintenance of Way Operating Rule 1.6 Conduct and Maintenance of Way Operating Rule 1.5 Duty-Reporting or Absence. The alleged incident occurred on Thursday, March 31st, 2016 when you failed to report for duty as a Traveling Mechanic in Essex, Montana. The date BNSF received first knowledge of this alleged violation was March 31st, 2016.

Following postponements, a hearing was held. Following the investigation, Claimant received a letter advising him:

As a result of investigation held on Friday, May 13, 2016 at 0900 hours at BNSF 2nd Floor Conference Room, 235 Main Street, Havre, MT, 59501 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to comply with the BNSF MWOR 1.6 Conduct and MWOR 1.15 Duty-Reporting or Absence. The incident occurred on Thursday March 31, 2016 when you failed to report for duty as a Traveling Mechanic in Essex, MT. The date BNSF received first knowledge of this violation is March 31, 2016.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.6 Conduct and MWOR 1.15 Duty Reporting or Absence.

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.

The Carrier argues that the Rule is clear. Although the Carrier investigated Claimant for not reporting for work, the investigation revealed dishonesty because Claimant was not in his company truck and nonetheless logged that he had driven from Columbia Falls to Essex and back. The notice was sufficient to put Claimant on notice that he was being investigated for an incident of dishonesty. The Carrier further asserts that there are no procedure defects which void the discipline.

The Organization argues a number of procedural defenses. According to the Organization, the notice was only related to a failure to report to work and was not notice about a DOT violation. Further, there was collusion among witnesses and the conducting officer. On the merits, the Organization argues that Claimant was performing service to the Carrier when he drove to various suppliers. Rather than drive his large company boom truck in the congested town, he drove his pickup truck. He stopped at various vendors, ordered parts, was unsuccessful at getting quick couplers for the Porta-Power unit, and ordered welder and truck parts. Claimant was not attached to a gang and was getting his truck prepared for a forthcoming safety audit. He was restocking supplies for the War Wagon and his truck in anticipation of the gang work in the following week.

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.

Claimant was charged with a Rule 1.6 violation for dishonesty and a Rule 1.15 violation for failure to report to work. A review of the evidence shows that Claimant was performing traveling mechanic work on March 31. Claimant's supervisor saw Claimant's truck parked in front of Claimant's home. Rather than phone Claimant, the supervisor called the Essex shop and spoke with a co-worker to confirm that Claimant was not at Essex. The supervisor did not call Claimant to ascertain his location because it "was not his policy."

Claimant produced a number of witness statements to show that he had spent the day in the area of Columbia Falls and Kalispell. These statements corroborated that he was performing travelling mechanic work for the Carrier. There is no substantial evidence in the record to establish the Rule 1.15 violation.

The failure to prove the Rule 1.15 violation does not end the inquiry. Had the evidence simply shown that Claimant was performing Carrier work, then the Claim would be sustained. However, there are more proven acts in the instant matter. Claimant admitted to falsifying his DOT log book in order to square with his odometer. Claimant testified that he had not been diligent in his logs versus his odometer. When his supervisor checked the DOT log and compared it to the supervisor's knowledge that Claimant's assigned company truck had not moved from Claimant's house, the supervisor's suspicion was aroused. Seeing two versions of how Claimant spent his day, an investigation followed. Claimant was dismissed for the offense of "when you failed to report for duty as a Traveling Mechanic in Essex, MT." As discussed above, the charge was not proved.


The Carrier did not prove that Claimant was dishonest for claiming that he worked on the 31<sup>st</sup> because he was working for the Carrier on that date. His dishonesty on the

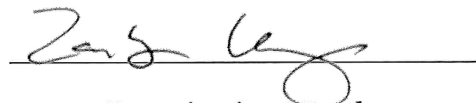
DOT books was not charged. However, this Board cannot ignore Claimant's admission to dishonesty in his DOT log books. His admission was an admission to dishonesty – not for the failure to appear at Essex, but a dishonest statement nonetheless. The Organization's procedural argument that Claimant should be completely exonerated is not persuasive.


The evidence shows that the Carrier did not prove that Claimant was dishonest by his failure to report to work at Essex as stated in the Dismissal Letter. However, this Board does note that the investigation revealed that Claimant entered a March 31 entry for his trip to Essex – a trip he never made because he remained in town to do Carrier work. He stated that he made the entry into his DOT log in order to fix his poor record keeping.

This Board is confronted with a unique situation where dismissal charges were not proven, but the investigation revealed other misconduct. Accordingly, it was an abuse of discretion for the Carrier to dismiss Claimant from service. However, some discipline is warranted for the DOT book entry. Accordingly, Claimant's dismissal is reduced to a suspension without backpay. Claimant will return to work with seniority unimpaired but with no award of backpay.

Sustained in part.

  
Carrier Member

  
Organization Member

  
Neutral Member

Dated: 02-04-2019