

PUBLIC LAW BOARD NO. 7988

**CASE NO. 3
AWARD NO. 3**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

and

Soo Line Railroad Company

**Claimant: A. Delzer
System File No. D-71-20-380-07
Carrier File No. 2021-00019657**

BACKGROUND:

On October 23, 2020 the Carrier issued to Claimant A. Delzer a notice of formal investigation and hearing which stated, in part, as follows:

The purpose of this investigation and hearing is to develop all facts and circumstances and to place your responsibility, if any, in connection with your alleged failure to report for duty and leaving your assignment on Thursday, October 8, 2020 and Wednesday, October 14, 2020, brought to the Company's attention on Monday, October 19, 2020. This indicates a possible violation of, but not limited to, the following rules:

- **US Rulebook for Engineering Employees: 1.6 Conduct**
- **US Rulebook for Engineering Employees: 1.13 Reporting and Complying with Instructions**
- **US Rulebook for Engineering Employees: 1.15 Duty - Reporting or Absence**

On the agreed-upon date October 29, 2020 the investigation and hearing convened. Claimant, with representation assistance, presented testimony and examined the Carrier's five (5) witnesses and eleven (11) exhibits.

On November 12, 2020 the Assistant Chief Engineer - Structures notified Claimant of the following:

Upon a review of the transcript of the investigation it has been determined that the hearing record contains substantial evidence and proof that you violated the following rules:

- **US Rulebook for Engineering Employees: 1.6 Conduct**
- **US Rulebook for Engineering Employees: 1.13 Reporting and Complying with Instructions**
- **US Rulebook for Engineering Employees: 1.15 Duty - Reporting or Absence**

Based on the facts and evidence in the hearing record, the severity of the incident, and your past discipline history, you are hereby assessed a discipline of thirty (30) calendar day suspension as a First (1st) Major - Life Threatening & Conduct Unbecoming Offence in accordance with the Hybrid Discipline & Accountability Process (the "Process").

WARNING: You are currently at one (1) discipline event and the first (1st) offense of the *Major - Life Threatening & Conduct Unbecoming Offences* in the Guidelines. Please consult the Guidelines to learn how you can improve your discipline standing.

On January 7, 2021 the Organization filed an appeal; the Carrier denied the appeal on March 5, 2021. The dispute remains following conference on September 1, 2021 and confirmed by each party's letter dated September 2, 2021. In accordance with the Agreement dated December 16, 2021 the dispute is before the Board for review and decision.

FINDINGS:

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

As stipulated in Paragraph (H) of the Agreement, the record in this proceeding "will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on-property, as applicable." Additionally "[t]he Neutral Member

shall have the authority to require the production of such additional evidence, either oral or written, as he or she may desire from the parties." No additional oral or written evidence was required.

The long-standing recognized function of the Board in this appellate forum is to review the record which is the documentation itemized in Paragraph (H) of the Agreement. When the record contains substantial evidence in support of the Carrier's decision, the discipline assessed remains undisturbed unless exposed as arbitrary, capricious, discriminatory, an abuse of discretion or punitive. A definition for substantial evidence is cited in the Carrier's response where it references Second Division Award No. 7492 - - "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Substantial evidence may be direct and eyewitness or indirect and circumstantial. Substantial evidence resides at the base of the evidence pyramid, an unexceptional level or threshold compared to preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt.

As a preliminary issue the Organization states the Carrier prejudged Claimant and did not afford him a fair and impartial hearing when it violated Rule 18(b) in the Schedule of Rules Agreement. The incidents related to the charged rules violations occurred October 8, 2020 and October 14, 2020. Carrier officials became aware of the incidents on October 19, 2020. The notice of formal investigation and hearing issued October 23, 2020; the hearing convened October 29, 2020. As required by Rule 18(b) the "hearing [was] held within . . . twenty (20) days from the date information [was] obtained by the appropriate officer of the Company[.]" The Carrier did not prejudge Claimant when it withheld him from service after the hearing and prior to the assessment of any discipline.

Claimant has approximately five (5) years of service with the Carrier. In October 2020 he was assigned to a steel erector crew working as a carpenter, Monday through Thursday, ten (10) hours daily. On October 8, 2020 Claimant and crew began their workday by cleaning the shop at the depot in La Crosse (WI). After three (3) hours the crew drove their personal vehicles from the depot across the bridge to La Crescent (MN). The Crane Operator drove the Carrier's truck and arrived at La Crescent after the crew arrived and observed Claimant was not present. Claimant acknowledged he arrived thirty (30) to forty-five (45) minutes after the crew; no one knew of his whereabouts because he informed no one. The employee recording time on the 8th credited Claimant with ten (10) hours; Claimant did not notify his foreman or assistant foreman that he worked less than a full day. He acknowledges not reporting the time for his absence from the worksite because the timekeeper, assistant foreman, foreman, manager, and senior manager "never asked" him whether he worked ten (10) hours. Claimant acknowledges he would have contacted his foreman or assistant foreman to correct his time had the situation involved adding hours.

On October 14, 2020 Claimant was sitting in the Carrier's truck on the bridge with the Crane Operator eating lunch. Claimant exited the truck after lunch, walked off the bridge and drove away in his personal vehicle without informing anyone where he was going or when he would


return. Claimant needed to use a restroom; he acknowledged that he knew there was a porta-potty at the bridge which he had never been inside of and would not use. He drove to La Crosse or La Crescent. Claimant acknowledged he was away from the worksite during duty hours for at least thirty (30) minutes. The employee recording time on the 14th credited Claimant with ten (10) hours; Claimant did not notify any one to correct his time and account for his absence from the worksite because timekeeper, assistant foreman, foreman, manager, and senior manager "never asked" him whether he worked ten (10) hours. Claimant acknowledges he would have contacted his foreman or assistant foreman to correct his time had the situation involved adding hours.

Claimant states that during his five (5) years of service no one discussed the rules or expectations with him about leaving the worksite without informing anyone, obtaining approval or taking leave. Claimant is rules qualified. His absence from the worksite during duty hours without approval, not taking authorized leave and not informing any one is substantial evidence that Claimant violated the charged rules - - US Rulebook for Engineering Employees: 1.6 Conduct, US Rulebook for Engineering Employees: 1.13 Reporting and Complying with Instructions and US Rulebook for Engineering Employees: 1.15 Duty - Reporting or Absence.


The Board finds the Carrier did not act in an arbitrary, capricious or discriminatory manner nor abuse its discretion. The Carrier provided Claimant with notice of the charged rules violations, identified the incidents under investigation, afforded Claimant due process and a fair and impartial hearing prior to assessing any discipline. The assessed thirty (30) calendar day suspension comports with the Process where Claimant's infractions are a major rule violation. The suspension is corrective and not punitive. The Board will deny this appeal.

AWARD:


Appeal denied.



Patrick Halter
Neutral Referee
Dated: 8/11/2022



Erica Barnard
Carrier Member
Dated: August 11, 2022



John Schlismann
Employee Member
Dated: August 10, 2022