

BNSF Railway (Former Burlington Northern Railway)
- and -
Brotherhood of Maintenance of Way Employees

Public Law Board No. 7585
Case No. 20
Award No. 20
Carrier File No. 11-12-0226
Organization File No. S-P-1643-G
Claimant: Joshua Ross

FACTS:

Claimant Joshua Ross was hired in 1996. On January 6, 2012 he was working as a track inspector with dual authority. Authority 263-62 was granted on main track two between North Crossover, Napaville South, SW-N, and SBCS, Chehalis Junction SW-Y. Authority 263-63 was also on main track two, between North Crossover, Chehalis Junction, SW-N and South Crossover, Centralia south, SW-N. He released the 263-62 authority while still occupying main track two. At that point his only authority was north of his location and he was outside his limits.

The Carrier deemed there was reasonable cause for drug and alcohol testing and Claimant drove 70 miles to undergo this testing. The results came back showing a cocaine level of 580 nanograms; the confirmation cutoff is 100. Claimant declined a reconfirmation test at a different laboratory.

The Carrier treated the breach of limits incident as a separate incident for which he was issued a Level S 30 day record suspension. This discipline was deemed a disqualifier for Employee Assistance, and he was found ineligible for treatment as a first time drug and alcohol offender. Accordingly, the Carrier dismissed him.

CARRIER POSITION:

The Carrier maintains there were two distinct and separate occurrences, each involving different alleged violations. This is why there were two separate investigations, it maintains. It points out that no part of the Agreement prohibits a witness from testifying via telephone, and that it does not honor policies or documents from predecessor employers.

In its view there was reasonable cause for the drug test. Applicable policy states that reasonable cause testing is performed when the employee's actions may have contributed to a potentially serious incident and the employee exhibits neglect of established safety or other BNSF procedures or errors in judgment and control.

It maintains the Rule 40 requirement of an impartial and fair hearing was not violated. It further asserts that Claimant Ross was denied Employee Assistance because he failed to follow through on their instructions.

ORGANIZATION POSITION:

The Organization contends that the Carrier's records of Claimant's disciplinary history are inaccurate. Claimant asserts he never lived in Texas and also maintains that the 30 day Record Suspension shown for 2008 was given Alternative Handling.

The Organization alleges a breach of Rule 40 requirements in that Manager of Medical Support Services Martin Crespin was allowed to testify by way of telephone over the Organization's objection, and further because the Hearing Officer was not the person to issue the discipline. It contends it was a violation of Rule 40 for the employer to list Roadmaster Kim Ohs as a witness when Mr. Ohs was not present for the investigation. The Organization also referenced a policy from a predecessor employer asserting the provisions have not been followed here. It concludes that no discipline can be sustained in this case.

The Organization asserts reasonable cause for testing was lacking in this case. It maintains the Carrier abused its discretion in separating the violations, first because the out-of-limits incident served as reasonable cause for the drug testing, inextricably intertwining the two, and secondly because this is neither logical nor accepted practice; rather, it was done solely to deny the employee the opportunity to engage in the Employee Assistance Program.

In the Organization's view, the Carrier has pyramided the charges against Claimant for the sole purpose of denying him assistance under the EAP. Claimant testified that because of the Carrier's denial of help, he spent \$1140 for intensive therapy with a psychologist.

DECISION:

The Board is in agreement with the Organization's assertion that the two incidents should be handled as one with the alleged rule violations being compound. But for the out-of-limits incident, there would have been no drug test. This joins the two rules violations at the hip. There was no prejudice arising from the separation of investigations. Though the Conducting Officer refused to permit the transcript from the out-of-limits hearing to be admitted as an exhibit in the drug testing investigation, the fact remains that all persons with an interest in the case had access to the records compiled in both investigations.

It was not a denial of an impartial and fair hearing to permit Martin Crespin to testify by telephone. There was no challenge from the Organization to any of Mr. Crespin's testimony. Claimant does not assert that his drug test was mishandled or that the

results are inaccurate. It follows that there was no prejudice to him from the Conducting Officer's inability to see Crespín's facial expressions or mannerisms during testimony. Both sides accepted the testimony, and the Union's arguments are based on other grounds.

The Carrier cannot be held to policies and documents from a predecessor employer which it has not adopted as its own. The Board has no jurisdiction to enforce such documents.

The Carrier had reasonable cause to order drug testing. In breaching his authority, Claimant Ross caused an incident which constituted a serious safety risk. He exhibited a behavior properly described as both neglect of established safety or other BNSF procedures as well as error in judgment and control. It was his duty to understand the limits of his authority. Ohs' written statement indicated confusion about which authority included the plant. However, the evidence establishes that Claimant Ross violated MOWOR 3.6.1 when he released his authority under 263-62. As a result, the fact that the Conducting Officer did not make the final decision on this violation was not prejudicial to Claimant and does not constitute a separate ground for overturning his discipline.

As mentioned earlier, the Board cannot find a reasonable rationale for separating these incidents into two disciplinary events. There would be no reasonable cause for drug testing without the breach of authority, and the breach of authority may well have been attributable to the fact that Claimant had over five times the limit of Cocaine in his system at the time of the incident. These events occurred simultaneously and must be treated as one.

Under the applicable Alcohol and Drug Policy, management is given the discretion to decide whether an eligible first time offender will be permitted a waiver. It is well established in the common law of labor arbitration that the standard of review in the exercise of managerial discretion is whether it was arbitrary, capricious, discriminatory or unreasonable.

Section 7.5 of the policy clearly provides: "All alcohol and drug violations are considered serious. Drug and alcohol violations will be considered with any and all existing violations on an individual's employment record for assessing appropriate discipline." The terms "any and all" define the existing violations which may be considered for purposes of implementing this policy. "Any and all" is very broad language, and as such, permits consideration of any and all discipline received in the course of an employee's employment, whether active at the time management determines eligibility for waiver or not. Coupled with the permissive language of Section 7.6 of the Policy, stating the employee "may also be offered" a waiver, the Carrier may consider prior disciplinary actions when making the determination as to whether to offer a waiver.

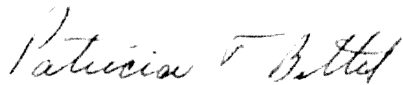
Claimant's record shows the following: April 1999: formal reprimand for failure to properly report injury; August 2002: 10-day record suspension for failure to report; June

2004: 20-day record suspension for absence without proper authority; Oct. 2008: 30-day Level S record suspension for failure to provide proper authority for a truck; Jan. 2012: 10-day record suspension for claiming time worked. Claimant disputes the 2008 discipline and claims he was never in Texas. The claim that he was never in Texas does not dispute the legitimacy of any disciplinary action. Even if the 2008 discipline is discounted, Claimant's record consists of multiple disciplinary actions for infractions which cannot consistently be deemed minor in nature. Even without the 2008 discipline, it cannot be said that the Carrier abused its authority when it deemed Claimant ineligible for waiver based on his history of discipline.

AWARD:

The claim is denied.

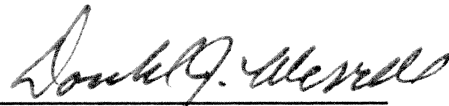
August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member


D. J. Merrell, Carrier Member



PLB6920--21*

PLB6920--21

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6920**

Kansas City Southern Railway Company)
MidSouth Rail Corporation/South)
Rail Corporation)

and

Case No. 21

Award No. 21

Illinois Central Gulf Federation)
 Brotherhood of Maintenance Way)
 Employees Division, International)
 Brotherhood of Teamsters)

STATEMENT OF CLAIM:

1. Carrier violated the January 6, 1994 Agreement between the Kansas City Southern Railway Company-MidSouth Rail Corporation/South Rail Corporation and its employees represented by the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters when, on February 6, 2012, it dismissed Claimant R. Riley from service.
2. As a consequence of the violation referred to in Part 1 above, Claimant should be immediately returned to service and reimbursed for all wage loss sustained and his record cleared of all charges.

Findings:

Public Law Board 6920, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this dispute were accorded due notice of the hearing.

On January 3, 2012, the Roadmaster informed the Division Engineer that Claimant may have been arrested on December 27, 2011, for driving under the influence (DUI). After consulting with Human Resources, the Division Engineer removed Claimant from service the next day (January 4) pending investigation of the alleged arrest and DUI.

As part of its inquiry into December 27, 2011, the Carrier requested an investigative background report from HireRight, a vendor providing employment screening services to the Carrier. The report (dated January 18, 2012) did not confirm Claimant's arrest and DUI but it identified a legal proceeding on April 6, 2005, where Claimant pled guilty to two (2) counts of criminal conduct referenced in the report as a felony and misdemeanor.

After receipt of HireRight's report, the Carrier requested its police to obtain a copy of the court record or minutes on Claimant's guilty plea. Once it obtained the minutes the Carrier reviewed Claimant's application for employment of July 18, 2007, and observed that he responded "No" to the question whether he ever had pled guilty to a felony or misdemeanor.

Based on the report, minutes and application, the Carrier issued a notice of investigative hearing on January 20, 2012. The notice stated that the hearing's purpose was "to ascertain the facts and determine your responsibility, if any, in connection with your alleged falsification of your application for employment with the [Carrier]. Carrier's first knowledge of incident was January 18, 2012."

The hearing convened on January 27, 2012. Claimant testified that when his application was considered in July 2007 he submitted a court-certified document to HireRight's predecessor - - Sterling - - showing that the felony had been reduced to a misdemeanor. As for marking "No" on his application about a felony or misdemeanor, Claimant testified he misunderstood or misread the question in his rush to complete the application. The Organization requested that the Carrier refrain from issuing a decision until it received a copy of the document that Claimant provided to Sterling in July 2007.

Also at hearing the Organization noted that HireRight's report of January 18, 2012, did not confirm the alleged arrest and DUI yet the Carrier continued to withhold Claimant from service. BMW argued a violation of Rule 33(b) which it recites as "[a]n employee charged with an offense will be furnished with a letter stating precise charge or charges against him" and "[n]o charge should be made that involves any matter which the employing officer has had knowledge fifteen days or more."

Instead of restoring Claimant to service on January 18, 2012, BMW states that the Carrier initiated another investigation on that date, without notice to Claimant, based on its concern that he falsified his application in July 2007 when Claimant answered "No" to whether he ever had pled guilty to a felony or misdemeanor when he had pled guilty to a misdemeanor in April 2005. This matter or discrepancy had been considered by Sterling during the employment review process of Claimant's application and, having considered it, the Carrier proceeded to hire the Claimant on July 23, 2007.

During the investigative hearing, the Carrier stated that it no longer uses vendor Sterling for employment screening services and noted Claimant's acknowledgement that he did not state "Yes" on his application to having pled guilty.

After completion of the investigative hearing and review of the record, the Assistant Vice President (Southeast Division) notified Claimant on February 6, 2012, that he had "violated [the Carrier's] General Code of Operating Rules 1.6 – Conduct" and was dismissed from service. In this regard, Rule 1.6 - Conduct, states that an employee "must not be" dishonest.

On February 28, 2012, the Organization filed a claim over Claimant's dismissal. BMW argues that Claimant's four (4) plus years of service contains no entries in his record yet the Carrier did not exercise any measure of progressive discipline. In addition to his satisfactory employment record, the Organization asserts that Claimant's misreading of the application in July 2007 and misdemeanor guilty plea in April 2005 were considered prior to the Carrier's hiring Claimant on July 23, 2007. Almost five (5) years after Claimant's entry on duty, the Carrier conducts another review of his application and initiates another background investigation over this examined matter.

On May 3, 2012, the Carrier denied the claim. Its customary course of action when investigating an allegation of criminal conduct involves obtaining a background investigative report and / or deploying railroad police to ascertain whether the employee reported the criminal conduct to the Carrier. The court's minutes of the legal proceeding confirm Claimant's guilty plea. Whether a singular count or both counts of criminal conduct were reduced from a felony to a misdemeanor is not material as both involve criminal conduct that Claimant, when questioned about such conduct on his application, denied.

As worded on the application, an affirmative response to the question whether an applicant ever pled guilty to a misdemeanor or felony "does not necessarily disqualify" the applicant from hire "but an untruthful response does." Under Terms of Employment on the application, item (4) states that "employment ... is dependent upon the truthfulness of the statements contained herein" and any false or misleading statement results in dismissal. Item (11) reads that an applicant represents "all information given on this form and on any other forms completed at the time of employment to be true" and "any misrepresentation or concealment of information will be sufficient reason for dismissal." Claimant falsified his application which is a dishonest act and violates Rule 1.6 Conduct.

Following the usual and customary manner for processing a claim on-property, the parties met in conference on July 11, 2012. With no resolution at conference, the claim is presented to the Board for final adjudication.

As a matter of clarity, the record contains the Assistant District Attorney's letter of January 2012 that confirms Claimant's testimony he pled guilty to misdemeanors in April 2005. Claimant never pled guilty to a felony. The Carrier's assertion during the investigative hearing purports to establish a felony plea; however, that is a mistaken assertion.

Notwithstanding the discrepancy between Claimant's "No" response in July 2007 to the question whether he ever pled guilty to a misdemeanor while having done so in April 2005, the vendor Sterling (acting as the Carrier's apparent agent) considered that discrepancy along with Claimant's application in July 2007. The apparent agent's knowledge of the discrepancy is imputed knowledge to the principal - - the Carrier. That is, the apparent agent's findings and considerations within the scope of its authority is chargeable to the principal because the findings and considerations were open or available for the principal's discovery in the context of the apparent agent's work. With imputed knowledge of the considerations surrounding Claimant's application, the Carrier hired the Claimant effective July 23, 2007. Thus, the "Carrier's first knowledge of incident" was July 2007 and not January 18, 2012 as stated in the notice of investigative hearing.

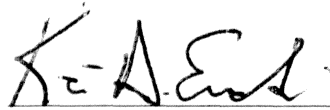
In view of the agent - principal nexus establishing knowledge and consideration of the discrepancy and the resulting decision by the Carrier to hire Claimant, the Board finds that the Carrier abused its discretion when it dismissed the Claimant on February 6, 2012, for a matter examined by the principal's apparent agent 5 years prior. When there is an abuse of discretion, Board review of the penalty imposed is appropriate.

The penalty imposed - - dismissal - - is harsh and punitive. Consequently, the Board finds that the appropriate remedy is worded in Part 2 of the Statement of Claim. Specifically, Claimant is "immediately returned to service and reimbursed for all wage loss sustained and his record cleared of all charges."


Award:

The claim is sustained and the remedy in Part 2 of the Statement of Claim is granted.

Patrick Halter /s/
Patrick Halter
Neutral Member
PLB 6920 Case No. 21



Kevin D. Evanski
Organization Member



Tammy Hardge Stephenson
Carrier Member

Dated this 23rd day
of August, 2013