

PUBLIC LAW BOARD No. 7589

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

Case No. 11
Claim of J. E. Boyd
Dismissal - Dishonesty
and Indifference to
Duty

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION

STATEMENT OF CLAIM: Claim on behalf of J. E. Boyd requesting reinstatement, restoration of seniority intact, restoration of fringe benefits and payment for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant was employed by the Carrier beginning May 3, 2004. On the night of April 19 or early morning hours of April 20, 2012, Claimant's father apparently fell while at home. On April 20, 2012, at 6:48 a.m., Claimant reported to the Carrier by e-mail that he would be absent from his scheduled assignment because his father had fallen overnight and Claimant would be looking to find assisted living for him. Claimant did not report to work for the Carrier as scheduled, but on that same date he worked as a Deputy for the Summer County Sheriff's Department from approximately 8:00 a.m. until some time in the afternoon. Claimant's grandfather had also been ill. Later that same day, Claimant learned that his grandfather's condition had worsened and he was taken to the hospital, where he passed away that afternoon.

There is dispute whether Claimant worked for the Sheriff's Department in a paid capacity. Signal Patrolman Bishop testified he had been told by someone in the Department that Claimant worked as a "part-time" deputy. He further testified that the Sheriff's Department representative told him that a "part-time" deputy position is a paid position but that a "reserve" deputy is uncompensated. Officer Bishop also testified that he checked the "911" records and that they showed Claimant's radio number 142 to have been in service on April 20, 2012, from 8:16 a.m. until 4:23 p.m. The 911 phone records for radio number 142 were received during the Investigation.

Claimant acknowledged that he worked for the Sheriff's Department on April 20, but only until approximately 1:00 p.m. The "911" records showed that Claimant's radio number 142 was in service on April 20, 2012, from 8:16 a.m. until 4:23 p.m. The 911 phone records indicate, and claimant admits, that he handled three "public service calls," i.e., calls to the Sheriff's Department that only required talking on the phone, after 1:00 p.m. (2:27 p.m., 2:41 p.m., and 2:53 p.m.). Claimant did not directly challenge the Carrier's testimony that his position with the Sheriff's Department was a paid position; he merely testified that, "to the best of [his] knowledge," he had not been paid for April 20, 2012.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWOR 1.6 (Conduct-Dishonest) and GCOR 1.18 (Unauthorized Employment).

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty of dismissal. It asserts that the facts and testimony presented at the investigation make it clear that Claimant reported that he would be absent but worked for another employer during that same time. BNSF contends that, at hearing, Signal Patrolman Kenneth E. Bishop testified, and Claimant admitted, that he worked for the Sheriff's Department that day. It asserts that, when an employee admits guilt, there is no need for further proof. It maintains, in addition, that the Organization's excuses why Claimant should not be held accountable for his dishonesty are not persuasive.

As to the penalty, BNSF maintains that Claimant's violation is a stand-alone dismissible offense under PEPA. It contends, in addition, that the instant case was Claimant's second Level S within his Review Period and that, pursuant to PEPA, that is also considered dismissible. It points out that leniency is not in the Board's jurisdiction but is, instead, the exclusive prerogative of the Carrier.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that the Carrier presented no evidence to contradict its assertion that Claimant's work for the Sheriff's Department was voluntary - a volunteer public service opportunity that appeared at a time of crisis - and was not compensated. It asserts that Claimant was not dishonest or indifferent to his Carrier duties but that two of his family members were experiencing serious health problems. BMW maintains that Claimant's decision to report off that morning was merely an effort to remain close to and provide care for his family. It contends that Claimant's dismissal, the result of a family health matter, is overkill. It asserts that the discipline is extreme, unwarranted and unjustified and a flagrant abuse of the rules. It maintains that, even if the Carrier had sustained the charges - which it did not - the discipline is excessive in proportion to the allegation.

The Organization argues that the Claim be sustained, that Claimant be returned to service and for his pay for any time lost be restored, along with restoration of seniority and fringe benefits.

DISCUSSION AND ANALYSIS: GCOR 1.6 prohibits employees from being dishonest and provides that "indifference to duty . . . will not be tolerated." GCOR 1.18 prohibits employees from engaging in "another business or occupation that . . . would interfere with their availability for service." The Carrier is in a competitive, scheduled business. It is entitled to require its employees to be available to work as scheduled, on a reasonably full-time basis.

Claimant acknowledges that, on April 20, 2012, he reported that he would be absent from his position because his father had fallen overnight and that he would be looking into assisted living for his father. Claimant did not report to work for the Carrier, as scheduled, on that date.

Claimant testified that he worked for the local Sheriff's Department, allegedly so that he could remain close to his father. However, there is no evidence in the record that, during the time that he was supposed to be working for the Carrier but instead called off, he actually made any efforts to find assisted living for his father. There is no evidence that Claimant's grandfather's condition, let alone his later death, was a factor in Claimant's decision to call off.

The parties dispute whether Claimant's activities with the Sheriff's Department were paid or voluntary. The evidence on this subject is inconclusive. As indicated, Carrier Signal Patrolman Bishop testified that he talked to someone at the Sheriff's

Department who told him that Claimant worked as a "part-time" deputy and that part-time deputies are paid. The Board is not convinced that whether the work was paid versus voluntary is of any consequence. The evidence is that Claimant called off from his scheduled assignment; but, instead of doing what he told the Carrier he needed to do, he performed work for "another business or occupation." He chose that work rather than being available for service to the Carrier as he was scheduled. Moreover, insofar as the record indicates, Claimant did not follow through on his purported reason for calling off, that is, a family emergency which required that he look into assisted living for his father.

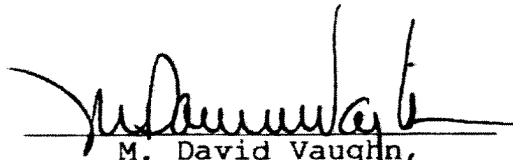
Claimant's grandfather's death, which took place after Claimant called off, cannot serve to justify Claimant having called off, it is unfortunate, but not relevant to his claim.

An employee's regular attendance is at the heart of the employment relationship. Reporting to work is the most basic of employee responsibilities; and an employee who fails to meet that obligation, especially in cases where he/she is dishonest about the reason for the failure, is subject to discipline. That is, as indicated, particularly important in the railroad industry.

Claimant's actions not only absented him from his scheduled assignment, but broke the level of trust the Carrier is entitled to have with its employees. Given the nature and circumstances of Claimant's violation and noting his prior Level S Suspension, the Board concludes that the penalty of termination was within the range of reasonableness. The Award so reflects.

AWARD: The claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his termination to have been an appropriate penalty.

Dated this 27 day of March, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner