

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 43, (Case No. 43)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing February 12, 2009, when Claimant, Donald J. Whalen (6597850), was dismissed for his failure to comply with instructions and becoming quarrelsome with Roadmaster while working as Foreman on January 19 and 20, 2009. The Carrier alleged violation of Maintenance of Way Operating Rules 1.6 and 1.13.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing February 12, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-09-0071) (Organization File No. 170-1311-092.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The Board notes that this is the second in a series of two cases involving the same Claimant. The facts indicate that on January 29, 2009, Claimant was directed to attend a formal Investigation on February 13, 2009, which was changed to and held on February 12, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.6 and 1.13 of Maintenance of Way Operating Rules in effect October 31, 2004, as supplemented or amended, concerning your alleged failure to comply with instructions issued by Roadmaster Steve Marino and allegedly becoming quarrelsome with same on January 19 and January 20, 2009 while working as Foreman on TMGX1155 in Kingman, Arizona."

On March 11, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier's dismissal of Claimant was in error. It argued that there is no proof that the Claimant entered into a verbal altercation with his supervisor, Roadmaster, Mr. Marino or that he failed to follow his instructions to place two taper rails into the track during a switch renewal project. It asserted that the testimony elicited at the Hearing by three witnesses (crew members of Claimant's Gang) verified that no one heard or observed any type of confrontation between the Claimant and Marino and they did not have enough track time or the proper equipment to complete the changing out of the transition rails at the time of the incident. It closed by stating that the Carrier did not meet its burden of proof and requested that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record substantiates that the Claimant told Roadmaster, Marino, on January 19, 2009, to **"..stay the f___ off my railroad"** and that was quarrelsome, discourteous as well as confrontational. It argued that the record further proves that the Claimant was agitated with the Roadmaster checking his work and the Claimant refused a direct order to install the taper rails. According to it the transcript shows the Claimant did exactly as he wanted to do and not what he was instructed to do. It further asserted that the testimony from the other members of the gang did not address or support any of the Claimant's testimony as they never stated they heard either the Claimant or Roadmasters discussions. It concluded that based upon the Claimant's past disciplinary record and the seriousness of the instant charges that the discipline should not be disturbed.

The Board has thoroughly reviewed the record and found that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. The facts indicate we have two contradictory stories as to what transpired on January 19 and 20, 2009, between the Claimant and his superior, Roadmaster, Mr. Marino. The facts of the case are straightforward. The Carrier alleged that the Claimant was quarrelsome, discourteous and confrontational to Mr. Marino and that he failed to follow specific instructions whereas the Claimant testified there was no confrontation and he never said he would not install the taper rails, but did not get them installed because he did not have the necessary track time and equipment to complete the assignment. The Organization and Carrier were equally adamant that their respective primary

witness was more credible than the other.

Roadmaster Marino testified on pages 11 and 12 of the Transcript that the Claimant cursed at him and was belligerent and refused to follow instructions to put in some taper rails stating that they had the proper equipment on site.

On page 21 of the Transcript Claimant denied cursing at Roadmaster Marino and telling him to get off of the railroad instead he stated:

"A: No I did not, because I called him to have him come out there to look to make sure that that 7 - foot west of previous points would be okay."

On pages 22 and 23 of the Transcript the Claimant further testified that this crew did not install the taper rails because the surfacing gang was still working on tamping and surfacing and needed more rock which required the loading up of the backhoe to go to get more rock, therefore, he did not have the use of that machine nor did he have a boom truck and without either he could not complete the task. In addition, he testified on page 27 of the Transcript as follows:

"A: ...So we went down to Griffith because we were told to finish tying that all up so the welders can weld on those switches down there. So we went down there to start weld, putting that all together for the welders to weld."

On page 24 of the Transcript the Claimant further testified that if he had tried to install the taper rails on January 19 and 20, 2009, his crew would have been in the way of surfacing crew which was not refuted.

Assuming for the sake of argument that the Carrier was correct when it asserted that the Claimant's crew member's testimony did not address or support the Claimant's testimony this case would come down to the testimony of Marino and the Claimant with no confirmation of either person's testimony. Under those circumstances, the Board would be faced with a situation wherein we have been given no reason to believe that either Roadmaster Marino or the Claimant fabricated their testimony. The Carrier argued, that in this instance, the Hearing Officer's determination of credibility should be followed and it relied upon Third Division Award No. 31487 that decided that credibility decisions are under the purview of the Hearing Officer as he can best measure the demeanor of witnesses. On the other hand the Organization argued that in those cases where there is a direct conflict of testimony at the Investigation between the Claimant and the Carrier's primary witness against him, without supporting testimony for either's position, the Carrier must lose because it did not meet its burden of proof (See Third Division Award No. 32890 and P.L.B. No. 7357, Award No. 1). However, in this case it asserted that the testimony offered at the Hearing was not equal as the Claimant's crew members each testified

that they saw no confrontation between Marino and the Claimant and they further testified they did not have the proper track time or the equipment to complete the changing out of the transition rails. On page 47 of the Transcript the Organization summed up its position of the incident in pertinent part as follows:

"Okay. Mr. Chairman we've got Mr. Marino's one side of the story. We've got Mr. Whalen's side of the story and then we have these other witnesses that presented their sides and what they observed and heard. At this point I don't feel that there was any confrontation between Mr. Marino and Mr. Whalen. The only testimony we've got that any confrontation occurred came from Mr. Marino. I don't know why he would say that. I have no clue. But that's the only testimony that we have that any type of confrontation even occurred. As far as the transition rails, we've heard the, the statement from the witnesses and from Mr. Whalen that they were short of track and time on the day the, the work was taking place and did not have the available track time to do that, nor at a later time did they have the equipment to, to get the rails changed out...."

The Organization's conclusion as to what transpired during the Investigation is accurate. As an example, on pages 33 - 36 of the Transcript Trackman T. Gene was questioned about the alleged incident and testified that he did not see any confrontation between the Claimant and Marino, but he could not actually hear their conversation. However, on page 36 when asked as to why the transition rails were not put in place he testified as follows:

"Q: Okay, y'all had no equipment?

A: Yeah, no equipment for that. Then, then, then, then, that short time too."

Another example of testimony that confirmed the Claimant's recollection of the incident is found on pages 39 - 40 where Machine Operator R. Lee was questioned by the Hearing Officer and testified as follows:

"A: So the reason why I was stuck cause we don't have no backhoe, no grapple truck. They're all using them now, trying to take out rail, put on the track, you know, to work on and so ____ (inaudible) Marino. So the way I look at it, he comes, start raising hell at us, you know. 'You guys don't do nothing' ____ (inaudible) we're trying to explain but he don't understand."

On pages 40 - 41 the questioning of R. Lee continued by the Hearing Officer as follows:

"Q: And were you, were you close to Marino when he first got there?

A: I was right here. He was right there.

Q: When he first come, come out of the truck you were right next to him?

A: Mr. Marino?

Q: Yeah.

A: I was on the jobsite. I was on the switch point...."

On page 42 of the Transcript, the Organization representative questioned employee Lee who testified in pertinent part:

"Q: Yeah, Ray, did you at any time Mr. Marino was out there, did you at any time hear Mr. Whalen cuss or yell at Mr. Marino?

A: No, I never did hear."

Employee Lee continued to testify on page 42 of the Transcript as follows:

"Q: Okay. One more question. On the day y'all put in the switch install, Mr. Marino, if I understand you, he wanted some transition rails put in. Did you guys run short of time or, or what happened? How come you didn't get them put in?

A: Okay, that switch and everything is all on the side.

Q: Right.

A: On the side of the track. But there is no machine or something to put up and put it in.

Q: Okay, so y'all had no way to move the rail?

A: No way to put in everything and all that. Then the next day how come you guys didn't put-you know, we asked for the machine and grapple truck just to put the rails in. They were.

Q: Never got?

A: Talking about safety, look at right there.

Q: Okay.

A: We are not going to let the whole _____ (inaudible) put ' em in.

Q: Okay."

On page 45 of the Transcript Trackman F. Bahe further confirmed Claimant's telling of the story when he was questioned by the Hearing Officer and testified as follows:

"Q: Okay. did you hear anybody cussing or anything out there?

A: No."

On that same page and continuing on page 46 of the Transcript the Organization questioned employee Bahe as follows:

"Q: Just two questions Mr. Bahe.

A: Okay.

Q: At any time did you hear Mr. Whalen and Mr. Marino get into a confrontation and Mr. Whalen cuss Mr. Marino? Did you hear any, at any time during that?

A: No.

Q: Okay. The other question is, I believe you guys were supposed to put in some, what they call transition rails. Did you run short of time that day or, or what was the reason you couldn't get them put in? Do you remember?

A: Yeah. We didn't have enough time to do that and then we got no machine for that.

Q: Okay, so all the machinery had left?

A: Yeah.

Q: Okay, and you were also short of track time?

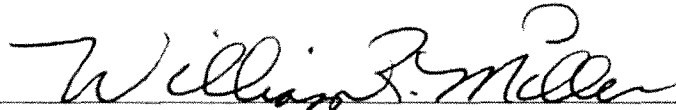
A: Yeah."

Examination of the record reveals there was no showing that employees T. Gene, R. Lee and F. Bahe had any reason not to be forthright, therefore, their testimony which was consistent with that of the Claimant outweighs that offered in opposition. In summary, the Board has determined that the Carrier did not meet its burden of persuasion.

The Board finds and holds that the termination is rescinded and removed from the Claimant's disciplinary record. Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since February 12, 2009, until reinstated in accordance with Rule 13(f) of the Discipline Rule. Claimant's disciplinary status under the Carrier's Policy for Employee Performance Accountability (PEPA) reverts to that he held prior to February 12, 2009.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner Employee Member

Dissent to follow
Award Date: 3/18/11