

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 45, (Case No. 45)**

**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 April 14, 2009, when Claimant, Chris R. Aragon (6584973), was dismissed for his failure to actively comply with instructions of the Medical and Environmental Health Department regarding requirements from BNSF's Employee Assistance Program.**
- 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 April 14, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-09-0109) (Organization File No. 180-1312-092.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 facts indicate that on May 9, 2008, Claimant tested positive for alcohol. Claimant accepted responsibility for his actions and entered the Carrier's Employee Assistance Program (EAP) and was released for a return to duty on June 25, 2008. At that time, the Claimant was advised that he would be subject to periodic drug and/or alcohol testing. Additionally, the Claimant was informed that he would be subject to Treatment/Educational and Ongoing Program

requirements and he would be subject to dismissal for a second violation of the Carrier's Drug and Alcohol Policy within a ten year period.

On April 14, 2009, Carrier notified Claimant to appear for a formal Investigation on April 22, 2009, which was mutually postponed until April 29, 2009, concerning in pertinent part the following charge:

"...to determine all facts and place responsibility if any, in conjunction with your alleged failure to actively comply with instructions of the Medical and Environmental Health Department regarding requirements from BNSF's Employee Assistance Program on April 14, 2009 while working as flagman on the Victorville Independent Flagman gang."

On May 27, 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 erred in dismissing the Claimant. It contended that the Claimant admitted responsibility for his failure to abide with the Carrier's Policy regarding alcohol and entered a rehabilitation program after which he complied with all instructions from EAP Counselor P. Lopez and under his guidance everything went well and Claimant regularly attended after work counseling sessions in various programs. It argued that subsequently, he had to work away from home and the Claimant and Counselor made adjustments in his requirements for travel. According to it, the Carrier changed personnel and the Claimant began to deal with a newly hired EAP Counselor, H. Whitfield, whom the Claimant had two meetings with. It further argued that the Claimant gave Whitfield his new address, new phone number and all other contact information that might be needed. Additionally, the Claimant changed all of the aforementioned information with the various departments of the Carrier as well as the Organization. The Organization asserted that at the second meeting the Claimant was told by Counselor Whitfield that he was in compliance with all of the EAP regulations and that it would not be necessary for him to contact him any further. However, if contact was needed in the future Whitfield advised Claimant he would call him. It stated that the Claimant continued to attend meetings as required, but simply did not contact the new EAP Counselor because he thought it was no longer required. Simply put it reasoned that there had been a miscommunication between the EAP Counselor and Claimant as to his continuing obligations. Last, but not least it argued that even if the Carrier could produce evidence to support their charges (which they did not) the discipline is excessive in proportion to the allegations. It concluded by requesting 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 did not contact his EAP Counselor, H. Whitfield from August, 2008 through April, 2009 and there is

nothing that shows that he was in compliance with his Client Agreement for the violation of its Policy on the use of alcohol and drugs or with EAP instructions. It argued that the Claimant made several excuses for his actions, but failed to prove they were justified. It stated in its declination letter of July 30, 2009, the following: **"It appears one phone call, one letter; one report of attending meetings for help would have saved his job. This Claimant did nothing to comply with his signed agreement with EAP."** It argued that there is no proof of attending weekly self-help group meetings or counseling sessions, nor is there any proof that Claimant attained a AA or NA sponsor or that he even furnished Whitfield with an updated address or telephone number. It asserted that the Claimant tried to blame everyone, but himself for his failure to meet his responsibility to be in compliance with his reinstatement requirements and because he did not meet his obligations he was guilty as charged. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and the record of evidence and found that that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. The record is clear that Claimant signed the Client Agreement which covers the Carrier's Policy on the use of alcohol and drugs on June 25, 2008, that had specific requirements covering his obligations for the retention of his position. There is no dispute that the Claimant did not follow all of those requirements between August 2008 and April 2009, the question at issue was there any mitigating reason for his actions. The Claimant testified on page 26 of the Transcript when asked why he had not been regularly calling his EAP Counselor as follows:

"No, this is why I called him to let him know what was going on with me while I was working. And this is when he told me if I need anything further from you I will be in contact with you. This is why I did not contact him once a month. I was just going to work and doing what I needed to do. He said if I need anything from you I will be in contact with you." *(Underlining Board's emphasis)*

The Claimant reiterated the testimony quoted above several times and it was not rebutted. In this instance it would have been valuable to have had testimony or a written statement from Mr. Whitfield the EAP Counselor as to his recollection of the second meeting and the conversation he had with the Claimant. Absent that testimony it is not unreasonable to believe that the Claimant misconstrued Whitfield's comments to believe that he did not have to contact the Counselor on a regular basis as he further testified without rebuttal that he gave the Counselor his new address and telephone number on the same day he gave it to various Carrier Departments. Claimant's possible confusion as to his obligations does not eliminate the fact that the Carrier has proven that he did not abide by all of the requirements of the Client Agreement.

The only issue remaining is whether the discipline assessed was appropriate. In this instance based upon the peculiar facts of the case the Board has determined there was probable

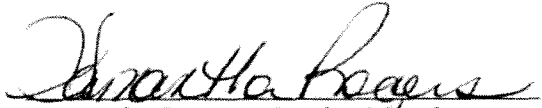
cause for confusion in the conference between the Claimant and EAP Counselor Whitfield and it is grounds for mitigation of the discipline. The Board finds and holds that the discipline was excessive and it is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated with seniority intact and all other rights unimpaired, but with no monetary back pay. Upon return to service Claimant's disciplinary status reverts to that he held prior to his dismissal on May 27, 2009, and he will be required to complete the June 25, 2008 Client Agreement in accordance with all EAP and Carrier instructions and policies. The Claimant is forewarned that he needs to be careful in the future to adhere to Carrier Rules and Policies.

AWARD

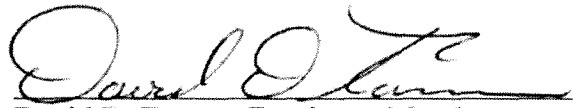
Claim sustained in accordance with the Findings and the Carrier is ordered to make the Award effective on or before 30 days following the date the Award is signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 3/18/11