

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7048  
AWARD NO. 46, (Case No. 46)**

**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 June 22, 2009, when Claimant, Raymond R. Romero (1752856), was dismissed for falsifying records on track inspections, falsification of time not worked and falsifying FRA documents on May 23 and 24, 2009. The Carrier alleged violation of MOWOR Rules 1.4, 1.6, 1.13, 1.14 and Rules 7.07, 233.03, and 233.08 of the 49 CFR Part 213.**
- 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 June 22, 2009, continuing forward and/or otherwise made whole."**  
**(Carrier File No. 14-09-0166) (Organization File No. 150-13D2-097.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.

On June 22, 2009, Claimant was directed to attend a formal Investigation on July 7, 2009, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, in connection with**

**possible violation of Rules 1.4, 1.6, 1.13, 1.14, and 1.15 of the Maintenance of Way Operating Rules, in effect October 31, 2004, and Rules 7.07, 233.03 and 233.08 of the 49 CFR Part 213, in effect March 2, 2009, as supplemented or amended, concerning your alleged falsifying records on track inspections, alleged falsification of time not worked and alleged falsifying FRA documents on Saturday, May 23, 2009 and Sunday, May 24, 2009, while working as a Track Supervisor on the Clovis Subdivision."**

On August 7, 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 its dismissal of the Claimant. It argued that procedurally the Carrier violated Rule 13(e) when it failed to provide the Claimant and Organization a copy of the stenographic report of the Investigation as that showed that the Carrier had pre-determined the outcome of its decision and on that basis alone the discipline should be set aside. Additionally, it argued that the Carrier did not meet its burden of proof that Claimant violated the alleged charges. 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 it did not violate Rule 13(e) as the records indicate that it sent the Organization and the Claimant a copy of the transcript. It argued that the Carrier provided the Organization a copy of the envelope sent to the Claimant, which he did not pick up and a e-mail from Division Engineer Jacobson which affirmed that the Organization was sent a copy, plus it furnished the Organization with another copy when requested.

On the merits the Carrier argued that the record substantiates that the Claimant reported that he traversed 113.6 miles of track and certified that he had inspected the track which was a false report to a government entity (FRA) as the company truck assigned to him was not used on May 23 or 24, 2009, nor did he attain any track time to accomplish such work. It additionally argued, that there was no proof that the Claimant was called for overtime on May 24th which was a false pay record. It concluded that based upon the seriousness of the charges dismissal was appropriate and it asked that the discipline not be disturbed.

The Board has thoroughly reviewed the record and will first address the Organization's procedural argument that it and the Claimant were not provided copies of the transcript. When the Carrier was challenged with that assertion it responded with a statement of November 2, 2009, from G. Jacobson, Division Engineer wherein he stated:

**"Here is a copy of the transcript envelope sent to Mr. Romero. It was returned,**

**due to him not picking his up. The Organization was mailed their copy at the same time."**

Review of the aforementioned envelope reveals that it was sent RETURN RECEIPT REQUESTED to the Claimant and the reason it was not received was because it was **unclaimed**. In view of the fact that there is clear evidence that the transcript was sent to the Claimant in a timely manner and a statement from the Division Manager that it was also sent to the Organization we are persuaded that the Carrier met its obligation to furnish the parties copies of the transcript. Additionally, it is noted that there was no showing that the Organization was hindered in its appeal as it did an admirable job in behalf of the Claimant. Lastly, we find that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

The facts indicate that the Claimant entered a track inspection report wherein it was alleged that he traversed 113 miles of territory on May 23 and 24, 2009. The Claimant testified that he did not use the company truck on May 23 and instead used his personal vehicle and walked his inspection for a little over four miles and cleaned the depot, however, that explanation does not explain why there was no movement of the hyrail truck on May 24th or how the reports entered by him showing that he was allegedly hy-railing 113 miles of territory, without any track and time could have been accomplished. Substantial evidence was offered at the Investigation that: 1.) the truck assigned to the Claimant was not moved on May 23 and 24, 2009, and 2.) the TIMS report filed by the Claimant to FRA showed that he hy-railed on both days. Claimant's assertion would not have been possible as the evidence substantiated that he was not issued any track and time on either day to have hy-railed or that the hyrail vehicle was moved. It is clear that the Claimant entered a false track inspection report and there was no evidence offered to support the Claimant's allegation that he was needed to work three hours of overtime on May 24, 2009. It is abundantly clear that the substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was proper. At the time of the offense the Claimant was a short term employee with a little over two years of service who was guilty of two serious infraction including a dangerous and illegal act of stating inspection of track, with no actual inspection. The Board finds and holds that the dismissal of Claimant was proper because it was not excessive, arbitrary or capricious and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

**AWARD**

Claim denied.



William R. Miller, Chairman & Neutral Member

  
Samantha Rogers, Carrier Member  
David D. Tanner, Employee Member

Award Date: 3/18/11