

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 704

AWARD NO. 51, (Case No. 51)

**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 May 3, 2010, when Claimant, Roy Hosteen (6595425), was dismissed for being absent from work for more than five consecutive work days and continuing forward without proper authority beginning May 3, 2010. The Carrier alleged violation of MOWOR Rules 1.13 Reporting and Complying with Instructions and Rule 1.15 Duty - Reporting or Absence in accordance with Appendix 11 Letter of Understanding.**
- 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 May 3, 2010, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-10-0151) (Organization File No. 240-13A1-106.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 14, 2010, Claimant was dismissed pursuant to the provisions of Letter of Understanding dated July 13, 1976, (amended January 1, 1984) for being absent without proper authority for more than five consecutive work days beginning May 3, 2010 and continuing. The Organization protested the Carrier's action and pursuant to Rule 13(a)

Appendix No. 11 it requested a formal Investigation. The Investigation was convened on June 18, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged absence from work for more than five (5) consecutive work days without the proper authority beginning May 3, 2010 and continuing.

This investigation will determine possible violation of MOWOR 1.13 Reporting and Complying with Instructions and MOWOR 1.15 Duty - Reporting or Absence.

You are ineligible for Alternative Handling."

On July 9, 2010, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

It is the Organization's position that the Carrier erred in dismissing the Claimant. It argued that the Claimant was denied a fair and impartial Hearing because it was held in absentia. It asserted that it requested the Investigation be moved from Fresno, California, to Flagstaff, Arizona, because it would be an immense hardship upon the Claimant to attend as he would have five young children in tow. It pointed out that the difference between the two locations and the Claimant's home resulted in a round trip journey of 1500 miles versus 300 miles. It argued that request was summarily denied and because of that Claimant was not able to attend the Hearing which was then held absentia. It additionally argued there were other procedural errors and on that basis alone the discipline should be set aside.

On the merits the Organization argued that the facts substantiate that the Claimant called his supervising Roadmaster, P. Heusler on May 2, 2010, to inform him that due to a family emergency he would not be at work on May 3rd. The family emergency was due to the arrest of Claimant's wife and eldest daughter who were incarcerated which forced the Claimant into a role of primary care giver for his other five children ranging in ages 5 to 12. According to the Organization the Claimant did the only thing he could do and that was stay home with his children as he had no other family support system. It also argued that when the Claimant realized that his seniority was in jeopardy he contacted the Organization which in turn filed a request for a Leave of Absence and/or Hardship Transfer (to allow him to work a job closer to home). It argued there was no reason why the instant request could not have been granted. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was absent without authority for more than five days in violation of Appendix 11, Letter of Understanding dated July 13, 1976, and according to the Carrier, it provided sufficient evidence during the Investigation to support its

charges against the Claimant. It argued that the record substantiates that the Claimant called in May 2, 2010, to tell his superior that he could not come to work because of a family emergency; however, he was informed at that point that his absence would not be excused. His Roadmaster P. Heusler was explicit when he told the Claimant during the call that due to his numerous absences he would not be granted authority to be absent on May 3, 2010, and following that initial call Claimant did not show for work and he did not keep the Carrier apprised of his situation as to when he would return to work. It further argued that the Carrier did not violate the Claimant's rights when it would not change the location of the Hearing and held the Investigation in absentia as it had previously allowed a postponement giving the Claimant an additional two weeks to arrange for attendance. It asserted it had no further obligation to provide another postponement as it is well established that the Carrier does not have to postpone Hearings when the charged employee is in jail thus it is reasonable to conclude it has no obligation to postpone a Hearing when a charged employee's wife is in jail. It closed by stating that the discipline was reasonable and it asked that it not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the parties Agreement allows for the Carrier to exercise discipline prior to a formal Investigation being held. In this instance discipline was exercised and the Organization requested a formal Investigation pursuant to Rule 13(a) the Discipline Rule and Appendix No. 11 which was convened in accordance with those Rules.

The Organization disputed the fairness of the Hearing on the grounds that the Carrier would not change its location from Fresno, California, to Flagstaff, Arizona, which prevented the Claimant's attendance as it placed an unnecessary burden upon him. It further argued that error was compounded by the fact that the Investigation was then held in absentia. The Carrier countered by arguing that it granted one postponement and it was not required to grant a second postponement because the Claimant's wife was incarcerated or a change in location. The Carrier is correct when it argued that it is not required to grant a postponement when a charged employee is incarcerated, but the request in this instance was because the Claimant had no one to care for his children account of his spouse's unavailability. The Organization requested a change in venue to accommodate his attendance at the Hearing as he was acting as the primary care giver for five children less than 12 years of age. It argued that the change would have allowed his attendance and because that change was not made the Claimant was unable to attend. On the surface, that argument of equitable treatment is not without some merit, however, in this instance the facts indicate that the parties agreed to a postponement which changed the Hearing from June 3 to June 18, 2010, giving the Claimant an additional two weeks to arrange to attend his Hearing. Examination of Rule 13 - Discipline, which controls the procedural handling of Investigations reveals there is no requirement to make a change in venue. Therefore, the Board has determined that when that request was denied the Carrier was within its rights and it did not violate the Claimant's right to a fair and impartial Hearing, in this instance, when it was held in absentia.

With respect to any other procedural arguments there is no showing that the Claimant was denied his Agreement "due process" rights.

Having determined that there were no procedural violations in the handling of this case the Board turns its attention to the merits. The facts indicate that the Claimant called his immediate supervisor, Roadmaster P. Heusler on May 2, 2010, and requested time off account of a family emergency which was denied. At the Hearing Heusler testified on pages 7 - 8 of the Transcript as follows:

"Q At any time during the 6 days did Mr. Hosteen attempt to contact you, to explain his whereabouts?

A Mr. Hosteen contacted me late in the evening of May 2, informing me that he would not be into work on Monday; based on previous habitual absenteeism he was not I informed him that he was not authorized in this work, he said he didn't have any choice, that he had a family emergency, and at that time I, I told him I reiterated that he was not, still not authorized based on his poor attendance in the past and our previous counseling sessions, however to keep me informed, and, and apprised of the situation and let me know when he would be arriving, that was the last time I spoke with Mr. Hosteen in the month of May.

Q Okay, so on May 2, you, you spoke of Mr. Hosteen and told him he was not authorized to miss work, correct?

A That is correct.

Q Okay, but on May 3, he did not show up and you said he was going for more than, well 6 consecutive working days, correct?

A Yes, yes he still has not returned to work for more, or returned to work, however, on May 17 I believe it was, he was formally dismissed from the company for absent without leave." *(Underlining Board's emphasis)*


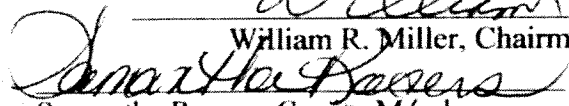
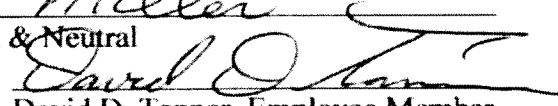
Despite the excellent representation afforded by the Organization to the Claimant it could not overcome the fact that the Claimant was told he was not granted time off. Review of the above testimony, also indicates that Supervisor Heusler recognized that the Claimant was not going to show up for work on May 3rd and some additional time to follow as he specifically instructed the Claimant to keep him apprised of his situation. From the date of that conversation 15 days passed before the Carrier dismissed the Claimant and during that time the Claimant did not

advise the Carrier as to what was going on and when he intended to return to service, nor did he request a formal Leave of Absence. The Board finds that all of the Claimant's absences beginning May 3, 2010, and continuing until his dismissal were not authorized. It is clear that 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 appropriate. At the time of the incident the Claimant had 30 plus years of service with a discipline record that included a demerit notation in 1990, a formal reprimand in 2004 and a record 30 day suspension in November, 2009, for failure to report for duty on two dates. That record further verifies that during those 30 plus years Claimant had one minor on the job injury with no loss of time. The evidence also substantiates that the Claimant had an extremely unusual reason for requesting time off work, namely that he was entrusted with the sole care of five young children due to the unexpected incarceration of his spouse. The Board does not excuse the Claimant's subsequent actions and we admonish him for not keeping the Carrier advised as to his situation, but despite that failure we recognize that because of the very unique circumstances of this dispute and a generally good work record there is reason for mitigation of the discipline on a non-precedential basis. Supervisor Heusler perhaps said it best when questioned about the Claimant's responsibility at the time of the incident to provide care for his children when he testified on page 15 of the Transcript as follows: **"That would definitely be the primary responsibility, that's what I would encourage."** The Board finds and holds that the discipline was excessive and is reduced to a lengthy suspension which is progressive and corrective in nature and in accordance with the spirit of the Carrier's Policy for Employee Performance Accountability (PEPA) wherein under Paragraph (b) General Information it states in pertinent part: **Circumstances surrounding a serious incident may reduce an employee's personal culpability."** As previously stated because of the unique circumstances of this case the Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back pay and two level S Violations on his record. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy as he works to clear off that record over the 12 months following reinstatement.

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	Samantha Rogers, Carrier Member	David D. Tanner, Employee Member
Award Date: <u>3/18/11</u>		