

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 53, (Case No. 53)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing June 29, 2009, when Claimant, Angel C. Flores (1614676), was issued a 10-day Record Suspension concerning his failure to protect his assignment by being absent without approval on June 23, 2009, and June 26, 2009. The Carrier alleged violation of MOWOR 1.5 Duty-Reporting or Absence.**
- 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 29, 2009, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-09-0155) (Organization File No. 180-13A1-0915.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 the Claimant marked off from work on June 23 and 26, 2009, without direct approval of the Roadmaster and because of that the Carrier decided that a formal Investigation was necessary to determine whether or not the Claimant had violated Maintenance of Way Operating Rule 1.15 and Engineering Instructions Rule 22.6.1.

On June 29, 2009, Claimant was directed to attend a formal Investigation on July 17, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determine your responsibility, if any, in connection with your alleged failure of Maintenance of Way Operating Rule 1.15 Duty-Reporting or Absence in effect October 31, 2004 including revisions up to November 06, 2008 and Engineering Instructions Rule 22.6.1 BNSF Absenteeism and Layoff Policy including revisions up to April 1, 2007 when you allegedly failed to protect your assignment as a track supervisor by being absent without approval on June 23, 2009 and June 26, 2009 at approximately 0600 hours while performing relief duties on the San Bernardino Subdivision's Pico Rivera yard. Your absence without acquiring permission resulted in track authority failure."

On August 13, 2009, Claimant was notified that he had been found guilty as charged and was issued a 10 Day Record Suspension and a probation period of one year.

It is the Organization's position that the Carrier erred in its discipline as it did not meet its burden of proof and even assuming for the sake of argument that the Carrier did prove its case the discipline was not in accordance with its Policy for Employee Performance Accountability (PEPA) and because of that it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the Claimant violated the Rules when he was absent from work on June 23 and 26, 2009. It argued the Claimant was given counseling by his immediate Supervisor on June 24th regarding the first absence and a phone card with all available phone numbers for contact, but still failed to call the Roadmaster to secure permission to be off on June 26th. It closed by asking that the discipline not be disturbed as it was clear that the Claimant was absent without proper authority.

The Board has thoroughly reviewed the transcript and record of evidence and determined 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.

Despite the skillful argument presented by the Organization in behalf of the Claimant the record substantiates that the Claimant did not secure and/or seek proper authority to be absent on June 23 and 26, 2009. In the Carrier's letter of declination of October 9, 2009, it reiterated that the Claimant was guilty of Maintenance of Way Operating Rule 22.6.1 - Absenteeism and Layoff Policy which states:

"The policy for handling un-excused absences or tardiness is as follows: 1) first violation will result in the road master or foreman counseling you concerning the rules involved. 2) second violation will result in the form of a letter of reprimand, noting the rule violation placed on your file, personal file, and 3) any subsequent

violations of these rules will result in scheduling a formal investigation and necessary disciplinary action being taken. If for some reason you need to be absent it will be necessary that you personally contact your Assistant Roadmaster or foreman to discuss the matter with that person. Leaving a voice mail message for the Roadmaster will not be considered contacting the proper authority."

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 was appropriate. On pages 12 and 13 of the Transcript, Roadmaster A. Trevizo was questioned as to why if June 26th was the second alleged violation of the Absenteeism and Layoff Policy the Claimant was not issued a letter of reprimand rather than a formal Investigation. Mr. Trevizo was questioned as follows:

"Gary Marquart: Okay, also it says uh on the first violation you do the counseling, which you stated that you did on that Wednesday, is that correct?"

Andrew Trevizo: Yes.

Gary Marquart: Okay, on the second one, did you issue a formal letter or reprimand or anything?"

Andrew Trevizo: I contacted my D. E. who suggested we do the uh, the formal investigation because of such an egregious event in a matter of 2 days 3 days time that you know, it just, the, the, message was not received.

Gary Marquart: Okay, but he did call in these two times, to uh, supervisors that work with him, other people?"

Andrew Trevizo: Yes, he did call. (Underlining Board's emphasis)

The Board understands the Carrier reasoning in this instance that because the second violation of Rule 22.6.1 occurred within three days of the first violation it felt the formal Investigation was appropriate as it would magnify the seriousness of the violation. We do not disagree with that logic, however, Rule 22.6.1 states in pertinent part: **"...2) Second violation will result in the form of a letter of reprimand, noting the rule violation placed on your file, personal file,..."**. Because the aforementioned Rule is explicit the Board finds and holds that the 10-Day Record Suspension with a one year probation period is rescinded and reduced to a formal reprimand to be placed on the Claimant's personal file. The Board further notes that even though Claimant

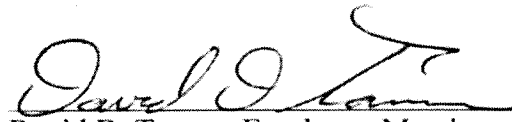
called Supervisors on both dates he should have followed the counseling instructions of June 23rd and should be careful to adhere to instructions in the future.

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

Award Date: 6/13/11