

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO 60, (Case No. 60)**

**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 May 26, 2010, when Claimant, David J. Devitt (1343383), was issued a Level S 30-day Record Suspension with 3 years probation concerning his failure to comply with instructions on May 5, 2010. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying With Instructions.**
- 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 26, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0132) (Organization File No. 120-1311-103.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 May 10, 2010, Claimant was directed to attend a formal Investigation on May 18, 2010, which was mutually postponed until May 26, 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 failure to comply with instructions we had discussed, when you let some gang members report for duty prior to 0800 hours

on May 5, 2010 on the Orin Subdivision while working as Foreman on gang TRPX0005, temporarily headquartered at Gillette, Wyoming."

On June 22, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a three year probationary period.

It is the Organization's position that the Investigation Notice was defective in that the Claimant was charged with having allowed gang members to report for duty prior to 0800 on May 5, 2010, but when the Investigation was held it was clear that the Hearing was actually concerned with the date of May 6th. It further argued that the Investigation was set to be held at America's Best Value & Suites in Sidney, Nebraska, which was subsequently changed by telephonic conversation to America Inn in the same town. It asserted that the Hearing was unfair because of the incorrect information which denied the Claimant the opportunity to arrange witnesses in his behalf and it forced the Claimant and the Organization to scramble to relocate to a new Hearing site and put together a proper defense against other charges. On the merits the Organization argued that the Claimant instructed two of his employees to begin work at 0630 rather than 0800 on May 6th because they were driving two large slow trucks that had to travel 244 miles to be at the new work site by 1200 Noon, thus it was necessary that they left earlier. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier there were no procedural errors in the handling of the Investigation. Regarding the change of location it was explained by the Hearing Officer at the beginning of the Investigation that several attempts were made to contact the Organization prior to the Hearing to ensure everyone arrived at the correct location. Additionally, it pointed out that the change of location was 4.6 miles from the original location. With respect to the argument that the Carrier had the wrong date for the alleged incident the Carrier argued that Claimant's testimony on page 49 of the Transcript makes it clear that the Claimant understood the Investigation was for the purpose of determining whether or not on May 6, 2010, he followed the instructions given him by his Supervisor on May 5th. Turning to the merits, the Carrier argued that the Claimant was given instructions on May 5th that his entire gang was not to leave the motel before 0800 on May 6th to travel to Torrington, Wyoming, (the new work site) and he did not follow those instructions. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that we must address the Organization's procedural arguments. Review of the record indicates that the change in location may have been inconvenient, but there is no showing that the change hindered the Claimant's defense nor has there been a showing in this instance that the date of the incident in the Notice impaired the Claimant's defense as it is clear that the Claimant and the Organization both understood the instructions were given to the Claimant on May 5th for work to be done on May 6, 2010, therefore, the Board concludes that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

Turning to the merits the Claimant's immediate Supervisor, Devereaux L. Fisher, Roadmaster testified on pages 14 and 15 of the Transcript as follows:

"Debra J. Smith: You gave him instructions on May 5th. Again, what were the instructions you gave him?"

Devereaux L. Fisher: The instructions were have all, all the employees leave at 0800 on May 6th.

Debra J. Smith: Okay. Did he comply with the instructions that you gave him on May 5th?

Devereaux L. Fisher: No." (Underlining Board's emphasis)

On page 24 of the Transcript the questioning of Supervisor Fisher continued as follows:

"Debra J. Smith: When did you first become aware of the fact that your instructions were not followed?"

Devereaux L. Fisher: Uh, I uh, it was the night of 5/6. And I brought it to Mr. Devitt's attention the Friday morning at the, right after the briefing, on the 7th.

Debra J. Smith: And again, what was his explanation?

Devereaux L. Fisher: That he wanted the grapple truck and the bus to get over here uh, due to how they travel on the highway.

Debra J. Smith: In your opinion as the Roadmaster in charge of this gang, was that necessary overtime?

Devereaux L. Fisher: It really wasn't necessary overtime uh, because we could have done without the bus and grapple truck. We were just unloading.

Debra J. Smith: And, was it overtime authorized by you?

Devereaux L. Fisher: No. (Underlining Board's emphasis)


On pages 49 and 62 of the Transcript the Claimant acknowledged the fact that Supervisor Fisher instructed him on May 5th to leave the motel at 8:00 a.m., May 6, 2010, with his entire crew to travel to Torrington, Wyoming. Claimant's decision to have two of his crew members leave earlier with the slow moving vehicles was well intentioned, but before he chose to

counterman his Supervisor's instructions he should have called Roadmaster Fisher to seek approval. Based upon Fisher's testimony it is unlikely he would have changed his mind as he stated that it was not necessary that the two slow moving vehicles be at the new work site at 12 Noon. The record is clear that substantial evidence was adduced at the Investigation that the Claimant did not follow the instructions of his Supervisor.


The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 12 years of service with a less than stellar work record which included a suspension for sleeping on a machine, formal reprimand for being absent from duty without proper authority, conditional suspension for first time violation of alcohol/drugs, record suspension for failure to hold a proper job briefing, record suspension for failure to have portable radio while inspecting track as a lone worker. The Carrier's Policy for Employee Performance Accountability (PEPA) allows for the dismissal of an employee that has two Level S incidents within a 36 month period and in this instance the Claimant was granted leniency as this was his second Level S violation within six months. The Board finds and holds the discipline will not be rescinded as it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


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

Award Date: 6/29/11