

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 62, (Case No. 62)**

**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, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 20, 2010, when Claimant, Roy D. Ling (1468255), was issued a Level S 30-day Record Suspension with 1 year probation on August 19, 2010 concerning his failure to follow instructions concerning his taking a company vehicle home on May 20, 2010. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying With Instructions and Engineering Instruction 15.2 Policies Unique to Engineering Employees.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline, and reinstate with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 20, 2010, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-10-0170) (Organization File No. 170-13C2-1026.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 26, 2010, Claimant was directed to attend a formal Investigation on June 10, 2010, which was mutually postponed until July 22, 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 violation of Rule 1.13 of the Maintenance of Way Operating Rules effective December 2, 2009, and 15.2 of the Engineering Instructions effective November 2009 as supplemented or amended, concerning your alleged failure to follow instructions in taking a company vehicle home while working as a Track Supervisor on TINS1588 on the Seligman Subdivision on Thursday, May 20, 2010.

On August 19, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a one year probationary period.

It is the Organization's position that the Claimant received an emergency phone call on May 20, 2010, which required his return home. At that point the Claimant realized he did not have sufficient funds or gas in his personal vehicle to go home and return to work the next day. As a responsible father and spouse he made an instinctive decision to use a company vehicle on this one occasion with no intent to go against supervisory instructions, but only to take care of his family's needs and it stated the vehicle he chose to take was one that would not be used for callout purposes. It argued that even though the Claimant was experiencing some financial constraints he paid back the fuel costs as soon as he could afford it. The Organization further asserted that the Claimant had not been tested on the Engineering Instructions for which he was charged and the Carrier provided no evidence that he had ever been tested on MOWOR 1.13. Lastly, it stated that even if the Carrier could produce evidence to support their charges, which it did not, the discipline is excessive in proportion to the allegations. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that prior to May 20th, the Claimant had discussions with his Roadmaster, F. Aldana wherein he was instructed not to take the company vehicle home. Following those discussions Aldana sent an email with irrefutable instructions to the Claimant telling him not to take the company vehicle to his home. It argued that the Claimant admitted he used BNSF emails yet he conveniently forgot if he had received the email from his Roadmaster with explicit instructions not to drive the company vehicles home, however, he did admit during the Hearing that Roadmaster Aldana specifically instructed him not to take company vehicles home and he disregarded that directive on May 20, 2010. It further argued that the discipline exercised was lenient and 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 the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

The record is clear that the Claimant admitted several times during the Hearing that he used a company vehicle to return home counter to Roadmaster Aldana's instructions. For example, on page 22 of the Transcript, he was questioned as follows:

"Paul Thomas: Do you recall a conversation with Mr. Aldana about taking the vehicle home.

Roy D. Ling: Yes. My personal or the company?

Paul Thomas: Take the company, the company vehicle home.

Roy D. Ling: Yes.

Paul Thomas: So what did that entail, do you recall?

Roy D. Ling: He said that he did not want us taking the company vehicles home anymore. *(Underlining Board's emphasis)*

On page 23 of the Transcript, the Claimant was asked if the GDM authorized him taking home any company vehicles on May 20th and he again stated, No. On page 29, the questioning continued as follows:

"Paul Thomas: I have a couple. When did you hear about this emergency that required you to go home, Mr. Ling, about what time was that?

Roy D. Ling: It was, it was after, it was after work. I don't know the exact time.

Paul Thomas: What time did you get off work that day?

Roy D. Ling: 3:00 is generally.

Paul Thomas: So it was after 3:00?

Roy D. Ling: Yeah.

Paul Thomas: Did you make an effort to call Mr. Aldana and ask permission to take that truck home?

Roy D. Ling: No. *(Underlining Board's emphasis)*

Review of the entire record makes it clear that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. The Organization offered a vigorous and able defense of the Claimant and argued that the unusual circumstances

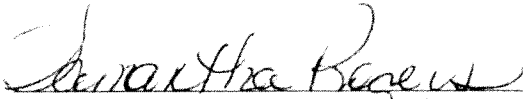
of the case are reasons for mitigation. The Board is not unsympathetic to the Claimant's plight on the date in question, however, on page 36 of the Transcript the Claimant admitted he violated MOWOR 15.2 when he made no effort to contact his immediate Supervisor. If the Claimant had attempted to reach Roadmaster Aldana or left a message explaining the situation the Organization's argument for mitigation of the discipline might have been more persuasive. The discipline exercised by the Carrier was in accordance with its Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds the discipline will not be rescinded because 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: 10-12-11