

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 73, (Case No. 73)**

**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 August 18, 2010, when Claimant, Douglas B. Wooldridge (6577027), was Dismissed for paying himself for time not worked during March and April 2010. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.15 Duty - Reporting or Absence, MOWOR 1.19 Care of Property, and MOWSR S-12.1.1 Operation of Motor Vehicles- General Requirements.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing when Claimant withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0193) (Organization File No. 180-13D2-106.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.

On May 24, 2010, Claimant was directed to attend a formal Investigation on June 1, 2010, which was mutually postponed until August 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 fraudulent activity on March 12, 2010

when you charged for time not worked while assigned as a welder in Barstow, CA.

The investigation will also be for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of a company vehicle on the dates of March 16, April 9, April 12, April 13, April 16, and April 19, 2010, while working in Barstow, CA.

This investigation will determine possible violation of MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.15 Duty - Reporting or Absence, MOWOR 1.19 Care of Property, and MOWSR S-12.1.1 Operation of Motor Vehicles - General Requirements."

On September 14, 2010, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Carrier did not meet its burden of proof. In addition, it argued that the incidents under review were outside of the time limits for consideration which violated Rule 13. Based upon that procedural error alone it asserted that the discipline should be set aside without even reviewing the merits. It further argued that the Claimant is a 49 year old employee with 15 years of good service and even if the Carrier could produce evidence to support their charges, which it did not, the discipline was 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 the Organization's argument regarding the time limits has no merit and the incidents under review were properly presented in a timely manner at the Investigation. On the merits it argued that three eye witnesses testified the Claimant left work without permission on March 12, 2010, for more than 30 minutes, but only deducted 30 minutes from his eight hours regular time. It also suggested that testimony substantiated that Claimant took the company vehicle home on all of the other dates listed in the Notice of Investigation without permission. Lastly, it argued that theft is a standalone dismissible offense per its Policy for Employee Performance Accountability (PEPA) and it closed by stating that the Claimant was guilty as charged and it asked that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. On pages 37 through 40 of the transcript, Roadmaster F. Barrera, III testified without rebuttal that it was not until May 3, 2010, that he had first knowledge of the incidents covered by the charges that transpired in March and April 2010. The Investigation Notice was mailed on May 24, 2010, scheduling the Hearing for June 1, 2010, which was 29 days from first knowledge meeting the requirements of Rule 13(a) that states in

pertinent part: **"...which will be promptly held..."**. The Board has determined that the Investigation was held in accordance with Rule 13(a) the Discipline Rule and Appendix No. 11.

The facts indicate that the Claimant asked Track Supervisor John Banks on March 12, 2010, at approximately 7:30 a.m. if he could go to see a Doctor. On page 12 of the transcript, Banks was questioned about the incident as follows:

"Adam Richardson: Okay, well uh, about roughly what time was that?"

John Banks: It was roughly 7:30.

Adam Richardson: So roughly 7:30.

John Banks: 7 - 7:30, yes.

Adam Richardson: He asked to go to a Doctor's appointment, at that time you uh, you told him no, is that correct?

John Banks: Yes, yes, I told him no.

Adam Richardson: Okay. Okay, and um, from that point on, from 7:30, on, what did uh, what did you do?

John Banks: Uh, from 7:30, on uh, I had uh, I uh, told Mr. Wooldridge if he, if he wanted to take off he would have to get with the Roadmaster, Frank Barrera, and to okay that if he was going to take off, and um, so he, he went and got in his truck and took off and I'm assuming that uh, they would, he was going down to the job site." (*Underlining Board's emphasis*)

On page 13 of the transcript, Banks testified in pertinent part as follows:

"...When I approached the gang I noticed that uh, Mr. Wooldridge was not there and I asked his partner uh, Rick, uh, where was, where was Doug at, and he said that uh, he had took off and that I had given permission to go to uh, to his appointment, in which I had not..."

Banks went on to say that he waited for the Claimant's return to work and he asked him who gave him permission to go to see the doctor. Track Supervisor Banks stated the following:

"...and who gave him permission to, to bring his truck and to go and then he said

that he talked to Frank, the Roadmaster,...". (*Underlining Board's emphasis*)

On page 14 of the transcript, Track Supervisor Banks further confirmed that he was not sure what time the Claimant left the property, but he did know that he was not on the property from approximately 9:00 a.m. to a little after 10:00 a.m.

On pages 36 and 37 of the transcript, Roadmaster, Frank Barrera testified that the Claimant was not to be allowed any time off without first contacting him due to the excessive amount of time he had taken off prior to March 12th. He was questioned as follows:

"Adam Richardson: Okay. Uh, did Mr. Wooldridge, on March 12, 2010, did Mr. Wooldridge try to contact you to uh, ask to be off?"

Frank Barrera III: No he did not.

Adam Richardson: From 7:30 to 10:05 on March 12?

Frank Barrera III: No he did not. (*Underlining Board's emphasis*)

On page 75 of the transcript, the Claimant admitted his statement to Track Supervisor Banks was not accurate and the Roadmaster did not give him permission to leave work on March 12th when he was questioned as follows:

"Adam Richardson: Did you talk to Frank Barrera?"

Douglas B. Wooldridge: No I didn't." (*Underlining Board's emphasis*)

On page 18 of the transcript, the Claimant's partner Welder R. Halter was questioned about the Claimant's absence on March 12th as follows:

"Adam Richardson: Okay, what time did uh, or did Mr. Wooldridge uh, show back up on March 12, 2010?"

Richard Halter: I've got written down in my notes here, 10:05, so it was within a few minutes of that either way, it was after 10:00.

Adam Richardson: Okay, so roughly two hours and 35 minutes he gone from the job site?

Richard Halter: Yes." (*Underlining Board's emphasis*)

Mr. Halter further testified on pages 20 - 21 of the transcript that he maintained a log of time the Claimant stopped by his house during working hours which covered the dates of March 16, April 12, 13, 16 and 19, 2010. Halter testified the Claimant told him they were stopping for a variety of reasons such as dropping off a credit card for his girlfriend. Halter explained he discussed Claimant's activities with the Roadmaster Barrera because he was concerned that he might be implicated in the Claimant's misuse of a company vehicle as they had been instructed to not take company vehicles to their homes. In his defense the Claimant stated that often times the crew did not have access to a bathroom and he only stopped at his house to use the bathroom because it was convenient and close to the railroad. However, other testimony verified that the Claimant went by his home on each occasion listed in the charges after leaving a facility, where there were bathrooms, and before reporting to the work site.

On page 63 of the transcript, Foreman J. Boinski testified that he was at the Claimant's work site on March 12, 2010, and the Claimant was gone from approximately 8:00 a.m. until 10:00 a.m. He further testified on page 68 that their track and time authority had to be extended because there was not two welders working at the job site.

Review of Halter's testimony reveals that it was not effectively rebutted, nor was Banks, Barrera and Boinski's testimony refuted. Examination of the Claimant's testimony indicates that it was not consistent whereas the Carrier's witnesses testimony was far more credible. Testimony further revealed that Claimant only deducted 30 minutes from his time payroll for March 12, 2010, when he was clearly absent from the job site in excess of 30 minutes. 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. At the time of the incidents Claimant had approximately 15 years of service with one Conditional Suspension on his record within the prior 11 months. The Carrier's Policy for Employee Performance Accountability (PEPA) states under Appendix C the following:

"Dismissable Rule Violations

- 1) Theft or other act with intent to defraud the carrier of monies or property not due, to include falsification or misrepresentation of an on-duty injury.**
- 2) Gross dishonesty in communicating with officials of the company about any job related subject...."**

As previously stated the Claimant did not deduct from his payroll the proper amount of time for March 12th and he did not have permission to leave the work site on that date nor was

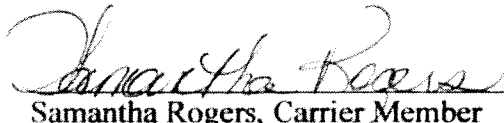
he forthright about the fact that when Track Supervisor Banks asked him if Roadmaster Barrera had approved his absence for March 12, 2010, he asserted that he was given permission when in reality he never requested permission. Additionally, it was substantiated that he did not have permission to visit his home on the other occasions listed in the Notice of Charges, therefore, the discipline exercised by the Carrier was in accordance with PEPA. The Board finds and holds the discipline will not be set aside because it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 1-10-12