

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 74, (Case No. 74)**

**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 December 3, 2010, when Claimant, Stanley Benally (6596878), was issued a 10-Day Record Suspension, for being off without permission from his Foreman on October 28, 2010. The Carrier alleged violation of MOWOR 1.15 Duty - Reporting or Absence.**
- 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 compensated for his lost time and expense and otherwise made whole."
(Carrier File No. 14-11-0020) (Organization File No. 240-13A1-1013.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 November 3, 2010, Claimant was directed to attend a formal Investigation on November 10, 2010, which was rescheduled for November 9, 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 being off without permission from Foreman Randy Hale on Wednesday, October 27, 2010 and Thursday, October 28, 2010 and your alleged being insubordinate with motel manager on Thursday, October 27, 2010 while working as a Machine Operator on TRPX0014.

This investigation will determine possible violation of MOWOR 1.13 Reporting and Comply with Instructions, MOWOR 1.15 Duty-Reporting or Absence, MOWOR 1.16 Subject to Call, EI 21.2 Showing Proper Conduct, and EI 21.3 Staying Two to a Room."

On December 3, 2010, Claimant was notified that he was assessed a 10 Day Record Suspension for being off without permission on Thursday, October 28, 2010.

It is the Organization's position that the Claimant was denied a fair and impartial Hearing because the Carrier did not require employee John Ray to attend as a witness and a statement from the Motel Manager was improperly read into the record without allowing the Organization to question the writer of the statement. It argued that a review of the record indicates that the Carrier did not meet its burden of proof and Claimant was not guilty of anything. It further argued that 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 even though the Claimant had various excuses regarding his absences on October 27, 28 and 29, 2010; he did admit that he did not verify that his Foreman had received his message regarding October 28th, thus, according to the Carrier he was absent without permission for that date. Additionally, it asserted that the discipline was in accordance with Carrier Policy. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has found that the Organization's procedural arguments do not rise to the level to set aside the discipline without reviewing the merits of the case. Therefore, it is determined that the Investigation was held in accordance with Rule 13(a) and Appendix No. 11.

The record reveals that the Claimant was charged with multiple offenses which including being rude and insubordinate to a Motel Manager and being AWOL on October 27 and 28, 2010. At the conclusion of the Hearing the Carrier determined that there was no substance to the allegations that the Claimant had acted improperly towards the Motel Manager or that he had been absent without permission on October 27th. The Carrier was correct in regards to those two charges as there was no evidence produced to substantiate either allegation. Therefore, the only allegation before the Board is whether or not the Claimant was AWOL on October 28, 2010.

On page 17 of the transcript, Foreman Randy Hale was questioned about Claimant's absence of October 28th as follows:

"Sheri Ellis: I do have a couple additional questions. Um, Mr. Hale, going back to firsthand knowledge, um, as a Foreman on the gang, do you approve absences?"

Randy Hale: Yes.

Sheri Ellis: And, it's known to the employees that they can call you if they're going to be absent from work?

Randy Hale: As a normal rule, uh, that they need to tell me at least a day ahead of time so I can plan on it. Uh, like I've always told everybody, calling unless it's a family emergency, or an emergency of some kind, calling it an hour before it's time to go to work isn't considered, uh, acceptable, you know."

The questioning of Mr. Hale continued on page 18 of the transcript as follows:

"Sheri Ellis: Okay. But, Mr. Benally's message didn't indicate that he was going to be gone from work. All, like you said, you, all you could hear on the 28th was that Mr. Be-, it was basically Mr. Benally, correct?

Randy Hale: Yes."

On page 32 of the transcript, the Claimant was questioned about his absence of October 28, 2010, as follows:

"Sheri Ellis: So, for clarification Mr. Benally, you did speak to Mr. Hale on the 27th and 29th, which would be Wednesday and Friday, and he did approve the absence?

Stanley Benally: Yes.

Sheri Ellis: And, you were unable to reach him on the 28th.

Stanley Benally: Yes." (*Underlining Board's emphasis*)

The testimony of Foreman Hale and the Claimant was consistent regarding the Claimant's inability to contact Hale on October 28th and substantiates that the Claimant did not verify whether or not he had permission to be absent on that date. Substantial evidence was adduced that the Claimant was absent without permission on October 28, 2010.

The only issue remaining is whether the discipline was appropriate. Claimant's disciplinary record indicates that prior to the instant discipline he had not been disciplined in approximately four years. Paragraph (a.) and (b.) of the Carrier's Policy for Employee Performance Accountability (PEPA) states in pertinent part:

"a. An employee involved in a first non-serious incident may choose alternative handling. Examples of alternative handling include coaching and counseling, training, or the Safety Incident Analysis Process (see Appendix A). The employee's record will not be marked, but the alternative handling will be noted in the operations testing database and a letter will be sent to the employee documenting the findings. A copy of this letter will be maintained locally.

b. Subsequent rule violations, provided they are not of a serious or dismissable nature, will result in a record suspension, the length of which will be determined by the number of prior rule violations within a rolling 12-month review period. An employee involved in a second, third or fourth non-serious rule violation within this review period will be given a record suspension of 10, 20 or 30 days respectively..."((Underlining Board's emphasis)

The discipline exercised in this case was for a second non-serious violation within a 12 month period which was inappropriate, therefore, in accordance with Paragraph (a.) of PEPA it is reduced to that of a counseling session and is removed from his permanent disciplinary record. The reduction of discipline in this instance reverts Claimant's disciplinary status to that he held prior to December 3, 2010, but does not negate his subsequent discipline of January 14, 2011.

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: 1-10-12