

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7394
AWARD NO. 13, (Case No. 13)**

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

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michele McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it assessed Ms. Gina M. Lindsey a Level S 30-Day Record Suspension with a three year probation period for alleged violation of MOWR 1.13 - Reporting and Complying with Instructions on April 6, 2010, decision upheld on May 28, 2010.**
- 2. As a consequence of the Carrier's violation referred to in part (1) above, we request that these charges be removed from the Claimant's record and that she be allowed to return to her position with the BNSF."
(Carrier File No. 12-10-0075) (Organization File No. B-2634-23)**

FINDINGS:

Public Law Board No. 7394, 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 Board notes that this is the first in a series of two cases involving the same Claimant. The genesis of this dispute arises from a former case wherein the Claimant was dismissed from the service of the Carrier on February 20, 2008. P.L.B. No. 6986, Award No. 24 reviewed that decision and in January of 2010 determined that the discipline was excessive and reduced it to a ten-day record suspension, plus a one year probation period from February 20, 2008 through February 19, 2009, returning the Claimant to service with seniority intact, benefits unimpaired and full back pay, less substitute interim earnings.

The events leading to the assessment of discipline in this instance occurred while the Carrier was in the process of complying with the aforementioned Award in the return of the Claimant to service. That process began in February, 2010, when the Claimant was notified of the steps she needed to take to return to duty. The Carrier has alleged that the Claimant did not comply with the instructions of Division Engineer, D. Befort for her return to work that were set forth in his letter of March 23, 2010, which stated in pertinent part the following:

"A physical examination for you has been scheduled for 9:10 AM on March 23, 2010. This is the third and final appointment that will be scheduled for you.

- * In order to notify you of this appointment, we tried contacting you at 205-483-7483, first number on file at 3:28 PM on March 22, 2010 but the phone rang multiple times without going to voice mail or permitting a message to be left. We also called 205-275-1512, the second number on file at 3:30 PM on March 22, 2010. This number was answered by Ms. Sarah Montgomery, who stated she was your mother-in-law. Ms. Montgomery said she would notify you of the scheduled appointment and if she could not reach you, she would call back. However, Ms. Montgomery talked to EG Bennett at the BMW office in Tulsa, Oklahoma and EG then left a message with this office that you had been notified of the appointment.**
- * Any paperwork requested by BNSF which includes documentation required, for the operation of BNSF vehicles must be, sent in to the appropriate office in Ft. Worth no later than 3:30 PM on Friday, March 26, 2010.**
- * Failure to comply with above instructions by Friday, March 26, 2010 will result in disciplinary action.**
- * If you have any questions concerning the above, please call me at 901-433-7400."**

Because of the alleged failure to comply with the letter above, on April 6, 2010, Division Engineer D. F. Befort sent the Claimant a letter which stated in pertinent part:

"As a result of your failure to comply with instructions by March 26, 2010 which includes:

- 1) failure to submit required documentation to the appropriate office in Ft. Worth by 3:30 PM on March 26, 2010 per letter of instructions dated March 23, 2010 that you received and signed for on March 24, 2010 per USPS records on file; and**
- 2) failure to call Division Engineer Duane Befort with questions or concerns related**

to Item 1 above."

You are hereby assessed a Level S 30-day record suspension with a 3-year probation period. Any further rule(s) violation(s) during this probation period could result in further disciplinary action."

On April 8, 2010, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on May 20, 2010, concerning in pertinent part the following charge:

"...in connection with your alleged failure to comply with instructions when you failed to contact Division Engineer Befort as instructed, and when you failed to provide the required documentation by March 26, to the appropriate office in Ft. Worth."

On May 28, 2010, Claimant was notified that she had been found guilty as charged and her Level S 30-day record suspension remained intact.

It is the Organization's position that the Carrier erred in its issuance of discipline. It argued, that with respect to the alleged violation of failure to submit required documentation, the time line for submitting the documentation was so severe that it made physical compliance nearly impossible because the letter sent by the Carrier was sent on March 23rd, to the wrong address and was not received until March 24th with an unreasonable compliance date of March 26th. According to it, that was done intentionally so Claimant could not comply and would be subject to discipline. It further argued that despite the unreasonable restraints applied to her she, nonetheless, contacted the Supervisor over the CDL DOT paper work, and explained that she had not and did not need the CDL License and DOT physical paperwork to return to her former position as it was not a job requirement and he was satisfied with that explanation.

The Organization also asserted that a reading of the transcript reveals that Division Engineer Befort did not have a copy of the paperwork to be sent to Ft. Worth and did not know what it consisted of, except that it had something to do with CDL DOT material. It further argued he entered no proof that the Claimant failed to meet the requirement of furnishing any needed paperwork for the operation of Carrier vehicles. It alleged that the Claimant called and made arrangements with Supervisor, S. Simms regarding the operation of vehicles, thus, she had properly handled the matter which it stated was not refuted during the Investigation. Lastly, it argued that the Claimant did not call Division Engineer Befort because she did not have any unanswered questions. It suggested that all of the Carrier's actions showed a concerted effort to circumvent compliance with the reinstatement Award and 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 Claimant received a fair and impartial Hearing and was guilty as charged. It argued that the record substantiates that Claimant failed to keep multiple scheduled appointments for a return to work physical, improperly extending the period of time the Carrier had to compensate her even though she was not working. It alleged that because the Claimant had missed several appointments it scheduled a final appointment so that she could get the required physical that would enable her to return to work. It further argued that the letter of March 23, 2010, was sent to the address the Claimant provided the Carrier and it stated that multiple phone calls were made to the Claimant and the Organization in an attempt to contact her personally. It asserted that contrary to the Organization's argument, there was no attempt to circumvent compliance with a reinstatement Award, but instead the facts indicate it was trying to get the Claimant back to work as quickly as possible and to avoid any further delays by the Claimant preventing the accomplishment of that goal.

The Carrier reasoned regardless of the Claimant's excuses for non-compliance with its instructions it is clear that she failed to comply with instructions issued to her by a supervisor having the proper jurisdiction, Division Engineer Befort, because she was directed to contact him if she had any questions regarding the instructions. Furthermore, it argued Claimant admitted during the Hearing that she did not provide the requested documentation or contact Mr. Befort, as instructed in the March 23rd letter. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule and it is clear that the Hearing was conducted in a fair and impartial manner and Claimant was not denied her Agreement "due process" rights.

The Board will first address the Organization's assertion that the Carrier attempted to circumvent the compliance of a reinstatement Award in the instant dispute. That argument is not persuasive in view of the fact that despite being disciplined in this case and in companion Case No. 14, Award No. 14 of this Board, Claimant was still paid all back pay owed in accordance with Award No. 24 of P.L.B. No. 6986 after furnishing the required paperwork.

Turning to the merits the Carrier alleged that the Claimant violated MOWOR 1.13 Reporting and Complying with Instructions which states:

"Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

In its arguments the Carrier emphasized that portion of the Rule which states: "...from

supervisors who have the proper jurisdiction..." and based upon that language it concluded that the Claimant failed to comply with instructions from the proper supervisor who was Division Engineer Befort.

The pertinent portions of Befort's March 23, 2010, letter that the Carrier asserted the Claimant violated were the third and fifth bullet which stated:

"* Any paperwork requested by BNSF which includes documentation required, for the operation of BNSF vehicles must be, sent in to the appropriate office in Ft. Worth no later than 3:30 PM on Friday, March 26, 2010.

*** If you have any questions concerning the above, please call me at 901-433-7400."**

On page 31 of the Transcript Division Engineer Befort was questioned about whether or not the Claimant had to meet DOT CDL requirements for reinstatement as follows:

"RICK SANDLIN: Okay. Are there jobs that she could have perhaps placed herself to that did not require CDL DOT? For instance, a Trackman's position or, for instance, a Machine Operator position?

DUANE F. BEFORT: Yes, she could have.

RICK SANDLIN: Okay.

DUANE F. BEFORT: If she would have called me and talked to me about it. The letter of reinstatement that was awarded for her by the Award 24 Public Board 6986 specifically said, "DOT requirements" to get her back pay, to get reinstated.

RICK SANDLIN: You're gonna have to show me that." (*Underlining Board's emphasis*)

The Organization's challenge of the Carrier's assertion was correct, as review of the aforementioned Award reveals that it had no DOT requirements to be met for reinstatement or back pay. On page 41 the questioning continued of Befort as follows:

"RICK SANDLIN: Just one, and it's a clarification. What documentation did Ms. Lindsey fail to submit to Fort Worth?

DUANE F. BEFORT: I don't have that package with me, but I know there is a yearly annual driver's license review, annual DOT. I'd be speculating at this

time...." (*Underlining Board's emphasis*)

Befort's testimony confirms that he speculated that the Claimant did not provide sufficient information to the Ft. Worth office. That speculation is further emphasized by the fact that it does not appear logical that the Claimant could provide a yearly annual driver's license review as she had not been working for two plus years. On page 46 of the Transcript the Claimant testified in pertinent part as follows:

"GINA L. LINDSEY: The documentation I was supposed to turn in was turned in...."

Claimant testified on pages 48 - 52 that she had a discussion with Mr. Steve Sims of the Ft. Worth office who oversees CDL and DOT requirements and who requested the information. She explained to him that she would not be sending in paperwork regarding the DOT until after the completion of her physical and according to her he had no problem with that. Claimant was questioned by the Hearing Officer as to whether or not she had advised Befort of her conversation with Sims and she responded on pages 48 and 49 of the Transcript as follows:

"GINA L. LINDSEY: No, I didn't know that I had to contact him. I thought it was taken care of. I talked to, which I did try to call his office, but he didn't answer, so I talked to Connie, his, I guess his Secretary."

CALVIN BRAY: Okay.

GINA L. LINDSEY: Or Clerk. I think his Clerk's name is Connie. I had spoken with her and she said as long as DOT was notified that she understood that's what I had to, so that's I contacted, I had already talked to them and I wanted to make sure they had it on record...." (*Underlining Board's emphasis*)

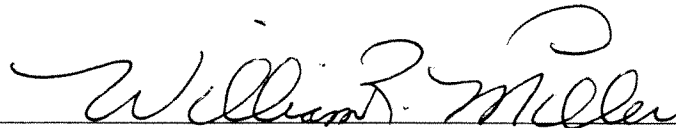
The Carrier never refuted the Claimant's explanation of her conversation with Mr. Sims. It offered no statement from Sims contradicting her recollection nor did it deny that Claimant explained to Befort's Secretary and/or Clerk about that conversation. Additionally, there was no testimony from Befort stating that he was not advised by his Secretary of what transpired. It is clear from the testimony provided at the Hearing that Sims modified the March 23rd request to send in all DOT paperwork until a later date and that Befort's assistant (Connie) acting as his agent, in his absence, relayed information to the Claimant that she had complied with Befort's instructions. Claimant's acceptance of Befort's assistant's information that she was in compliance with his instructions was a reasonable conclusion upon her part, which did not suggest that she needed to call back and personally talk to Befort.

In the final bullet of the March 23rd letter Befort wrote in pertinent part the following: "...**please call me...**" Claimant testified on page 50 of the Transcript that she did not call Befort's office again, after talking to his assistant, because she had no other questions and, furthermore, she reiterated on page 55 of the Transcript that she turned in all the required paperwork without refutation. As stated above it was not unreasonable for the Claimant to conclude that it was not necessary for her to personally talk to Division Engineer D. F. Befort.

The record is clear that substantial evidence was adduced at the Investigation that the Carrier did not meet its burden of proof in this instance. The Board finds and holds that the discipline is set aside and the charges are removed from the Claimant's personal record, however, she is not returned to active duty because of the determination made in the companion case to this dispute, Award No. 14.

AWARD

Claim sustained in accordance with the Findings and the Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



William R. Miller, Chairman & Neutral Member

Award Date: 3-11-11