

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 15
Carrier File No. 12-06-0086
Organization File No. B-2634-21
Claimant: Gina M. Lindsey

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 30, 2006, when Claimant Gina M. Lindsey was assessed a Level S 30 Day Record Suspension with a three year probationary period for being absent without proper authority from July 31 through August 10, 2006.
2. As a consequence of the Carrier's violation referred to in part (1) above, the Claimant shall be paid for all time lost, the charges removed from her record and that the days she missed, medical and discipline, be designated as Approved Absences.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Gina M. Lindsey, was originally dismissed from her position as a Machine Operator Mobile Gang in Birmingham, Alabama on August 10, 2006 for being absent without proper authority from July 31 through August 10, 2006. An investigative hearing was held on August 22, 2006 in Memphis, Tennessee before Calvin Bray, Conducting Officer. The dismissal was subsequently reduced to a Level S 30 Day Record Suspension with a three year probationary period.

The Organization grieved this discipline, contending that the Claimant had complied with all applicable procedures for reporting off for medical reasons when she notified her Assistant Roadmaster or Foreman regarding the need to be absent for medical related reasons, which she subsequently documented, from July 31, 2006 to August 10, 2006. The Carrier denied the grievance, contending that, because of her prior attendance record, the Roadmaster who supervised the Claimant had properly ordered her to report off directly to him in the event of any future absences, and she had not spoken to the Roadmaster on the days she was absent

The Organization contends that the Carrier failed to abide by the time limits in the collective bargaining agreement regarding communication of the results of the Carrier's investigation. The Organization further contends that the charge for which the Claimant was dismissed was invalid, as it did not specify a rule or reason for her dismissal. Finally, the Organization contends that the Carrier tampered with a witness by directing the Claimant's foreman, to whom she reported her absence, not to provide a letter for the Claimant. The Carrier denies any of these alleged improprieties.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted for adjudication by Public Law Board No. 6986.

FINDINGS AND OPINION

The parties do not dispute that the Claimant timely contacted her foreman or her Assistant Roadmaster regarding her protracted absence from July 31, 2006 through August 10, 2006 for documented medical reasons (Exhibit 16) as required by the applicable Rule, BNSF Engineering Instructions Section 22.6 -Absence from Duty Procedure (Exhibit 10). BNSF Engineering Instructions Section 22.6 -Absence from Duty Procedure (Exhibit 10), requires that employees who will be absent contact either their Assistant Roadmaster or their Foreman.

The Claimant was deemed by the Carrier to be absent without proper authority because she did not notify the Roadmaster directly pursuant to his previous instruction. The Roadmaster, W.G. Buzbee, imposed discipline predicated on his unilateral determination that he alone was the proper authority whom the Claimant must contact for any future absences. However, the Roadmaster cannot unilaterally alter the procedures BNSF Engineering Instructions Section 22.6 -Absence from Duty Procedure established by the Carrier for notifying the Carrier when an employee will be absent. His unilateral imposition of such a directive was arbitrary and capricious, as it exceeded his authority to alter the procedures established by the Carrier and communicated to the Organization and to bargaining unit employees.

Furthermore, Section 22.6.1 specifies the sequence of discipline for unexcused absences or tardiness. The first violation results in "your Roadmaster or Foreman counseling you concerning the rules involved. This occurred when Roadmaster Buzbee previously spoke directly with the Claimant about her excessive absences. Section 22.6.1 states that a "Second violation will result in a formal Letter of Reprimand noting the rule violation placed on your personal file." According to the testimony at the investigatory hearing, such a Letter of Reprimand was prepared, but not delivered to the Claimant because she was absent on July 31, 2006 and thereafter. Consequently, immediately escalating the penalty for a

similar infraction between July 31, 2006 and August 10, 2006 was premature.

Section 22.6.1 also provides that "Leaving a voice mail message for the Roadmaster will not be considered contacting the proper authority." Consequently, the Claimant's telephone messages for the Roadmaster-- which were left at times such as 9:56 p.m., 11:29 p.m., 3:03 a.m., and 5:00 a.m., when she could not have reasonably expected the Roadmaster to be present—did not satisfy the directive he had established for the Claimant. However, the Claimant did adequately comply with the rules governing calling off sick. The Claimant's failure to apply for such a leave is immaterial and irrelevant because only employees who will absent for more than thirty days must seek a leave of absence pursuant to Rule 87. Thus, she was not absent without proper authorization.

The Board need not determine whether the Claimant also failed to follow a valid additional directive that she notify the Roadmaster directly, rather than by leaving a message, whenever she was going to be absent, or failed to heed an instruction by her foreman or by the Assistant Roadmaster to contact the Roadmaster, as the Claimant was not disciplined for insubordination or any infraction other than her being absent without proper authorization.

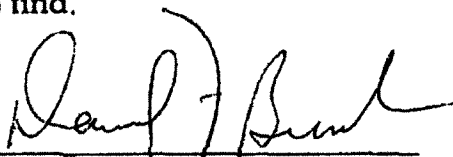
The Organization's allegation of witness tampering must be addressed. Although the Claimant or the Organization could have called the Claimant's foreman as a witness, the potential politics of calling him to testify after the Roadmaster allegedly told him to remain uninvolved suggest that even a formal notice to appear might have provided less than satisfactory testimony after the Roadmaster's admonition. This remark, if it occurred, did not affect the outcome of the investigation, as the parties did not dispute that the Claimant had contacted the foreman about her absences in a timely manner. Nevertheless, similar interference in future cases could invalidate otherwise proper discipline.

Finally, the original discipline was not defective for failure to specify the nature of the infraction, as the nature of the charge was clearly communicated to the Claimant. Citation of rule numbers allegedly violated is not required, provided the employee can reasonably discern the nature of the infraction. The Organization contended that the Carrier's amendment on September 13, 2006 to remove the waiver of the Claimant's right to contest the discipline that was included in the original thirty day suspension issued on August 30, 2006 resulted in a violation of the ten day time limit established by Rule 91(b)(5), within which a decision must be rendered by the Carrier after an investigation has been completed. The Organization's contention in this regard is without merit, as the Claimant knew of the Carrier's original decision

within the requisite time period, and the amendment was made at the behest of the Organization.

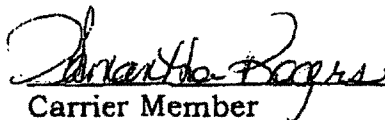
Therefore, based on the evidence submitted, the Claimant, Gina Lindsey, was not absent without proper authorization between July 31, 2006 and August 10, 2006. The Level S 30 Day Record suspension and three year probationary period imposed by the Carrier are hereby rescinded. The Claimant shall be made whole for any missed time or other detriment attributable to the suspension, which shall be expunged from her record. Her absences between July 31, 2006 and August 10, 2006 shall be reclassified as authorized absences.

We so find.


Daniel F. Brent, Impartial Chair

Dated: October 24, 2008

() I concur. (X) I dissent.


Carrier Member

Dated: November 12, 2008

(X) I concur. () I dissent.


Organization Member

Dated: Oct. 31, 2008