

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 102, (Case No. 102)**

**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 2, 2011, when Claimant Branden L. Slichter (6597926), was Dismissed, by letter dated September 2, 2011, for fraudulent activity when he charged for time not worked on July 18 and 21, 2011 and for being absent without authorization on July 18, 2011 and for being tardy without authorization on July 21, 2011, all dates while attending the welding class at BNSF's Technical Training Center in Overland Park, Kansas. The Carrier alleged violation of MOWOR 1.6 Conduct.**
- 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 pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0199) (Organization File No. 190-13D2-111.CLM & 190-13A1-1114.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 August 2, 2011, Claimant was directed to attend a formal Investigation on August 8, 2011, which was mutually postponed until August 8, 2011, concerning in pertinent part the following charge:

On September 2, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because he was removed from service prior to the Hearing which indicated pre-judgment. It further asserted that the Carrier procedurally erred when it allowed witnesses to testify via telephone and the charges were not precise. Additionally, it suggested that it was inherently unfair for the discipline to be issued by a Carrier Officer that was not in attendance of the Hearing because he did not have the ability to make credibility assessments of the evidence and testimony presented during the Hearing. It argued that because of those technical violations the claim should be sustained without even reviewing the merits. However, if the merits are examined it argued that the Carrier did not meet its burden of proof as Claimant only made a payroll error that did not cause any loss of Carrier monies. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural errors that denied the Claimant his right to a "fair and impartial" Investigation. It argued the facts indicate that the Claimant paid himself for July 18 and 21, 2011, for time not worked and for being absent without authorization on July 18, 2011, and for being tardy without authorization on July 21, 2011, while attending the welding class at the Technical Training Center in Overland Park, Kansas. It further argued that the Claimant admitted his guilt and based upon the seriousness of the charges and his past disciplinary record, dismissal was appropriate. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. Countless Boards have determined that telephonic testimony is acceptable and does not deny an employee his right to a "fair and impartial" Hearing nor is it improper for a decision to be rendered by a Disciplinary Officer that was not in attendance of the Investigation. Additionally, Boards have ruled that it is acceptable to remove an employee from service pending their Investigation when serious charges are filed and it does not indicate pre-judgment. After consideration of the various arguments and the facts of this case the Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights.

On pages 76 and 77 of the transcript the Claimant testified that he was absent without authorization on July 18th and he had requested eight hours pay at straight time for that day. On page 78 he was asked the following question:

"Frank Barrera: Okay. So then once again on the, on the 18th you paid yourself straight time and overtime on a day that you said you did not report for work?"

Branden Slichter: That is correct. *(Underlining Board's emphasis)*

The questioning of the Claimant continued on pages 78 and 79 of the transcript as follows:

"Frank Barrera: And would you agree with as well the statements that were made earlier and what's in the investigation notice that on the 21st of July that you were tardy for class by a half an hour?"

Branden Slichter: That is correct.

Frank Barrera: Okay. Did, did Mr. Armes, as he stated in his statement, come and pick you up at the La Quinta hotel and take you back to class?"

Branden Slichter: That is correct, on the 21st.

Frank Barrera: On the 21st as he, as he.

Branden Slichter: That is correct.

Frank Barrera: As he, as was stated. Okay and once again on the 21st it shows that, that you inputted yourself for eight hours of regular pay along with a half hour of overtime?"

Branden Slichter: That is correct.

Frank Barrera: And once again I'll ask you the same question that I did about the 18th. Why, what was your reasons for paying yourself for a full eight when you only confirmed, performed a certain amount of service and then as well the overtime.

Branden Slichter: Unsure. I, I don't know. I don't know what I was thinking there. I don't know for sure. *(Underlining Board's emphasis)*

The Claimant testified that he had made an inadvertent errors on both of the aforementioned dates and he subsequently corrected his errors so that he would not be paid for monies not earned. The Carrier countered that argument and stated that after the Claimant received his Investigation Notices of August 2, 2011, and realized he had been caught stealing time he went back into the timekeeping system on August 3, 2011, in an effort to change his time, but according to the Carrier he had already been caught and it was too late to change that fact.

Claimant's suggestion that he inadvertently put in for eight hours pay for a day he did not work and then a half hour overtime for a day that he was 30 minutes late for class is not persuasive; especially when he acknowledged that a Carrier Officer picked him up at his hotel, on the date he was tardy, after he missed the bus and took him to his welding class. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 15 years of service with two actual suspensions and three record suspensions (one of which was a Level S that was still within his 36 month review period). Dishonest behavior is a stand-alone dismissible offense and in this instance it is coupled with a less than stellar work record. The Board finds and holds the dismissal assessed against the Claimant will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and 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: 10/23/12