

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 105, (Case No. 105)**

**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 November 10, 2011, when Claimant, James E. Stephen (7984636) was dismissed for his failure to answer a call while he was subject to call and report to a right-of-way fire in a timely manner. The Carrier alleged violation of MOWOR 1.6 Conduct and MOWOR 1.16 Subject to Call.**
- 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 November 10, 2011, and continuing forward and/or otherwise made whole." (Carrier File No. 14-11-0228) (Organization File No. 1405-13N1-1184.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 October 6, 2011, Claimant was directed to attend a formal Investigation on October 14, 2011, which was changed to October 13, 2011, 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 violation of Maintenance of Way Operating Rule 1.6, Conduct and Maintenance of Way Operating Rule 1.16, Subject to Call, concerning the right-of-way fire reported on the Houston Subdivision at MP 175.6

on September 8, 2011."

On October 6, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

The undisputed facts indicate that on September 8, 2011, in the early morning there was a right-of-way fire involving railroad ties at MP 175.6. Claimant was working as a Track Supervisor and while off duty was subject to call. Claimant was called by the Maintenance Desk without success and it subsequently called M. Castillo to address the fire. Castillo advised the Maintenance Desk he would try to get hold of the Claimant and if he did not he would go to the fire. Castillo testified without rebuttal that he called the Claimant about 1:30 a.m. at which time the Claimant told him he would take care of the fire.

It is the Organization's position that the Claimant might have been guilty of being exhausted and falling back to sleep after Castillo called, but he was not guilty of violating any Agreement Rules as he had been working long hours for several days putting out various fires that had arisen account of grass/brush fires. It acknowledged that Castillo called the Claimant and he fell back asleep, but he woke back up and left his house around 3:00 a.m., after he gathered the material that was needed to address the problem, and drove to the location arriving about 4:30 a.m. at which time the Dispatcher refused to allow the Claimant authority on the track because of train traffic. The Organization argued that it was not that much of an emergency in view of the fact that the tie fire had not negatively affected train movement. Lastly, it asserted that the mistake on the Claimant's part was not an intentional act and it concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant failed to answer a call while he was subject to call and report to a right-of-way fire in a timely manner, while performing his duties as a Track Supervisor on September 8, 2011, at MP 175.6. It argued that was a serious violation considering the fact that a portion of the railroad was on fire and it was the Claimant's responsibility to protect that portion of the track. It asserted that Claimant testified he fell back asleep after he had been called to report to duty admitting his guilt (See Transcript page 34). It reasoned that Claimant's response reflected a total disregard for the safety of the railroad and the communities through which the Carrier serves and 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 it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The record was not refuted that the Claimant had been working long hours for several days prior to the incident under charges. It is also clear that the Claimant did not respond to the first call from the Maintenance Desk and he fell back asleep after being called by Mr. Castillo nor did he respond to Carrier Officer McQuinn's call. Additionally, the facts indicate that the fire did not prevent train traffic movement. However, the totality of the record shows that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

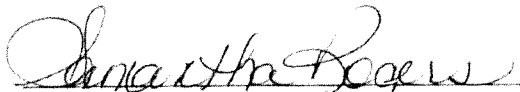
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 33 years of service with 13 disciplines including three Level S Serious incidents within the preceding 36 months. The Board is always reluctant to dismiss a long term employee, however, the Carrier's Policy for Employee Performance Accountability (PEPA) explains that two serious Level S offenses within a 36-month review period is considered grounds for dismissal under Dismissible Violations and, therefore, to waive a third serious Level S offense would be an exercise in leniency which is not within our discretion. The Board finds and holds that dismissal was consistent and appropriate with PEPA and it will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 2/27/13