

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 106, (Case No. 106)**

**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 September 7, 2011, when Claimant, Bobby D. Sena (1250398), was dismissed for being absent without authority for more than five (5) consecutive days beginning July 11, 2011 and continuing. The Carrier alleged dismissal was in accordance with Appendix 11, Letter of Understanding.**
- 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 September 7, 2011, and continuing forward and/or otherwise made whole." (Carrier File No. 14-11-0220) (Organization File No. 160-13A1-119.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 July 27, 2011, Claimant was directed to attend a formal Investigation on July 26, 2011, which was mutually postponed until September 7, 2011, concerning in pertinent part the following charge:

"...with your representative and witness(es), if desired, in connection with your being absent without proper authority for more than five (5) consecutive work days beginning July 11, 2011 and continuing."

On September 29, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

The facts indicate that the Claimant was scheduled to work on July 11, 2011. On that date the Claimant left a voicemail on Foreman M. Paul's cell phone advising him he would be at the job later, but he did not report, nor did he answer numerous calls from Structure Supervisor D. I. Zuniga or Foreman Paul regarding his continued absence. Additionally, he never called either supervisor to advise them why he had not shown up for work and continued to be absent. Subsequently, on July 19, 2011, the Carrier dismissed the Claimant for being absent without authority for more than five (5) consecutive work days beginning July 11th, in accordance with Appendix 11, Letter of Understanding dated July 13, 1976.

It is the Organization's position that during this time period the Claimant was experiencing the "summer from hell". While he was on the road working his spouse was cheating on him. Additionally, she had become a drug addict and burglar and was not making mortgage payments. Because of her burglary activities his home was raided four times by the police and to make things even worse his 15 year old daughter was pregnant. Account of his spouse's behavior his home was foreclosed and he was in the process of being evicted from his home during the time period he was dismissed from service for being AWOL. It argued that the Claimant was a good worker and had sought counseling for stress and anxiety and was on the road to recovery. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record indicates the Claimant did not report to work when he said he was going to and the plethora of excuses as to why he did not report to work are without merit as he made no effort to explain to the Carrier why he did not report to work and continued to be absent. It argued it is a substantiated fact the Claimant was absent without authority for more than five days and because of that in accordance with Appendix 11, Letter of Understanding dated July 13, 1976 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 the 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.

There is no dispute between the parties and the Claimant that he was AWOL for more than five consecutive days. On page 13 of the transcript Claimant was questioned about the period after July 11th as follows:

"Victor J. Lopez: Did you, did you ever after that day uh attempt to try to call your Supervisors?"

Bobby D. Sena: No, I didn't, they got me down for, they got me for AWOL."
(Underlining Board's emphasis)

The Organization is correct that it appears the Claimant's life was tumultuous, but it is equally clear that he understood he had a responsibility to the Carrier, as his employer, to alert and/or explain to it why he could not come to work. Claimant's understanding of that responsibility is apparent because on July 11, 2011, he left a message with his immediate Supervisor telling him that he was running late. Unfortunately after missing his ride to work he made no sincere effort to explain his circumstances. He testified that he tried calling, but because he was in a canyon area he did not have cell phone reception. That argument is problematic especially in view of the fact that he called his Supervisor earlier and told him he was running late and the argument becomes even weaker since he could have used a land line phone or gone to a different geographical area to make a cell phone call. Simply put there was a variety of ways the Claimant could have advised the Carrier as to what was going on in his life rather than ignoring his responsibilities. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 13 years of service with an unblemished record. On page 10 of the transcript Foreman Paul was questioned about the Claimant as follows:

"Brian T. Poston: How long have you worked with uh Mr. Sena?"

Michael T. Paul: At least ten years. October, ten years at least.

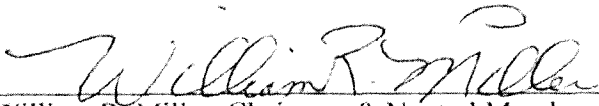
Brian T. Poston: And during that time have you know him to be a, a good employee?"

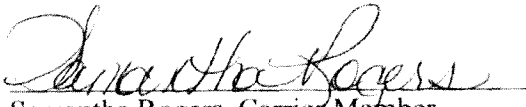
Michael T. Paul: Yes." *(Underlining Board's emphasis)*

The Board does not excuse the Claimant's behavior as it was a serious error in judgment, but because he had been a good employee prior to this incident the Board finds and holds that his past good record coupled with the unique circumstances that arose at that time in his life mitigates in his behalf and the dismissal is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service with seniority intact and all other rights unimpaired with no back-pay. Claimant is also forewarned that upon reinstatement he should be careful to adhere to all directives, instructions and Carrier Rules.

AWARD

Claim partially 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.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 2/27/13