

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 108, (Case No. 108)**

**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 October 1, 2010, when Claimant, Ervin Foster (6542005) was dismissed for DUI in a BNSF Company vehicle on October 1, 2010. The Carrier alleged violation of BNSF Policy on the use of Alcohol and Drugs dated April 15, 2009, MOWOR 1.5 Drugs and Alcohol, MOWOR 1.6 Conduct, and MOWSR 12.1 Operation of Motor Vehicles.**
- 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 October 1, 2010, and continuing forward and/or otherwise made whole."**  
**(Carrier File No. 14-11-0082) (Organization File No. 170-1312-1011.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 November 3, 2010, Claimant was directed to attend a formal Investigation on November 9, 2010, which was mutually postponed until January 18, 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 DUI in a BNSF Company vehicle while**

**working as a machine operator on TSCX0002, on October 1, 2010, Lewiston, MT, and your alleged violation of BNSF Policy on the use of Alcohol and Drugs, dated April 15, 2009."**

On February 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 the Hearing Officer allowed telephonic testimony, the Notice of Investigation was not precise because it did not list all potential Rules violated and Claimant was not offered a waiver for a first time violation of the Drug and Alcohol Policy. Lastly, it argued that the Claimant is a 53 year old employee with 32 years of service and if the Carrier had proven its charges, which it did not, the discipline was excessive. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors involved in the handling of the Claimant's case and he was not denied a "fair and impartial" Investigation. It argued the record is clear the Claimant admitted he was driving under the influence on October 1, 2010. It further argued the Claimant's violation was of a serious nature wherein he knowingly placed the safety of himself and others in grave danger. Lastly, it asserted that it had no obligation to offer the Claimant a waiver as the Claimant violated two stand alone dismissible violations under the Carrier's Policy for Employee Performance Accountability (PEPA) found on page 7, Appendix C that states:

- "6) Gross negligence, indifference to duty, intentional destruction of company property, malicious rule violation, insubordination.**
- 8) Knowingly placing the safety of themselves or others in immediate danger."**

In closing it suggested that the list of excuses as to why the Claimant should not be held accountable is not persuasive and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will address the first procedural issue that various witnesses should have been made available for the Hearing on site, rather than testifying telephonically. The record indicates that those employees who testified via telephone had legitimate reasons for not being in attendance and this Board recognizes that countless arbitral Boards have determined that telephonic testimony is permissible provided it is intelligible and the respective parties are allowed to examine and cross-examine all witnesses. Review of the transcript shows that the Investigation met the aforementioned standards. Examination of the other alleged procedural errors find them lacking

substance, therefore, 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 is clear that on October 1, 2010, Claimant was driving a company van while under the influence of alcohol. A non-employee driving next to the Claimant informed the police to report the driver of the van driving erratically. Claimant was arrested and the arresting officers (Lt. T. D. Eades, Sherriff Killham and Officer R. Vaughn) provided narrative reports outlining the reasons for the Claimant's arrest. Those reports were attached to the transcript as Exhibit H. Listed below are some of the details that stood out in the reports as follows.

- "\* Prior to being stopped by a law enforcement officer, Claimant was observed "traveling on the shoulder of the roadway...the van traveled over the fog line by two to three feet for a short distance then swerved back on the roadway... traveling with its driver's tires on the centerline until the intersection of Third Ave., North."**
- \* "It appeared to me that the van was traveling at a speed in excess of the speed limit."**
- \* "...Sheriff Killham was attempting to stop the vehicle...I observed Sheriff Killham exit his vehicle and advance on the Van with his duty rifle drawn. He was yelling at the driver of the van to stop the vehicle and put his hands where he could see them. The van was moving directly towards the gas pumps where people were pumping gas. Sheriff Killham told me later that he thought the driver of the van was going to run over a patron of Petro Depart who was standing nearby."**
- \* When asked to produce a proof of insurance the Claimant gave the Officer a cloth zip up booklet, the operating manual, and the gas credit card. The officer noticed "he seemed to be confused and his speech was slurred."**
- \* "According to the breath test Foster's blood alcohol was twice in excess of the legal limit to drive."**

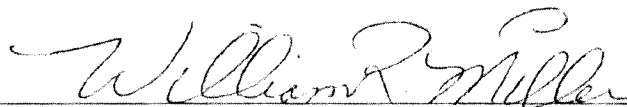
The aforementioned reports were not contested and on page 50 of the transcript the Claimant confirmed that he was driving the company van under the influence of alcohol. It is clear that substantial evidence was adduced at the Investigation that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 32 years of service with five prior disciplinary offenses including a prior dismissal for operating a company vehicle while under the influence of alcohol and not possessing a valid driver's license. The prior dismissal violation date was November 4, 2000, and the instant dismissal violation date was October 1, 2010, so almost on the tenth anniversary of the prior dismissal the Claimant committed another egregious violation that

subjected the Carrier to potentially great liability and placed the public and Claimant in genuine danger as he chose to drive while under the influence of alcohol. The Board is not persuaded that the Carrier should have offered the Claimant a waiver to enter a rehabilitation program and even though we are always reluctant to dismiss a long term employee the Board finds and holds that the 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