

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 31, (Case No. 31)**

**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, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 1, 2009 when Claimant, S. D. Bailey (6479117) was issued a Level S thirty (30) day Record Suspension. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6 - Conduct. The incident concerned false payroll reporting for overtime on March 1, 2009.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this incident from the employee record and pay all wages loss commencing March 1, 2009, continuing forward and/or otherwise made whole."**

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.

The Board notes that this is the third in a series of four cases involving the same Claimant. The facts indicate that on March 12, 2009, Claimant was assessed a Level S 30 day Record Suspension for alleged false payroll reporting. The Organization protested the Carrier's action and pursuant to Rule 13(a) the Discipline Rule and Appendix No. 11 it requested a formal investigation. The Investigation was convened on March 17, 2009, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, in connection with your alleged false payroll reporting for overtime on a track light call-out. The alleged violation occurred on March 1, 2009...."

On March 25, 2009, Claimant was notified that he had been found guilty as charged and his Level S 30 - day Record Suspension remained intact.

It is the Organization's position that the Carrier erred in assessing the aforementioned discipline. It argued that the Claimant was denied a fair and impartial Hearing because the ultimate decision was pre-determined prior to the formal Investigation and on that basis alone the discipline should be set aside.

On the merits the Organization argued that the Claimant was properly called out on overtime for a trouble light. It argued that as a result of the call on March 1st he performed service when he contacted the Signal Maintainer on the territory and they discussed the situation after which the Signal Maintainer found a problem with a signal appliance. He stated he would call the Claimant back if he needed assistance and for this service Claimant was entitled to a four hour call for work less than 2' 40". According to the Organization the Claimant was told to sit by the phone and wait which he did for four hours. It further argued that under the Agreement you are either on the clock or off and because he was waiting for a return call he was entitled to pay for that time as well. It contended that if the Carrier deemed him off the clock, then he should have received another four hour call when the second call came or was made. In either manner the Claimant was entitled to receive two four hour calls which paid eight hours straight time or one four hour period at the overtime rate. It concluded by requesting that the discipline should be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant was afforded his contractual rights and was not denied a fair and impartial Hearing. It further contended that the record proves that Claimant falsely requested four hours of overtime on the date in dispute for work never performed as instructed by Supervisor Knight who testified on page 32 of the Transcript that he told Claimant to check the Main Track #2 by doing a patrol going south from the Burnett crossover because there was a **"...possibility of a strip joint or a broken rail..."** which he did not do. It argued that the discipline was appropriate and it asked that it not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the parties Agreement allows for the Carrier to exercise discipline prior to a formal Investigation being held. In this instance discipline was exercised and the Organization requested a formal Investigation pursuant to Rule 13(a) the Discipline Rule and Appendix No. 11. The formal Investigation was then held in accordance with the aforementioned Rules and there is no proof that Claimant was denied his Agreement "due process" rights account of alleged pre-judgment.

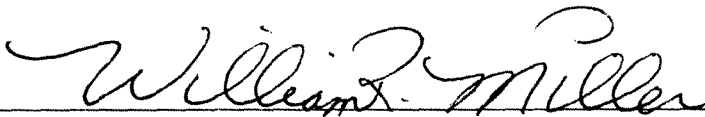
The resolution of this case will be determined upon whether or not the Carrier met its burden of persuasion which does not contemplate whether or not the Agreement required payment for stand-by work, as that is an issue for another day. Instead the case will be resolved upon its participant's testimony. Testimony of Roadmaster Knight on pages 6, 9, 14-15, 31-33 and 40 of the Transcript was consistent that he ordered the Claimant to physically inspect the tracks. Equally consistent was the Claimant's testimony on pages 34-37 wherein he testified that Knight told him to call Signal Maintainer Miller to rectify the problems and Miller told him to stay home. He further testified on page 35 they had repeat problems at this location and Roadmaster Knight **"...started telling us to call the Signal Maintainer."** The testimony of the principal and the Carrier's singular witness are directly contradictory and in this instance testimony from Signal Maintainer Miller might have been helpful. Absent that testimony we have a one against one with no supporting testimony and/or evidence for either party. Third Division Award No. 32890 is directly on point wherein the Board ruled the following:

"...The record contains a direct conflict of testimony between the Claimant and Carrier's primary witness against him, with no supporting testimony for either's position. In such situation, where the contradictory evidence can truly be said to result in a "net wash," the party with the burden of persuasion -- this case the Carrier -- must lose. Accordingly, the instant claim is sustained."

The aforementioned logic and reasoning applies in the instant case as well, therefore, the Claimant's Level S 30 - day Record Suspension is set aside because the Carrier did not meet its burden of proof. However, the Claimant will **not** be reinstated as that issue is moot because this Board upheld his dismissal in Award Nos. 29 and 32. Additionally, the Claimant is not due any compensation as the discipline was a record suspension.

AWARD

Claim sustained in accordance with the Findings.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date:

8/6/10