

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 32, (Case No. 32)

**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, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 5, 2009 when Claimant, S. D. Bailey (6479117) was dismissed. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6 - Conduct. The incident concerned alleged misuse of BNSF Internet and Intranet Policy governing use of company owned computer equipment and internet access.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 5, 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 facts indicate that on May 5, 2009, Claimant was dismissed for alleged improper use of company owned computer equipment and internet access. 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 scheduled for May 21, 2009, which was mutually postponed and convened on June 16, 2009, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, in connection with your alleged violation of Maintenance of Way Operating Rule 1.6 (*Conduct*) and the BNSF Internet and Intranet Policy governing use of company owned computer equipment and internet access...."

On June 25, 2009, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

It is the Organization's position that the Carrier erred in dismissing the Claimant. 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 Claimant had not had access to the computer in question since December 2008, during which time it had been sent in for repairs and no exception was taken. Additionally, it argued that the Claimant gave out his password to another employee who had trouble inputting payroll. He gave him his "B" code and password so that he could access the computer to get paid. It concluded that the Carrier did not meet its burden of persuasion and it requested that the dismissal 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 argued that the record proves that Claimant used the company assigned computer to view improper pornographic websites with his employee id and password. It also contended that Claimant violated the Policy on sign in security as he gave out his access number and/or password. It concluded 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 Organization's procedural arguments concern same and/or like issues as those addressed in Award Nos. 29, 30 and 31 and for the same reasons expressed in those Awards this case will not be resolved on the basis of alleged technical violations.

Turning to the merits the Board notes that this is the fourth in a series of four cases involving the same Claimant. The facts indicate that Claimant was dismissed on March 5, 2009, at which time his company computer was returned to the Carrier (See Award Nos. 29 and 30 of this Board). After the laptop computer was returned the Carrier, it had an outside company (Litigation Solution Incorporated) perform an examination and analysis of its past usage. The Forensic Examination found in pertinent part the following:

"B. User Accounts

1. Two partitions exist on this hard drive. User B647911 (*Claimant's Account*) was found to have two user directories, one on each partition.
2. User directories were located on this hard drive as follows:

a) Partition 1, within folder Partition\Documents and Settings\;

B647911
C802446

b) Partition 2, within folder Partition 2\c\;

B160163
B167445
B647911

3. Both B647911 user directories and these other users' directories were examined for adult content.

C. Internet History

1. An examination of internet history within B647911 user directory on partition 2 revealed cached records of access by B647911 to the following websites between August 6, 2008 and October 4, 2008: (*Underlining Board's emphasis*)

- a) Adultfriendfinder.com
- b) Hornymatches.com
- c) Freesmutecub.com

These three websites were found to contain adult content

Several dozen visits to various pages on these websites occurred, but the date range of August 6, 2008 -- October 4, 2008 referenced above is based upon the "last visited" times to these sites. (*Underlining Board's emphasis*)

2. The other user directory for B647911, on partition 1, did not contain internet history records of sites appearing to contain adult content.
3. Internet history from the other users' directories did not contain records

of sites appearing to contain adult content."

Claimant argued that he had not had access to his computer since December 2008 and that he had given his access number to a fellow employee so that he could enter payroll information. Claimant never denied he viewed and accessed pornographic material on his computer, but instead suggested that it must have been someone else. That testimony overlooks the fact that during the time period covered by the forensic examination August 6 through October 4, 2008, the computer was under his control and **713 adult content graphics** were stored. That argument further overlooks the fact that on page 16 of the Transcript the Claimant testified as follows:

"Q: Okay, And you have no information about who else used it? Do you have any information about who else may have had access to, who would have used it?"

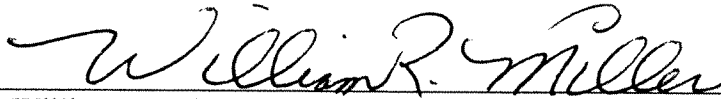
A: My Assistant Foreman had access to it while I was on vacation."
Underlining Board's emphasis)

The period covered by the computer examination was eight weeks and assuming for the sake of argument that Claimant took his vacation during that period of time it did **not** cover eight weeks with 13 years of service. Claimant's testimony is contradictory, self-serving and lacks credibility. Substantial evidence was adduced at the Investigation confirming that Claimant used a company computer to view adult porn which was inappropriate work conduct and prohibited use of the computer and Carrier Work Rules.

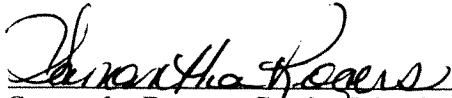
The only issue remaining is whether the discipline was appropriate. The Board finds and holds that the second dismissal of Claimant was proper because it was not excessive, arbitrary or capricious and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 8/6/10