

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7394
AWARD NO. 5, (Case No. 5)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 20, 2009 when Mr. Paul L. Stephens was assessed a Level S 30-day Record Suspension with a 36-month review period and disqualified as Foreman/Assistant Foreman for his violation of Maintenance of Way Operating Rule 1.13--Reporting and Complying with Instructions and Maintenance of Way Operating Rule 1.6--Conduct.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request the Claimant be returned to his foreman position, paid for all time lost, and the Level S along with all restrictions be removed from his personal files."

(Carrier File No. 12-10-0011) (Organization File No. B-3345-6)

FINDINGS:

Public Law Board No. 7394, 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 August 20, 2009, Division Engineer, J. Wiederholt sent the Claimant a letter which stated in pertinent part the following:

"On August 7, 2009 you took a company vehicle home in violation of instructions issued by Assistant Roadmaster Jack Blackwell, which is a violation of Maintenance of Way Operating Rule 1.13 [Reporting and

***Complying with Instructions).* When questioned about this incident Mr. Blackwell on Monday August 10th, you lied to him about taking the vehicle home in violation of Maintenance of Way Operating Rule 1.6 (Conduct).**

For these violations you are issued a Level S 30-day Record Suspension with a 36-month review period and you are disqualified as Foreman/Assistant Foreman effective immediately."

On August 24, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on September 29, 2009, after a mutually agreed to postponement, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, in connection with your allegedly taking a company vehicle home on August 7, 2009, in violation of instructions issued by Assistant Roadmaster Jack Blackwell and then allegedly lying to him on August 10, 2009 when questioned about the incident...."

On October 23, 2009, Claimant was notified that he had been found guilty as charged and his Level S 30 day record suspension with a 36 month review period and disqualification as Foreman/Assistant Foreman remained intact.

It is the Organization's position that the Carrier did not comply with Discipline Rule 91(b)(5) which requires that a decision must be rendered within ten days after the completion of the Investigation. According to it the Investigation was held on September 29, 2009 and the decision was not issued until October 23rd, 24 days after the Hearing. On that basis alone it argued that the discipline should be set aside.

Turning to the merits it argued that the Claimant took the truck home to clean and that by doing such he protected its contents as items had been taken from it in the past when it was left on company property. It further argued that the Claimant at the time of the incident was not in a proper mindset as he had recently been involved in an accident wherein he was driving a vehicle that struck a young child. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that the Claimant did not have permission to take the company vehicle home because he was not on call on weekends as are some other Foremen on Patrol Gangs who are required to work weekends when called. It further stated that even if the vehicle needed washing there are other avenues for cleaning a company vehicle that do not require taking it home. Additionally, it argued that when equipment is stolen

from a company vehicle there is a proper procedure for reporting its loss and that is not an excuse for taking the vehicle home without permission. It also argued that the Claimant was not forthright when questioned about taking the vehicle home. Lastly, it suggested that even though its disciplinary decision was untimely the Claimant was not placed at any disadvantage as it used that extra time to completely discuss and determine the appropriate discipline to be assessed. It argued that absent a showing of harm to the Claimant, failure to issue a decision within the specified time period following an Investigation does not constitute a fatal flaw even when such a violation can be proven and it offered various Awards supporting that contention.

The Board notes that this is the first case in a series of three cases involving the same Claimant. We have thoroughly reviewed the transcript and the record of evidence and determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule. It is clear that the Hearing was conducted in a fair and impartial manner.

However, there is a question of whether or not after the conclusion of the Hearing the Claimant was denied his "due process" rights when the Carrier rendered its disciplinary decision 24 days after its closure. There is no disagreement between the parties that the decision was untimely. The Carrier argued "no harm, no foul" while the Organization stated that the time limits were agreed to by the parties and are specific and must be adhered to.

The Carrier's argument to disregard its time limit violation on the basis that the Claimant was not disadvantaged has been addressed by various Section 3 tribunals with differing results. However, the Board believes that the reasoning expressed by Third Division Award No. 22748 (*involving the same parties to this dispute*) is directly on point and should be followed in this dispute as well. Award No. 22748 stated the following:

"The Carrier takes the position that any defect in the timeliness of the notice was not prejudicial and hence should not be the basis for overturning the discipline assessed.

While we find some language in Award 20238 that could be cited for the proposition that a failure to give the 5 days notice required by rule 40-C is not fatal unless shown to be prejudicial, we believe that the awards of this Board which hold the parties to their agreements with respect to time limits should be followed. The wording of the rule is clear; 5 days written notice is required. That is a bargained for right of an employee subject to discipline.

In the instant case the employee being subject to discipline lay claim to that right at the onset of the hearing. While holding the parties to the time limits set out in their agreements may from time to time work an injustice for either a carrier or claimant, we must apply the agreements as written and not by case law create exceptions which have not been agreed on by the parties." (*Underlining Board's emphasis*)

The aforementioned logic involving the issuance of a timely notice is equally applicable to the rendering of a timely disciplinary decision and we do not believe that we are empowered to rewrite exceptions to the parties Agreement not considered by the parties. Therefore, we will follow the rationale of Award 22748 which is consistent with countless other Boards and all Divisions of the National Railroad Adjustment Board that have repeatedly held that when the Agreement clearly sets forth the time limits requirement within which to render a decision it will strictly be enforced because to do otherwise is to do a disservice to the meaning of the disciplinary Rule (See First Division Award 16366, Second Division Award 2364, Third Division Awards 11019, 21415 and Fourth Division Award 4211 to name just a few examples). It is further noted that the National Disputes Committee which was formed to address major issues that included disciplinary time limits and was comprised of all of the major Carriers and Organizations (including the instant parties) stated:

"...that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the stage of handling in which such failure becomes apparent. If the Carrier has defaulted, the claim should be allowed at that level presented..."

Although we always prefer to rule on the merits of a case we are not empowered to ignore a procedural defect when it is raised in the defense of the Claimant and in this instance it is clear that Rule 91(b)(5) states:

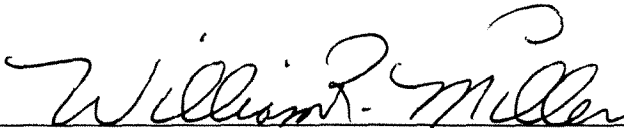
"A decision will be rendered by the Carrier within 10 days after completion of the investigation."

Regardless of what the Carrier's motivation might have been in taking longer than required to render its decision that does not absolve it from the fact that its decision was untimely. The Board must apply the Agreement as written, and because the procedural requirements were clearly violated, we will sustain the Claim on this basis without addressing the merits. The discipline is set aside and the Claim will be sustained as presented making the Claimant whole

for loss of compensation as the result of the disqualification as Foreman/Assistant Foreman. The Claimant's disciplinary status reverts to that he held prior to August 20, 2009.

AWARD

Claim sustained.



William R. Miller, Chairman & Neutral Member

Award Date: 8-24-10