

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7394

AWARD NO. 6, (Case No. 6)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 Paul J. Stephens was assessed a 20-day Record Suspension with a 12-month review period for his violation of Maintenance of Way Safety Rule S-26.6--Smoking.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request 20 day record suspension with 12 month review be removed from Mr. Stephen's personal file and paid for all time lost."
(Carrier File No. 12-10-0012) (Organization File No. B-3345-7)

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. Wiederbolt sent the Claimant a letter which stated in pertinent part the following:

"On August 13, 2009 you were interviewed concerning an 800 Call an 800 Call and you admitted to smoking in a company vehicle in violation of Maintenance of Way Safety Rule S-26.6 (Smoking).

For this violation you are issued a 20-day Record Suspension with a 12-month review period."

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 admitting on August 13, 2009, to smoking in a company vehicle...."

On October 16, 2009, Claimant was notified that he had been found guilty as charged and his 20-day record suspension with a 12 month review period 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. On that basis alone it argued that the discipline should be set aside. It further argued that the Carrier did not meet its burden of proof that the Claimant committed the alleged offense. 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 Claimant admitted to smoking in a company vehicle which is a violation of Carrier Rules and Policy. It also argued that the untimely disciplinary decision did not harm the Claimant as the extra time was used to completely discuss and determine the appropriate discipline to be assessed.


The Board notes that this is the second 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 an untimely disciplinary decision. Review of the facts substantiate that the Hearing was closed on September 29, 2009 and the decision was issued on October 16th which was 17 days after its conclusion. The arguments made by the parties on the time limit issue are the same that were set forth in Award No. 5 of this Board wherein 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.

For the same reasoning expressed in the aforementioned Award No. 5 the discipline is set aside as the Carrier's decision was untimely and the Claim is sustained as presented without addressing the merits, however, no monies will be due the Claimant as he lost no compensation. 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