

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO 36, (Case No. 36)**

**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 December 17, 2008, when Claimant, I. C. Rose (1614890) was issued a 30-day record suspension for use of company vehicle for weekend commutes on October 9 and 13, 2008. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6, and Engineering Instruction 15.2 and Company Vehicle Policy, Chapter III, Section C Subpart 3; and**
- 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 December 17, 2008, 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.

On October 14, 2008, Carrier notified Claimant to appear for a formal Investigation on October 23, 2008, which was mutually postponed until November 19, 2008, concerning in pertinent part the following charge:

"...to develop the fact and place responsibility, if any, in connection with possible violation of Rule 1.6 of the Maintenance of Way Operating Rules,

effective April 2007, as supplemented or amended, and Company Vehicle Policy, Chapter III, Section C Subpart 3, dated December 10, 2007, as supplemented or amended concerning your alleged use of Company Vehicle 20369 for weekend commutes from Grants, New Mexico to Flagstaff, Arizona and back to Grants, New Mexico at approximately 1:00 PM on Thursday, October 9 and at approximately 6:00 AM on Monday, October 13, 2008 while working as Foreman on gang TCMX0123."

On December 17, 2008, Claimant was notified that he had been found guilty as charged and was issued a 30-day record suspension.

It is the Organization's position that the Claimant was a Foreman on a Switch Maintenance Gang at the time of the incident in dispute. According to it, the Gang started the work week in Flagstaff, Arizona. After completing their work in that area, they moved to Gallup, New Mexico, and worked and then moved again to Grants, New Mexico, to finish up the week. It argued that as the person designated to drive the truck to the various locations, Claimant had to leave his personal vehicle in Flagstaff, and under its Agreement, the Carrier was obligated to get him back to his personal vehicle at the original starting point of work at no cost to him. It further argued that his immediate Supervisor made no arrangements for this to happen, therefore, he was left with no option except to take the company vehicle and drive back to where his personal vehicle was after which he drove that vehicle home. The Organization also argued that the Hearing was unfair and impartial as the Hearing Officer improperly held multiple roles in the investigative process. 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 substantiates that the Claimant was afforded his contractual rights and was not denied a fair and impartial Hearing. It argued that the Claimant admitted during the Hearing on page 13 of the Transcript that he had used the company vehicle to commute from Grants, New Mexico, to Flagstaff, Arizona, without permission, therefore, he was guilty as charged. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was not denied his "due process" Agreement rights.

This is the first of two companion cases involving the same Claimant regarding October 9 and 13, 2008. There is no dispute between the parties that on the aforementioned dates the Claimant used the company vehicle without authorization from the Carrier. The question is

whether or not there were mitigating reasons for that usage. The Organization did an excellent job of suggesting that the Claimant was required to move the company vehicle from the various locations by his superiors, thus at the end of the workweek when they offered him no assistance he was forced to use whatever means he could to return to Flagstaff. However, on page 22 of the Transcript the Claimant was asked who decided at the beginning of the workweek that he should be the one to drive the company vehicle to the various locations in view of the fact that he was not the Truck Driver. The Claimant responded to that question as follows:

"Q So that decision was all made by you guys as a group? Your, I you and between you and the truck driver?"

A Yeah, I guess it would of."

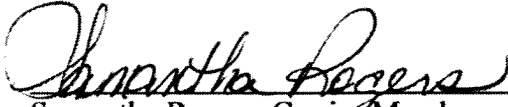
Claimant as the Foreman made the decision to drive the company vehicle on the basis he thought it would avoid having to bring the Truck Driver in early and paying him overtime. His reasons for driving the company vehicle from one location to the next may have been well intentioned, but before he decided to drive that vehicle from Grants to Flagstaff on October 9th and back to Grants on October 13th he should of gone to his Supervisors and requested permission. If permission had not been granted, the Carrier would of had the responsibility to make other arrangements to return the Claimant to where his vehicle was in Flagstaff. However, because the Claimant made no effort to secure permission and instead unilaterally decided to use the company vehicle he usurped his Supervisor's authority. Thus substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

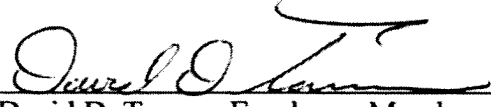
The only issue remaining is whether the discipline was appropriate. The record reveals that the discipline was progressive in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds that it will not be set aside because it 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: 12/6/10