

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 37, (Case No. 37)

**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, 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 Level S 30-day record suspension with 3 years probation for paying himself for time not worked on October 9 and 13, 2008. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6; 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 facts and place responsibility, if any, in connection with possible violation of Rule 1.6 of the Maintenance of Way Operating Rules, effective October 31, 2004, as supplemented or amended concerning your

allegedly paying yourself for time not worked on Thursday, October 9, 2008 and 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 Level S record suspension of 30 days with a three year probation period.

This is the second of two companion cases involving the same Claimant regarding October 9 and 13, 2008. In the first case the issue involved whether or not the Claimant had permission to use a company vehicle to return to the starting point of his workweek at the end of the week and then return to the new starting work point the following week. In this dispute the issue is whether or not the Claimant was entitled to be paid for both trips while driving the company vehicle. For the sake of brevity it is noted that some of the arguments raised by the parties in this case were previously addressed by the Board in Award No. 36 and will not be reiterated.

It is the Organization's position that on October 9, 2008, Claimant was properly driving a company vehicle in accordance with the parties Agreement between Grants, New Mexico and Flagstaff, Arizona, and October 13, 2008, he made the return trip for which he was entitled to be paid for. 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 verifies that the Claimant did not secure permission to use the company vehicle on the aforementioned dates, therefore, it is reasonable to conclude that he was not entitled to be paid for non-service. It closed by asking that the discipline not be disturbed and the Claim remain denied.

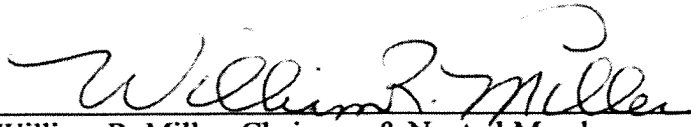
The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was not denied his "due process" Agreement rights.

As previously stated this is the second case involving the same Claimant and the incident that arose regarding October 9 and 13, 2008. In Award No. 36 the Board determined that the Claimant had a responsibility to secure permission to use the company vehicle on both dates before unilaterally deciding to use it and because he did not it he violated the Carrier's Operating Rules. Therefore, it logically follows that if he did not have permission to use the company vehicle then he was not entitled to be paid for driving it. It is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

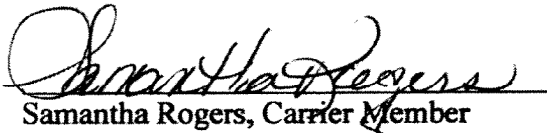
The only issue remaining is whether the discipline was appropriate. The record reveals that the discipline was progressive in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds that the discipline will not be set aside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