

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 50 (Case No. 50)

**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, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing February 18, 2010, when Claimant, Melvin Denny (6595300), was dismissed for cashing a paycheck that was reported lost on May 27, 2009 he requested replacement check stating he would not cash original check if found. It was confirmed on January 4, 2010 that both original and replacement checks had been cashed. The Carrier alleged violation of MOWOR Rule 1.6 Conduct and 1.13 Reporting and Complying with instructions.**
- 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 February 18, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0032) (Organization File No. 240-13D2-103.CLM)**

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 February 3, 2010, Claimant was directed to attend a formal Investigation on February 10, 2010, which was mutually postponed until February 18, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged signing a Replacement Check Request on May 27, 2009 stating that you would not cash the original if it showed up and then proceeded to cash your original check on October 19, 2009 after you had cashed your replacement check on the June 4, 2009. On January 27, 2010 it was confirmed that both checks had been cashed.

This investigation will determine possible violation of MOWOR 1.6 Conduct and MOWOR Reporting and Complying with Instructions."

On March 12, 2010, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It argued that the Claimant was a 50 year old Navajo Indian employee with 15 years of service who is not well educated, speaks broken English and does not understand written English. It asserted that he has always worked a Trackman's position and is not a "book of rules" qualified employee, therefore, he cannot be held accountable for something he is not qualified on which includes the Rules he was alleged to have violated. It further argued that the Claimant did not receive a regular pay check by mail in May of 2009. He was advised that he needed to sign a form to receive a replacement check, which he did. On May 27th a replacement check was issued and cashed. Claimant's job was abolished early in the work year and he was placed off-in-force reduction status in September. In October while going through his mail he discovered a pay check in the stack. He thought it was a check that he had not cashed and did not realize it was the duplicate check. On October 19, 2009, a full five months after cashing the replacement check he cashed the original check at a local store, where he cashes all of his checks. He did this to buy propane for heat, groceries and winter clothes for his six children and wife. The Organization emphasized the fact that the Claimant did not understand that he was doing anything wrong.

The Organization also pointed out that when the check was returned to the store as not being any good the Claimant arranged to make restitution and the Carrier lost no funds and was not harmed as a result of the check being cashed by the Claimant. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was dismissed because he attempted to cash a duplicate check for \$3,041.88 that he did not perform work for. It argued in its denial letter of May 5, 2010, that the Claimant requested a Replacement Check Request form on May 27, 2009, for a lost paycheck and on the Replacement Check Request form it states:

"...The original check should be destroyed in the event it is found or received, and under no circumstances, should I cash the original check.

Falsification or failure to comply with this agreement may be subject to appropriate disciplinary action, up to and including termination. Fraudulent claims may result in prosecution..." *(Carrier emphasis added)*

It stated that the replacement check was overnight mailed and cashed by the Claimant on June 4, 2009. On October 19, 2009, the Claimant cashed the original check and then at the Investigation he offered a variety of excuses for his theft, but ultimately admitted his guilt, therefore, dismissal was appropriate. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

There is no dispute between the parties and the Claimant that he requested a Replacement Check Request form on May 27, 2009, for a misplaced check. The Carrier furnished a replacement check and on June 4, 2009, Claimant cashed that check. Subsequently, Claimant found the original check and cashed that check on October 19, 2009. At the Investigation the Claimant offered several reasons as to why he cashed the original check such as: (1) he happened to be looking through his mail and came across the check, but did not realize it was a duplicate; (2) had no money to pay bills and his family needed heat, food and clothing; (3) he has difficulty understanding English and (4) he had heard that in the past people had done the same thing and it was just deducted out of their future checks.

The Organization offered an argument in behalf of the Claimant that was not without some merit, that being that the Claimant did not realize the check cashed on October 19th was the original check that had been replaced and instead thought it was an un-cashed check, however, that argument lost its value when the Claimant testified on page 23 of the Transcript as follows:

"Q So you know that there was going to be a check coming in to cover your, to cover the check that you didn't receive and you knew there was going to be another, the original check after that you weren't supposed to cash, correct?

A Yes, I, didn't cash them until later on but by then it was like. It was in the mail the pile of mail. I just came across it.

Q The?

A I wasn't thinking of cashing it until I seen it,...

Q And so just to confirm that we just stated on the record here is that you knew that you were not supposed to cash the original check?

A Yes. *(Underlining Board's emphasis)*

Claimant further confirmed that he understood that he was not suppose to cash the original check when he testified on pages 33 of the Transcript that he thought the Carrier would make deductions from future earnings. He testified in pertinent part as follows:

"Q ...Prior to you being contacted by Mr. Blair, had you seen deductions in your check for this replacement check that you cashed that you weren't supposed to?

A No.

Q Why?

A Because I thought they would, deduct them come later one some time. So I was just waiting to see what was going to happen then.

Q So when did you plan on saying something?

A Maybe second check because when you look those things they're in there with all the deductions and stuff like that."

On page 34 the questioning continued of the Claimant regarding potential deductions and he testified as follows:

"Q You weren't expecting it to be deducted for what you were allegedly going to owe back to the BNSF?

A I was, I was wondering how much it was going to be, you know, to see if they were going to take it all or something.

Q And when there was no deductions you didn't feel inclined to talk to your supervisor about that?

A No, cause I thought the second check was going to be much more so there's

maybe that was when they were going to deduct that. I expected that. I didn't think they would do it the first one because it wasn't a whole lot of money for a week's pay." (*Underlining Board's emphasis*)

The Mr. Blair mentioned in the Claimant's aforementioned testimony was the Special Agent who did the initial investigation of the matter and questioned the Claimant along with Assistant Roadmaster, T. Julik on January 24, 2009, as to why he had cashed the original check. Claimant's testimony confirms that he knew prior to his meeting with the Special Agent and Supervisor that his conduct was improper as he was expecting deductions to be taken out of his checks, therefore, it is evident that the Claimant did not mistakenly believe that the check was a un-cashed check that had been misplaced. The Organization's additional argument that because the disputed check was not honored by the Carrier there was "no harm thus no foul" does not prevail because it is clear that Claimant's actions were pre-mediated with intent to be paid for work not performed. 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 assessed was appropriate. At the time of the instant dispute the Claimant had 15 years service which included a 46 day actual suspension within less than two years of the instant dispute. Theft or any other act with intent to defraud the Carrier of monies not due an employee is punishable by dismissal in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the discipline was in accordance with PEPA and it will not be rescinded 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: 3/18/11