

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO 58, (Case No. 58)**

**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 March 9, 2010, when Claimant B. J. Cake (1323591) was not issued discipline; Claimant R. K. Morris (6537708) was not issued discipline; and Claimant W. J. Arend (6597629) was issued a Level S 30-day Record Suspension with 1 year probation concerning his involvement with the use of BNSF company property for his personal use the week of January 18-24, 2010. The Carrier alleged violation of MOWOR 1.4 Carrying out Rules and Reporting Violations and MOWOR 1.6 Conduct.**
- 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 continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0094) (Organization File No. 170-13C2-109.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 19, 2010, Claimants were directed to attend a formal Investigation on March 5, 2010, which was mutually postponed until March 9, 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 violation of Rules 1.4, 1.6 and 1.19 of the

Maintenance of Way Operating Rules effective December 2, 2009, as supplemented or amended, concerning your alleged use of BNSF property for personal use on or about the week of January 18-24, 2010."

No discipline was issued to Claimants B. J. Cake and R. K. Morris, but on April 1, 2010, Claimant W. J. Arend was notified that he had been found guilty as charged and was issued a Level S 30-Day Record Suspension and assigned a probation period of one year.

It is the Organization's position that the Carrier erred in disciplining Claimant Arend for multiple reasons. The first being that the discipline was untimely, it alleged in its appeal letter of July 12, 2010, that it had previously advised the Carrier on June 1st that it and the Claimants had not received any discipline letters or a copy of the transcript thus any decision after that date would be untimely. It further argued that Claimant Arend was denied a fair and impartial Hearing because of the multiple roles played by the Division Engineer who was the Charging Officer, key witness against the Claimant and the Officer who found the Claimant guilty and assessed the discipline. Additionally, it asserted that the alleged violation committed by the Claimant occurred while he was an Exempt Carrier Official which the Carrier disciplined him for on February 10, 2010, when it removed him from that position. According to the Organization the Carrier then improperly chose to discipline him a second time for the same alleged violation after he had exercised his seniority back to the craft. It closed by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimants were given a fair and impartial Investigation because the Investigation Notice was issued within the required time limits and contained enough information concerning the alleged violation for the Claimants and their representatives to prepare a defense. It further argued that the Investigation was held in a timely manner and the discipline was issued within an appropriate time period with copies of the transcript forwarded to the Organization and the Claimants. Lastly, it argued that the record was clear that Claimant Arend was guilty as charged. It concluded the discipline was proper and it asked that it not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that we must address the Organization's various procedural arguments. The Organization first alleged that the Carrier did not issue timely decisions to the various Claimants. It was not refuted that Claimant Morris signed for his decision letter on March 29, 2010, Claimant Cake signed for his letter on April 8, 2010, and Claimant Arend signed for his on April 17, 2010. Rule 13(a) of the Agreement states: **"Decisions on investigations will be rendered as promptly as possible."** The record is clear that each Claimant signed for their respective certified letters within a reasonable period after the conclusion of the Hearing, therefore, the Board finds no merit to the Organization's argument that the decisions were untimely. The Organization next argued that because of the multiple roles played by Division Engineer D.

Johnson in the investigation process and Hearing Claimant Arend was denied a fair and impartial Hearing. Review of the record indicates that Division Engineer Johnson by letter of February 12, 2010, removed Claimant Arend from his Exempt Carrier Officer position for alleged misuse of company assets for personal use. Subsequently, he issued the Notice of Investigation regarding the same incident, was a prosecution witness and the trier of facts who reviewed his own testimony. Awards 30 and 55 of this Board addressed similar issues and in Award 30 it was stated in pertinent part:

"The issue of Hearing and Charging Officer's improperly holding multiple roles in formal Investigation process has been the subject of countless Awards and authority can be found on both sides of several issues raised in the instant case. Consistent with the reasoning expressed in Third Division Award No. 31774 we find no language in the parties Agreement which prohibits the officer who initially rendered the discipline prior to the Investigation from issuing the same after the Hearing. However, in this instance there is an additional element, as that same officer was also a witness against the Claimant. In Third Division Award No. 24476 the Board discussed the multiplicity of roles that can be held by a Hearing Officer and it stated in pertinent part the following:

"...We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system..."

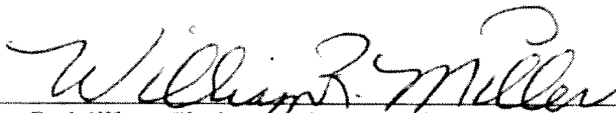
We believe that same reasoning applies in this dispute as well. The Agreement guarantees the employee a right to "due process". That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits." (Underlining Board's emphasis)

In the present dispute the Division Engineer removed the Claimant from his exempt position after which he issued charges for the same offense. He then proceeded to be a prosecution witness and the decision maker who judged witnesses credibility including his own. As stated in the aforementioned Awards that process was not fair and could have easily been avoided and remedied by having the Hearing Officer render the decision as he was in the best position to judge credibility. That rational applies equally in this instance, therefore, the Board finds and holds that the discipline of Claimant Arend must be set aside without addressing the

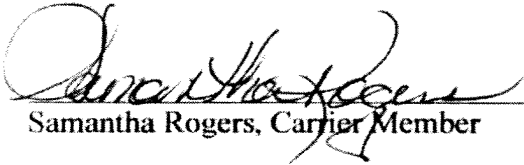
merits, however, the Claimant is not due any monies as he lost no wages. The Claimant's disciplinary status reverts to that he held prior to April 1, 2010.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 6/29/11