

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 85 (Case No. 85)**

**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 November 2, 2010, when Claimant, Wilson G. Yazzie (3973476), was Dismissed for theft of company property on November 2, 2010. The Carrier alleged violation of MOWOR 1.19 Care of Property and MOWOR 1.6 Conduct.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."**
(Carrier File No. 14-11-0023) (Organization File No. 240-13D2-1010.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 November 9, 2010, (Corrected Notice) Claimant was directed to attend a formal Investigation on November 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 theft of company property on the Seligman Subdivision while working as a Machine Operator on TMOX3197 at approximately 1630 hours on Tuesday, November 2nd.

This investigation will determine possible violation of MOWOR 1.6 Conduct and MOWOR 1.19 Care of Property."

On December 6, 2010, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the facts indicate that on November 2, 2010, Claimant was assigned as a Machine Operator operating a Back Hoe Tractor Machine. Part of his assigned duties included maintaining the right of way for the Carrier and keeping it clean of all material and trash. It argued that in the past, the Carrier allowed employees to haul off scrap ties to get them off the right of way. It further asserted the policy for removing scrap ties had changed and now required employees to get a note giving them permission to haul off ties which Claimant was not aware of. Claimant was needing some ties to repair his horse corral and he knew there were scrap ties he had to clean up, so while he was cleaning the right of way he loaded some of them on his trailer. Subsequently, he was approached by a Special Agent who asked him if he had a permit slip to take the ties at which time the Claimant explained that he did not know he needed written permission. Because he did not have a permit slip Claimant immediately unloaded the ties and told the Special Agent he would speak to the Roadmaster later about seeking permission to remove the ties. The Organization reasoned that this was nothing more than a misunderstanding about the process in place for the removal of scrap ties and the Claimant was not aware of the change in policy nor did he take anything. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the testimony of Special Agent Debbie Mitchell confirmed that she came upon the Claimant loading its railroad ties with a Carrier owned back hoe into his personal trailer at approximately 4:30 p.m. on November 2, 2010. It argued the Claimant admitted to the Special Agent that he did not have permission to take the ties and he told her the next day that he planned on taking 15 or 16 ties. It suggested the fact that the Special Agent stopped the Claimant before he left Carrier property with the ties does not change the fact that the Claimant's intent to defraud the Carrier was there.

In response to the Organization's argument regarding the policy change for the removal of ties and the allegation that the Claimant was not aware he needed permission before he could remove ties, it asserted that argument is without merit. It argued that the Claimant readily admitted in his testimony he was taking ties to build a horse corral and he had not been allowed to take them in the past unless he was working with a Contractor that had been contracted to pick up the ties. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute between the parties that Claimant admitted he intended to remove Carrier scrap-ties on November 2, 2010, without first securing permission. On page 20 of the transcript, the Claimant made a closing remark about the incident as follows:

"Wilson G. Yazzie: Well I just want to say that I guess I just made a mistake and I'm sorry about it you know, I feel sorry and think about it a lot since that time and I embarrassed myself, I'm embarrassing my family, I've put them through a lot, that's all I'm going to say, I'm sorry."


Review of the record reveals 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. At the time of the incident Claimant was 60 years old with approximately 32 years of service with one Level S serious violation that occurred about two months earlier. The Board does not excuse the Claimant's behavior, however, in this instance it finds and holds that based upon the Claimant's long and good work record and the unique circumstances of the dispute the discipline was excessive and is reduced to a lengthy suspension which is progressive and corrective in nature and in accordance with the spirit of the Carrier's Policy for Employee Performance Accountability (PEPA). Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back pay and two Level S Violations on his record. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy upon return to service.

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: 5-21-12