

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 86, (Case No. 86)**

**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 November 24, 2010, when Claimant, Brian L. Bruce (6532774), was Dismissed for theft of gasoline when he purchased it with his Company fuel card for personal use on November 22, 2010. The Carrier alleged violation of MOWOR 1.25 Credit or 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. 14-11-0055) (Organization File No. 160-13D2-1012.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 24, 2010, Claimant was directed to attend a formal Investigation on December 2, 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 use of company fuel card at approximately 2:44 PM on Monday, November 22, 2010, and other alleged personal purchases, while working as a Track Supervisor on the Gallup Subdivision.

This investigation will determine possible violation of MOWOR 1.6 Conduct and MOWOR 1.25 Credit or Property."

On December 21, 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 Claimant admitted he mistakenly used a Carrier fuel card on November 22, 2010, to purchase personal fuel. It argued that it was a honest mistake and was not done in an attempt to steal from or defraud the Carrier of monies. It closed by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was seen at a gas station on November 22nd, during his working hours filling up two cans of diesel fuel. Following that sighting of the Claimant he was witnessed by Assistant Roadmaster Thomas transferring the gas cans into his personal pickup truck. Claimant was questioned by Assistant Roadmaster Thomas with Trainmaster Farris there as a witness. According to it, both Thomas and Farris testified the Claimant stated he used his own personal funds to purchase the gasoline; however, he did not have a receipt. Both Carrier Officers felt Claimant's responses were questionable and because of that he was pulled from service and his company credit card was taken away from him. Thomas then contacted the Special Agent to have the matter investigated.

Special Agent Miller went to the gas station where he took a statement from the Manager who told him the Claimant had called in and asked to have the charge for the diesel fuel changed from the card he had given her to his personal card. The Special Agent stated the Manager told the Claimant that she could do that for him if he would return to the station with both credit cards. The Carrier argued the Claimant attempted to make restitution after he had already been caught, but because he no longer had his company credit card he was unable to get the charge removed, however, that attempt at restitution does not change the fact that the Claimant intended to defraud the Carrier. It concluded by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation was held in accordance with Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute between the parties and the Claimant that on November 22, 2010, the Claimant purchased two cans of diesel fuel for personal use while on duty with a company credit card. The Claimant argued he mistakenly used a company credit card rather than his personal card. On page 24 of the transcript Assistant Roadmaster Thomas was questioned about whether or not it was possible the Claimant could have inadvertently used his company card rather than his personal card. Thomas testified as follows:

"Brian Poston: Okay, you stated you observed him at the fuel station.

Tyler Thomas: That is correct.

Brian Poston: Okay, Did, uh, Mr. Bruce, uh, when you asked him, uh, about the fuel cans, what did he tell you?

Tyler Thomas: He said he paid for it out of his own pocket, opened up his wallet and showed me.

Brian Poston: Is it possible that he grabbed the wrong card and made the mistake at the end of a long day?

Tyler Thomas: No.

Brian Poston: And, used the wrong card?

Tyler Thomas: No.

Brian Poston: How do you know that? Did you witness him putting the card in?

Tyler Thomas: You have to enter your mileage of the vehicle, which you know you're doing on a company. (Underlining Board's emphasis)

Brian Poston: Sure.

Tyler Thomas: Vehicle and your employee ID. Do you do that with your debit card?

Brian Poston: I have to enter a zip code and I have to enter a, a pi-, a personal ID number, yes.

Tyler Thomas: Not your mileage and know that you're on a company truck, on duty. (Underlining Board's emphasis)

Carrier Officer Thomas's testimony was not effectively rebutted and it is clear that the use of the company credit necessitated a step, the entering of mileage at the pump, that would not be done with a personal credit card and should have alerted the Claimant to the fact that he was not using his personal credit card. The Claimant attempted to excuse his error on the basis that

he was very tired, stressed and distracted, but as previously stated to use the company credit card an employee is asked at the pump, once his card is swiped, to enter his employee ID number and his vehicle mileage. These are not questions that are asked if the Claimant had been using his personal credit card.

Review of the transcript, reveals that Claimant's testimony was evasive at page 44 when he stated that he often used his personal gas cans for Carrier and that he had asked Supervisor Sorenson in the past to purchase gas cans for him. After the Hearing Officer heard that comment he chose to telephone Mr. Sorenson to ask him to testify if the Claimant had ever asked him to purchase gas cans for him in the past. On page 74 of the transcript Sorenson was questioned as follows:

"Gary Gomez: All right. I think the only questions we'll have for you is, is some just to help, uh, clarify for Mr. Bruce. Um, Mr. Bruce said, um he was carrying around two five-gallon plastic containers in his personal ve- in his company vehicle because he did not have the proper BNSF safety fuel cans. Um, I asked Mr. Bruce if he had ever asked for any of the proper BNSF safety fuel cans. Um, I asked Mr. Bruce if he ever asked for any of the proper BNSF safety cans, he said yes, that he had spoke to you. Do you remember any said conversation?

Adam Sorensen: I do not.

Gary Gomez: Um, Mr. Bruce also said that during your conversation you said that during your conversation you said that you would order them for him. Do you remember that at all?

Adam Sorensen: I do not remember that. *(Underlining Board's emphasis)*

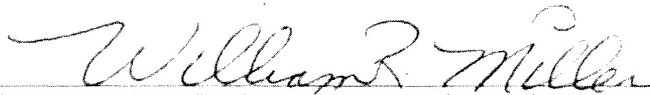
Sorensen's testimony was not refuted and was more explicit and credible than that of the Claimant. The record reveals that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant knowingly misused his company credit card and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 17 years of service which included a previous dismissal with a Leniency Reinstatement and a 30-Day Record Suspension for falsification of payroll records, a little over one year before the subject dispute arose. Many arbitral tribunals have ruled that the intentional misuse of company credit cards or theft of monies by employees, even those with an unblemished record, are grounds for dismissal. The Board finds and holds the discipline

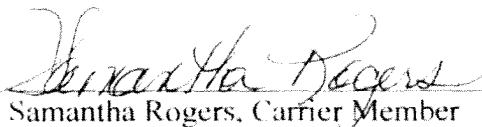
will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 5-21-12