

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7394

AWARD NO. 8, (Case No. 8)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on September 11, 2009 when Mr. Daniel J. Brewer was assessed a Level s 30-day Record Suspension with a three year probation period for his violation of Maintenance of Way Safety Rule S-1.2.5 - Safety Rules, Training Practices, Policies (Internet and Intranet Policy).
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the Level S 30-Day Record Suspension with a three year probation period be removed from Mr. Brewer's personal file."
(Carrier File No. 12-10-0029) (Organization File No. B-2083-18)

FINDINGS:

Public Law Board No. 7394, 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.

The facts indicate that on September 11, 2009, Division Engineer, D. F. Befort sent the Claimant a letter which stated in pertinent part the following:

"This is to advise that you are hereby assessed a Level S, 30 day Record suspension with 3 years probation for internet abuse.

It has been determined that you were in violation of Maintenance of Way Safety

Rule S-1.2.5 - Safety Rules, Training Practices, Policies (Internet and Intranet Policy), when you emailed sexually explicit emails to your Supervisor on August 26, 2009, while working welders job on TRWX 1358 Rail Recovery Unit."

On September 25, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on October 22, 2009, 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 inappropriate emails on July 27, 2009 and again on August 26, 2009 while working on TRWX 1358 after being advised by Supervisor not to.

It has been determined that you were in violation of Maintenance of Way Safety Rule S-1.2.5 - Safety Rules, Training Practices, Policies (Internet and Intranet Policy)."

On October 29, 2009, Claimant was notified that he had been found guilty as charged and his Level S 30 day record suspension with a three year probation remained intact.

It is the Organization's position that the Carrier erred in its discipline of the Claimant. It argued that the Claimant a long time employee with 28 years of service had not been formally trained on computer usage including the use of emails. It further argued that the Claimant admitted he sent his Supervisor emails on the aforementioned dates, but he did not view them as being sexually explicit or offensive nor outside of BNSF email policy standards. It further argued that after Claimant was forewarned on July 28th by his Supervisor that the pictures he emailed on July 27th were close to violating company email policy, thus he complied with that warning which is evidenced by the fact that the pictures he sent on August 26th were less revealing. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that on July 27 and August 26, 2009, the Claimant sent inappropriate emails with attached pictures showing women either nude or in night gown attire. It argued that the Claimant was advised by his Supervisor after the first email was sent that he needed to be careful in the future and abide by Corporate Policies when sending emails. The Carrier further argued that contrary to the Organization's argument that the Claimant had not had formal training on email usage it is clear that he regularly used the computer and sent emails and according to it every time he accessed the computer systems he was electronically advised as to the Rules governing its use. 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 formal Investigation was held in accordance with Rule 91 the Discipline Rule and it is clear that the Hearing was conducted in a fair and impartial manner.

This is the first of two cases involving the same Claimant. Review of the record indicates that Claimant sent emails on July 27 and August 26, 2009, depicting disrespectful images of women. It is clear that the Claimant understood that the photographs were not appropriate which is evidenced by the comment he made regarding the naked model in the initial email that stated the following:

"If you were a marketing or an art major, you will appreciate this. If you were anything else, you will still appreciate this.

BRAZILIAN BED ADVERTISEMENTS"

During the Hearing, on page 77 of the Transcript, Claimant was questioned about whether or not the emails that he sent on both of the aforementioned dates might be considered as being offensive and if they had anything to do with company business. Claimant responded as follows:

"Q Could anyone be offended by these?

A Apparently so, yes.

Q Were these emails considered a part of company business?

A No, I don't guess they would."

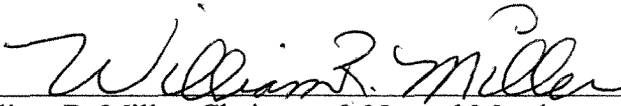
The emails were not related to company business and were of a personal nature. The Claimant was warned in July about sending those type of emails, by his immediate Supervisor, but chose to ignore that warning and sent a similar email one month later contrary to instructions and in violation of Carrier policies. It was not rebutted that the Carrier's messaging system is for business use, with limited personal emails of an urgent nature requiring immediate attention, neither of which was evident in this case. 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 proper. Claimant's violation is defined as being of a serious nature in Appendix B of the Carrier's Policy for

Employee Performance Accountability (PEPA), therefore, the Board finds and holds that because the discipline was not arbitrary, excessive or capricious it will not be disturbed.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member

Award Date: 12-13-10