

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 145, (Case No. 145)**

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

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Joy E. Mendez, 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 August 27, 2013, when Claimant, Lance P. Ramone (1713254), was dismissed for his alleged failure to report to work at designated time and place on with continual absenteeism beginning on July 3, 2013 and continuing while assigned Machine Operator on Tie Gang TP06 working on the Glasgow Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.15 Duty Reporting or Absence.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 27, 2013, continuing forward and/or otherwise made whole."
(Carrier File No. 14-13-0334) (Organization File No. 170-SF13A1-1319)**

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 July 10, 2013, Claimant was directed to attend a formal Investigation on July 17, 2013, which was mutually postponed until July 31, 2013, 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 failure to report for duty at the designated time and place with continual absenteeism beginning on July 3, 2013, and continuing while assigned Machine Operator on Tie Gang-TP06 working on the Glasgow Subdivision."

On August 27, 2013, 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 was denied a "fair and impartial" Investigation because it was held in "absentia". It argued that the Hearing should have been further postponed to ascertain whether or not the Claimant was medically fit to attend or had some other valid reason why he could not attend and because that was not done it asserted that the discipline should be set aside and the claim sustained without reviewing the merits. It further argued that if the Board chose to review the merits it would discover that the Carrier did not meet its burden of proof. Lastly, it argued that if the Carrier did show that the Claimant was guilty, which it did not, the discipline assessed was excessive. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that it did not err when it held the Investigation in "absentia". It argued the Notice of Investigation was sent to Claimant's last known address on file. It further asserted that if the Claimant would have reported to work on any date between July 3, 2013, up to the date of the Investigation on August 27, 2013, he would have been told to appear at the Hearing. Additionally, it pointed out that the Claimant's immediate Supervisor, Roadmaster, Mr. N. Criswell testified Claimant had not contacted him the entire time he was absent without authority or leave, (AWOL) and that Roadmaster Criswell had repeatedly tried to contact the Claimant to no avail.

Turning to the merits the Carrier argued that the Claimant was aware of the requirement of the Rules for reporting to work and contacting his Roadmaster if he would not be reporting. It asserted that Claimant's failure to protect his assignment left the Carrier short-handed and was another example of a continuing problem of excessive absenteeism and unauthorized absences for which Claimant had been forewarned, counseled and disciplined for in the past. Lastly, it argued the discipline was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural argument that the Investigation should not have been held in "absentia". The record was un-refuted that the Carrier sent the Notice of Investigation to the Claimant's last known address on file and it was further substantiated that the Claimant made no contact with the Carrier from the first day of his absence on July 3, 2013, up to and including the date of the Hearing on August 27, 2013. Additionally, the record shows that when the

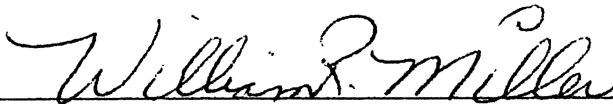
Organization made its appeal in behalf of the Claimant on September 25, 2013, the Claimant had still failed to offer any reason why he did not attend the Investigation. It is determined that the Claimant chose not to appear at the Investigation and he offered no proof that he was either ill or unable to attend the Hearing for other reasons. The Carrier did not violate the Claimant's right to a "fair and impartial" Hearing in this instance when it was held in "absentia". It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924, 13957 and Public Law Board No. 6402, Award No. 202. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11. The dispute will be resolved on its merits.

Turning to the merits, the transcript substantiated that the Claimant was absent without authority in violation of Maintenance of Way Operating Rule 1.15 which was affirmatively established by the testimony of Roadmaster N. Criswell whose testimony was not refuted. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

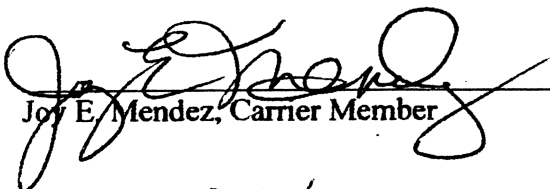
The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had approximately seven years of service. During his tenure Claimant had previously been disciplined five times and three times within the previous 18 months for either being Absent Without Authority and/or Failure to Report for Work at Designated Time and Place. The instant infraction is a continuation of the Claimant's failure to protect his assignment, therefore, the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014