

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 146, (Case No. 146)**

**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 July 12, 2013, when Claimant, F. Silva (6426936), was dismissed for his alleged dishonest conduct when he used Company fuel card to fuel a personal vehicle at approximately 4:39 p.m. on May 10, 2013, when he was working as a flagger on the Chillicothe Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (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 dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 12, 2013, continuing forward and/or otherwise made whole."**  
**(Carrier File No. 14-13-0337) (Organization File No. 10-SF13D2-1314)**

**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 May 24, 2013, Claimant was directed to attend a formal Investigation on May 29, 2013, which was mutually postponed until July 12, 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 dishonest conduct when you allegedly**

**used Company fuel card to fuel a personal vehicle at approximately 1639 hours on 5/10/13 while you were working as a flagger on the Chillicothe Subdivision. The date BNSF received first knowledge of this alleged violation is May 24, 2013."**

On July 30, 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 record shows that Claimant has been a dedicated and faithful employee for 35 years who had an unblemished record. It argued that the Claimant made a singular error in an otherwise exemplary career and it asserted that the level of discipline was excessive when weighed against his loyal service to the Carrier. 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 May 10, 2013, the Claimant was working as a flagger on the Chillicothe Subdivision and at approximately 4:39 p.m. the Claimant used a Company fuel card to fuel a personal vehicle. It argued that the transcript shows that the Claimant admitted he had stolen fuel for his personal vehicle with another employee's BNSF gas card and their employee number and he did not come forward about that transgression until he found out that the incident was being investigated by his Supervisor, Roadmaster N. Norman. Lastly, it addressed the Organization's argument that the discipline was excessive and it argued that an act of leniency is the sole discretion of the Carrier and that dishonesty is a stand-alone dismissible offense and in accordance with its Policy for Employee Performance Accountability, (PEPA) it properly terminated the Claimant. It closed 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 determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The facts are not in dispute that the Claimant improperly purchased fuel for his personal vehicle with another employee's Company fuel card and their employee number. On page 32 of the transcript the Claimant was questioned about the incident as follows:

**"Michael Heille: Did you, you did use another employee's per-**

**Froylan Silva: Yes.**

**Michael Heille: Employee number as the fuel purchase.**

**Froylan Heille: Yes.**

**Michael Heille:** So, was it your intent to steal the fuel?

**Froylan Silva:** Uh, yes, it, it was, uh, I find myself, uh without, uh, my wallet and an empty vehicle. And, I had called my wife to come pick me up or bring me money and, uh, she was out of, uh, she was out of town and, um, it was going to take a couple hours. So, I, I didn't want to wait and, uh, we used the company card to purchase the fuel for my, uh, vehicle. And, uh, and used the other, uh, truck, uh, fuel card not, not my own because I had fueled my truck in the same day.

**Michael Heille:** So, you used another employee's personal fuel truck card and you used that other employee's fuel, his personal identification number.

**Froylan Silva:** Yes." (*Underlining Board's emphasis*)

On page 33 of the transcript the Claimant confirmed that photographs from the service station substantiated that he fueled his personal vehicle using another employee's Company fuel card and on page 34 of the transcript the Claimant was asked the following:

**"Michael Heille:** And, this was after you purchased fuel with a BNSF credit card at this gas station with the intent of stealing it, is that right?

**Froylan Silva:** Yes." (*Underlining Board's emphasis*)

Substantial evidence was adduced at the Investigation that the Claimant violated MOWOR 1.6 Conduct when he used another employee's Company fuel card to purchase fuel for his personal vehicle and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the infraction Claimant had approximately 35 years of unblemished service, however, his offense was of an egregious nature. In Award No. 86 of this Board it was determined in pertinent part:

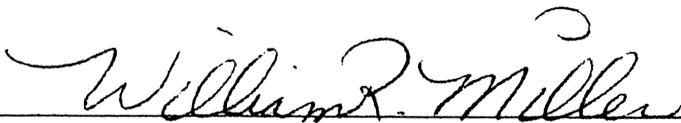
**"...Many arbitral tribunals have ruled that the intentional misuse of company cards or theft of monies by employees, even those with an unblemished record, are grounds for dismissal. The Board finds and holds the discipline will not be set aside...."**

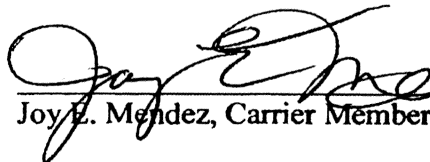
The Board is always reluctant to uphold the dismissal of a long-term employee, but in this instance to set aside the discipline would be an act of leniency which is not within the


discretion of the Board, 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.

  
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William R. Miller, Chairman & Neutral Member

  
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Joy E. Mendez, Carrier Member

  
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David D. Tanner, Employee Member

Award Date: July 10, 2014