

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 149, (Case No. 149)**

**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 June 17, 2013, when Claimant, T. L. Kee (6595383), was dismissed, for his alleged failure to report to work at designated time and place on Monday, March 25, 2012 and continuing forward while assigned as a Machine Operator on the Seligman 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 June 17, 2013, continuing forward and/or otherwise made whole."**  
**(Carrier File No. 14-13-0276) (Organization File No. 240-13A1-137)**

**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 March 28, 2013, Claimant was directed to attend a formal Investigation on April 8, 2013, which was mutually postponed until May 20, 2013, concerning in pertinent part the following charge:

**"...for the purposed of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report to work at designated**

**time and place on Monday, March 25, 2013, continuing forward, while being assigned as Machine Operator on TRPX0014 on the Selgiman Subdivision.**

**This investigation will determine possible violation of MOWOR 1.15 Duty Reporting or Absence."**

On June 17, 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. It recognized that the Claimant did not report for work when scheduled at his designated time and place beginning on March 25, 2013, and continuing forward, however, it argued that was a singular violation and under the Carrier's disciplinary policy it warranted no more than a 20 Day Record Suspension based upon the Claimant's prior discipline record. 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" and it asserted that was not contested by the Organization. Turning to the merits the Carrier argued that the Claimant was aware of the requirement of the Rule 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 notes that the Investigation was held in "absentia" and that the Claimant was aware of the date of the Hearing as his representative stated on page six of the Transcript: **"I am here at Mr. Kee's direction and authorized to represent him in his absence, as he was not able to, um, gather the funds necessary for the gas mi- gas money, uh, to make the trip from Gallup, New Mexico, to here today."** The Claimant made no request for further postponements thus it is determined that the Carrier did not violate the Claimant's right to a "fair and impartial" Hearing in this instance when it was held in "absentia". Additionally, it is determined that the Claimant was afforded his "due process" Agreement rights regarding the Investigation and appeal process.

The record shows that when the Organization made its appeal in behalf of the Claimant on August 2, 2013, the Claimant had still failed to offer any reason why he chose not to appear for work on March 25th continuing to the date of his Hearing on May 20th. As has previously been determined in multiple Awards of various tribunals including Award No. 145 of this Board 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. 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 Roger Lee 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.

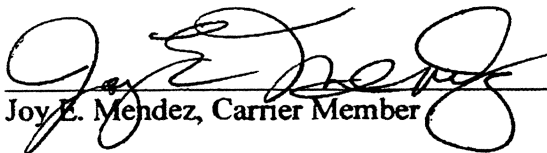
The only issue remaining is whether the discipline was appropriate. The Organization argued that in accordance with the Carrier's discipline policy the offense should not have merited more than a 20 Day Record Suspension whereas the Carrier argued that the Organization had taken the Policy for Employee Performance Accountability (PEPA) out of context by alleging that a job abandonment for 40 days should be treated as a non-serious violation. The Carrier asserted that its discipline policy sets forth violations that may be considered stand alone dismissible offenses which includes "**extended unauthorized absence**" (See page 6 of PEPA). The Board is not persuaded by the Organization's argument because it has the potential to lead to an unreasonable conclusion wherein an employee could be off for an extended period of time (far in excess of the Claimant's absence) without authorization and then be allowed to return to work with little more than a reprimand. Turning to the Claimant's work history the record shows that at the time of the incident the Claimant had approximately 22 years of service. During his tenure Claimant had previously been disciplined seven times and two times within the previous 14 months for 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 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