

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 175, (Case No. 175)**

**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 R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 11, 2014, when Claimant, Jonathan R. Parker (1464163), remained dismissed for being absent without proper authority for more than five (5) consecutive work days beginning May 3, 2014 and continuing forward. The Carrier alleged violation of the BNSF Maintenance of Way Operating Rule (MWOR) 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 including overtime commencing July 11, 2014, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-14-0302) (Organization File No. 180-SF13A1-1411)

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 all 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 8, 2014, the Claimant was sent the following letter which stated in pertinent part:

"This is to advise you, effective May 8, 2014 your seniority and employment with the BNSF Railway is hereby terminated pursuant to the provisions of Memorandum of Agreement dated July 13, 1976, for being absent without proper authority for more than five consecutive work days beginning date and continuing.

If you dispute the action taken herein above you may, if you desire, request to be given an investigation under the provisions of Rule 13 of the current agreement. Such request for investigation must be made in writing to the office at the address noted below within 20 calendar days of the date of this notice."

On May 20, 2014, the Claimant requested a formal Investigation and on June 16, 2014, Claimant was directed to attend a formal Investigation on June 24, 2014, 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 being absent without proper authority for more than five (5) consecutive work days beginning May 3, 2014 and continuing forward. The date BNSF received first knowledge of this alleged violation is June 10, 2014.

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

On August 6, 2014, 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 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 without reviewing the merits. It further 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 and the Organization was granted a recess to contact the Claimant when he did not appear at the Hearing. It further argued that it was clear that the Claimant was aware of the Investigation as the Claimant had personally requested the Hearing, therefore, it was within its right to proceed with the Investigation.

Turning to merits the Carrier argued that the Claimant was aware of the requirement of the Rules for reporting to work and contacting his immediate Supervisor if he would not be able to report. It asserted the record is clear that the Claimant was guilty as charged and he was absent without authority or leave, (AWOL). Lastly, it argued that 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 and the Claimant should have been aware of the Hearing as he had personally requested it. Additionally, the record shows that when the Organization made its appeal in behalf of the Claimant on August 22, 2014, 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, Public Law Board No. 6402, Award No. 202, as well as this same tribunal, Public Law Board No. 7048, Award No. 145.

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 in the testimony of Roadmaster Joe Pointer whose testimony was not refuted. Exhibits introduced by Mr. Pointer and his testimony established that the Claimant was on Medical Leave of Absence which began on September 22, 2013 and expired on November 1, 2013. Claimant was given a one-time ten day leniency to get an extension. The Claimant obtained and was granted an extension through May 2, 2014, and on that date the leave expired. As previously stated it was undisputed the Claimant did not contact anyone at the Carrier, or report to work, therefore, 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 eight plus years of service. During his tenure Claimant had previously been disciplined four times within the previous two years, three of which were for Failure to Report for Work at Designated Time and Place. The instant infraction is a continuation of the Claimant's

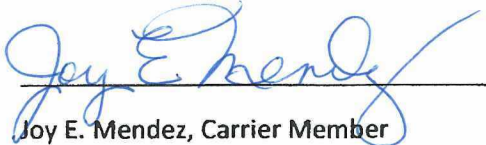
failure to protect his assignment, therefore, the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David R. Scoville, Employee Member

Award Date:

