

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 176, (Case No. 176)**

**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 September 8, 2014, when Claimant, John Wayne Henderson (0280479) was dismissed for his alleged absence without authority for more than five (5) days beginning June 30, 2014 and continuing forward. The Carrier alleged violation of the BNSF Railway Maintenance of Way Operating Rules (MOWOR) 1.15 Duty Reporting or Absence and 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 September 8, 2014, continuing forward and/or otherwise made whole."  
(Carrier File No. 14-14-0359) (Organization File No. 20SF13A1-1415)**

**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 July 18, 2014, the Claimant was sent the following letter which stated in pertinent part:

**"This is to advise you, effective this date your seniority and employment with the BNSF Railway is hereby terminated pursuant to the provisions of Letter of Understanding dated July 13, 1976, for your being absent without proper authority for more than five (5) days beginning June 30, 2014 and continuing forward.**

**You are in violation of MWOR 1.15 Duty Reporting or Absence and MWOR 1.6 Conduct.**

\* \* \*

**If you dispute the action taken herein above you may, if you desire request to be given an investigation under the provisions of Appendix 11 of the current agreement. Such request for investigation must be made to the office, in writing, at the address noted below within twenty (20) calendar days from the date of this notice."**

On July 29, 2014, the Organization requested a formal Investigation in behalf of the Claimant and on July 30, 2014, Claimant was directed to attend a formal Investigation on August 11, 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 absence without proper authority for more than five (5) days beginning June 30, 2014 and continuing forward.**

**This investigation will determine possible violation of MWOR 1.15 Duty Reporting or Absence and MWOR 1.6 Conduct."**

On September 8, 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 the Hearing Officer asked leading questions and Carrier witness Division Engineer, Mr. Martin gave false and misleading testimony. It asks that based upon those alleged procedural errors the discipline be removed without reviewing the merits.

Turning to the merits, it argued that because the Claimant was a new employee he assumed after his on-duty injury that he had permission to be off work without contacting his immediate Supervisor. 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 that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant was not denied a "fair and impartial" Investigation that is apparent by a reading of the transcript. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier argued that the record shows that Division Engineer, D. Martin, entered exhibits at the Hearing that showed that Claimant was absent for more than five days without authority. Mr. Martin testified and entered Exhibit No. 4 showing the Timekeeping Records where the Claimant was shown as "unapproved absence". It further argued that when the Claimant met with Division Engineer Martin on July 15, 2014, he did not provide any documentation that could explain his absence, therefore, according to the Carrier it was undisputed by Exhibit No. 5, the Claimant had not contacted anyone with the Carrier to request permission to be off work. Furthermore, the Claimant did not report for work. 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 arguments. After a careful examination of the transcript the Board is not persuaded that the Claimant was denied his "due process" Agreement rights as it is clear that the Claimant was well represented by the Organization and neither was surprised by anything that arose during the Hearing. It is determined that the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

Turning to the record it is clear that the Claimant testified multiple times (See page 33 as one example) that he did not provide any information to his Supervisors regarding his continued absence nor did the Claimant request permission to be off work. At the time of the incident Claimant was a newly hired employee who argued that he was not familiar with the Rules regarding being absent from service. The Board is not persuaded that the Claimant did not understand that all employees have a responsibility to call in and gain approval to be off work and failure to do such was a violation of Operating Rules. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

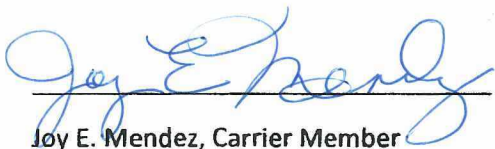
The only issue remaining is whether the discipline was appropriate. At the time of the offense the Claimant had approximately four months of service. Claimant's continued absence without authority was a Stand Alone Dismissible Violation, therefore, the Board finds and holds that the discipline exercised by the Carrier was in accordance with its Policy for Employee Performance Accountability (PEPA) and it will not be set aside because it was not excessive, arbitrary or capricious. The claim will remain denied.

**AWARD**

Claim denied.

A handwritten signature in blue ink, reading "William R. Miller", written over a horizontal line.

William R. Miller, Chairman & Neutral Member

A handwritten signature in blue ink, reading "Joy E. Mendez", written over a horizontal line.

Joy E. Mendez, Carrier Member

A handwritten signature in blue ink, reading "David R. Scoville", written over a horizontal line.

David R. Scoville, Employee Member

Award Date: July 27, 2016