

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 193, (Case No. 193)**

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

VS

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, 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 May 28, 2015, when Claimant, Raymond L. Mims (1767755), was dismissed on June 26, 2015 for false testimony during his investigation on Wednesday, May 13, 2015, at the Saginaw Engineering Office. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 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 including overtime commencing May 28, 2015, continuing forward and/or otherwise made whole.”
(Carrier File No. 14-15-0286) (Organization File No. 90-SF13C5-1514)**

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.

The facts indicate that the Claimant was assigned as a Trackman, Mobile Gang TP11, on the Texas Division and it was alleged that during an Investigation held on May 13, 2015, the Claimant offered false testimony and because of that allegation the Claimant was directed to attend a formal Investigation on May 28, 2015, 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 false testimony during your investigation on Wednesday, May 13, 2015 at the Saginaw Engineering Office.

This investigation will determine possible violation of MWOR 1.6 Conuct.”

On June 26, 2015, Claimant was notified that he had been found guilty as charged and was dismissed from service.

The Board notes that the instant case is a companion case to Award No. 194, Case No. 194 and Award No. 195, Case No. 195. This is the first of three cases that involve the same Claimant all of which are dismissal cases.

It is the position of the Organization that the Carrier did not present any evidence that the Claimant's testimony offered at the prior May 13, 2015, Investigation was not reliable and/or false. Instead it argued that the record shows that the Carrier's position relies upon supposition without any reliable evidence or corroborating testimony from competent witnesses. According to the Organization that supposition involves an alleged phone call received by a Carrier Supervisor and testified to by Carrier Witness Mouton who offered no phone records or even a screen capture from the other Supervisor's cell phone of the purported unidentified number wherein the Claimant allegedly told the Supervisor his absence from work was the result of incarceration rather than being off to care for an ill spouse. It concluded that the Carrier did not meet its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that the transcript verifies that the Claimant was properly dismissed for dishonesty. According to it, the Claimant did not deny that the reason he missed work was due to being in jail. Instead he testified that he did not recall telling anyone that he was absent account of incarceration. The Carrier argued that the Claimant was either dishonest by stating he missed work due to being in jail or he was dishonest by stating he missed due to his wife's sickness. It determined that the Claimant was properly found guilty of offering false testimony at the May 13, 2015, Investigation and no evidence was offered that refuted the Carrier Witnesses' testimony. Lastly, it argued that the Claimant was appropriately disciplined and 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 it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

Turning to the record the Carrier required the Hearing Officer, Mr. Issacc J. Mouton, of the Claimant's May 13, 2015, Investigation to testify at the instant Hearing regarding testimony offered by the Claimant and other witnesses. On page 6 of the Transcript, Mr. Mouton was questioned as follows:

"Geneva McNealy: Okay. And can you please tell us what you know about the incident that's in question today?"

Issacc J. Mouton: Uh, yes. Uh, we were doing an investigation, uh, on Mr. Mims. Um, uh, he, asked him a question about, uh, why, uh, what happened, why he missed days. Um, he stated, uh, due to his wife's health condition, he missed days. Um, and then, uh, asked Mr. Wright, uh, to, those days that come back in. Mr. Wright stated that a conversation he had with Mr. Mims, uh, stated that Mims had, uh, had spent some time in, in jail last week, uh, and, that's why he missed, uh he missed." *(Underlining Board's emphasis)*

Mr. Wright was the Roadmaster who testified in the previous Investigation. Mr. Wright specifically stated on page 13 of the May 13th transcript the following:

"John K. Wright: Uh, Mr. Mims was absent for a few days. I received a call from him, uh, can't remember the exact date, from an unknown number, or an unrecognized number. It wasn't unknown. Uh, and uh, he had told that me that he had reasons for his absences, that he was called ... warrants... and he had been in, uh, in jail for the, that week, and that is why he was, uh, AWOL from work." *(Underlining Board's emphasis)*

* * *

Brian Poston: Did he at any time tell you that his wife had been ill and he was off work caring for her?

John K. Wright: No." *(Underlining Board's emphasis)*

Mr. Wright further testified that the Claimant never offered any doctor's excuses for his absence. Additionally, on page 26 of that transcript Mr. Wright stated that the Claimant told him he had been picked up on outstanding warrants and was in jail.

At the May 13 Investigation the Claimant testified he was absent because of his wife's illness whereas at the instant Hearing he testified that he was off work because his wife was ill and he was sick on Monday, Tuesday, Wednesday and had insufficient funds to be able to travel

to work on Thursday and Friday.

On page 21 of the transcript the Claimant confirmed the prior testimony of Carrier Officer Wright at the May 13th Hearing that he had told Mr. Wright he had outstanding warrants. On that same page the Claimant was specifically asked the following:

“Geneva McNealy: Okay. And you never, you never told anyone that you were incarcerated?”

Raymond L. Mims Jr.: No, I did not, not that I recall, no I didn’t.” (*Underlining Board’s emphasis*)

The aforementioned response is a contradiction to the Claimant’s previous testimony. The Claimant testified he had not been incarcerated, therefore, if that statement is to be believed it would make no sense that the Claimant might have said he had been in jail or that he could not recall whether he might have inadvertently told someone he had been incarcerated. It is illogical to believe that someone might have told another person he had been in jail when he previously asserted he was never in jail. Claimant’s slip of the tongue is consistent with the testimony of Carrier Officer Wright wherein Mr. Wright testified that the Claimant had advised his Superior that he had been AWOL because he had been incarcerated.

The testimony of the Carrier witnesses was not effectively rebutted and despite the Organization’s vigorous defense of the Claimant, the Claimant was his own worst witness as Claimant’s testimony is best described as being self-serving and less than forthright whereas the testimony of the Carrier witnesses was straight forward with no showing that any of those witnesses had a reason to fabricate their testimony. Substantial evidence was adduced at the Investigation that the Claimant offered false testimony at his May 13, 2015, Investigation, therefore, it is clear 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 incident the Claimant had just over seven years of service. His disciplinary record included two formal reprimands (Waivers) for unexcused and/or unauthorized absences, two Record Suspensions (Waivers) for failure to report for duty as well as a Termination for Being Absent Without Proper Authority for more than five days beginning March 26, 2015 which is the subject of Award No. 194, Case No. 194 as well as an additional dismissal covered by Award No. 195, Case No. 195, both of which were upheld by this tribunal. The Board is not without compassion regarding the continuing illness of the Claimant’s wife. However, the record shows that the Carrier has been lenient with the Claimant in the past over his repeated unexcused absences


and that leniency was not rewarded with a correction by the Claimant of his repetitive behavior. In accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) the instant offense was a Stand Alone Dismissible Violation and coupled with the Claimant's previous offenses the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17