

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 217, (Case No. 217)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 September 1, 2016, when Claimant, Daniel McWilliams (6449060), was dismissed for misuse and improper care of company property when he took railroad property to his residence for personal use. The Carrier alleged violation of the Maintenance of Way Operating Rules 1.19 – Care of Property and 1.25 Credit or Property.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant, remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing September 1, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0449) (Organization File No. 2411-SL13D2-163)**

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.

The facts indicate that Claimant was a Bridge and Building Foreman at the time the subject incident arose. On July 6, 2016, Special Agent Palmer received a telephone call and was advised that the Claimant may have stolen company material. The Special Agent investigated the

allegations which included an interview of the Claimant on July 18th. During that interview the Claimant granted the Carrier the right to search his property without a Search Warrant which was conducted on the aforementioned date. After a search of the Claimant's property on July 20, 2016, the Claimant was directed to attend a formal Investigation on July 28, 2016, which was mutually postponed until August 4, 2016, 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 misuse and improper care of company property when you took railroad property to your residence at 5847 Ben D. Smith, Silsbee, TX for personal use.

This investigation will determine possible violation of MWOR 1.19 Care of Property and MWOR 1.25 Credit or Property."

On September 1, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation because the Carrier issued a faulty Notice of Investigation. Rule 13(a) specifically states that an Investigation must be scheduled no later than fifteen (15) days from the date of the occurrence or 15 days from the date of first knowledge of a Carrier Official, excluding the Security Department. It argued the record shows that Special Agent Palmer advised Manager of Structures, Ms. Kasie Holle of the allegations on July 6, 2016, and discussed the need to conduct interviews. The Organization argued that the Investigation was not scheduled until July 28th, which was 22 days after Ms. Holle received first knowledge, therefore, the Investigation was untimely. The Organization further argued that because of that procedural error the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier did not meet its burden of proof that Claimant misappropriated company material instead it was shown that the articles that were found at the Claimant's home were items he dug out of a dumpster after the Carrier had thrown them away to be picked up by a disposal company. It argued that if the Carrier had wanted the scrap material it would not have been thrown away and when the material was found the Carrier would have asked for it to be returned if it had any real value, which was not done. The Claimant also testified that he had never been told that he could not take trash from a dumpster and if he had ever been instructed such he would never had taken any discarded material and if the Carrier had asked for its return he would have immediately taken back to the Carrier. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that the Organization's objection regarding Rule 13(a) is invalid because it was not raised during the Investigation. It argued that because the Organization chose not to raise that argument at the Investigation giving the Carrier the opportunity to properly address it while the Investigation was open, the Organization had waived the right to raise such argument in its appeal after the Investigation had closed. It further argued that on July 6th the Special Agent only told Carrier Officer Holle of the allegation made against the Claimant, but advised her that interviews and investigative work still needed to be done to see if there was any substance to the allegation before charges might be levied. Therefore, according to the Carrier it was not until July 20, 2016, the Carrier had enough information to file its Notice of Investigation which meant that the Investigation was held in a timely fashion. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier argued that the Claimant freely confessed that the material shown in the photographic exhibits was removed from a Carrier scrap bin on Carrier property. It further stated that Claimant also admitted that the material was from a bridge renewal project at Romayor done sometime between 2006 and 2010. It further argued that employees have never been allowed to remove company material without first obtaining some form of permission. Additionally, it stated the Carrier material in question was not trash, but was instead scrap and the Claimant needed permission before he was entitled to remove the material and absent that approval the Claimant was guilty as charged. 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 will first address the Organization's procedural argument. The Carrier is correct that there was no discussion at the Investigation over the timeliness of the Hearing, however, the Board has determined that the Carrier's stronger argument is that Special Agent Palmer had not completed the investigative process until July 20th when he turned over his findings to Carrier Officer Holle. Palmer's conversation with Holle on July 6 was not in depth as Palmer had no facts to offer Ms. Holle at that time, only an allegation of misbehavior. The filing of a Notice of Investigation at that juncture on the basis of a telephonic allegation would have been premature and with no foundation. It was not until July 20, 2016, that an Officer of the Carrier was able to initiate disciplinary hearing proceedings after receiving the findings of Special Agent Palmer. It is determined that the Investigation was held within the prescribed time limits set forth in Rule 13 and the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

There is no dispute between the parties that Claimant had in his possession scrap material taken from a bridge renewal project at Romayor sometime between 2006 and 2010. Claimant testified that he assumed the material was either considered to be trash and/or scrap and not wanted by the Carrier once it was thrown into a dumpster or trash bin whereas the Carrier argued that the material was not trash and was scrap that still had marginal value as the wood products could have been sold to co-generation facilities who burn them to produce energy while the metal could have been sold for recycling purposes. It is clear that the Carrier met its burden of proof that the Claimant had at his home Carrier scrap material that Claimant did not secure permission to take.

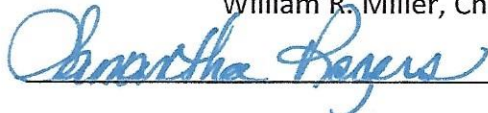
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 35 years of service with two Formal Reprimands and ten demerits and no active discipline. Mr. Ross R. Ruckel, Structure Supervisor, testified on page 47 of the transcript, that Claimant was "old school" the hardest working employee he had ever known who did quality work (a craftsman), dependable and punctual. There was no showing that Claimant's removal of the scrap material was for personal enrichment as the material had set on his property for at least six to ten years. Claimant erred when he took the material without permission and should have known that was a mistake, but dismissal for a long tenured employee with a very good work record was excessive and contrary to the spirit of the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds that the discipline is reduced to a lengthy suspension that is corrective in nature. The suspension period will run from the date Claimant was removed from service until March 31, 2017. Claimant will be made whole for loss of all monies since April 1, 2017, until reinstated in accordance with Rule 13(f) of the Discipline Rule.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 291, (Case No. 291)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

REQUEST FOR INTERPRETATION of P.L.B. No. 7048, Award No. 217:

On March 3, 2020, the Organization advised the Neutral Member of the Board that a dispute had arisen over the implementation of Award No. 217 because the Carrier had refused to make the Claimant whole for all losses of earnings and benefits suffered during the period he was improperly withheld from service (dismissed) by the Carrier on the basis that the Claimant had resigned.

The instant dispute was a dismissal case wherein it was determined that the Carrier met its burden of proof that Claimant was guilty as charged, but the discipline was excessive. Award No. 217 was adopted on January 5, 2018, and it concluded as follows:

“...the Board finds and holds that the discipline is reduced to a lengthy suspension that is corrective in nature. The suspension period will run from the date Claimant was removed from service until March 31, 2017. Claimant will be made whole for loss of all monies since April 1, 2017, until reinstated in accordance with Rule 13(f) of the Discipline Rule.”

The Question at Issue: **“Was the Carrier’s assessment of a 36-month review period to the Claimant’s Disciplinary Record upon Claimant’s reinstatement in accordance with Award No. 217?”**

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.

It is the position of the Organization in its Interpretation Request of March 3, 2020, that the Carrier has asserted that Claimant resigned from its service, therefore, it does not owe the Claimant any monies. The Organization initially argued that the Carrier has offered no proof of resignation from the Claimant and without proof of such and an examination of that resignation it is clear that the Carrier has not fulfilled the requirements of Award No. 217. Subsequently, in its Submission it dropped the argument regarding Claimant's alleged resignation and instead has asserted that when Claimant was reinstated to service the Carrier added a Three Year Review Period to begin on the day of Claimant's reinstatement. It asked that the Three Year Review Period be stricken from Claimant's Disciplinary Record because it was not part of the decision of Award No. 217. It closed by asking that its Interpretation Request be sustained.

It is the Carrier's position that the record substantiated that Claimant never resigned from its service and is presently working as an Assistant Foreman on a B&B Gang. It asserted that it has complied with Award No. 217 and it asked that the Organization's requests be denied.

The Board has been requested to issue an Interpretation of Award No. 217 which is the fifth of five Interpretation Requests to this Board during its ten plus years of existence. The central issue in the instant case is whether or not the Carrier adhered to the aforementioned Award.

Award No. 217 was adopted by the parties on January 5, 2018, and the Carrier was directed by the Board to make the Award effective on or before 30 days following the date the Award was signed by the parties.

The Carrier issued a Reinstatement Letter on January 31, 2018, to the Claimant which stated in pertinent part:

"Public Law Board 7048 decided your case and rendered Award 217, which reduced your dismissal for misuse and improper care of company property by taking railroad property to his personal residence, to a lengthy Level S actual suspension through March 31, 2017. You will be reinstated to service with seniority restored, but no pay from the date you were removed from service through March 31, 2017."

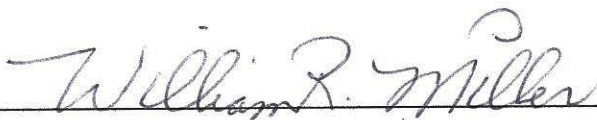
The letter goes on to explain to the Claimant five things Claimant needed to complete before Claimant would be returned to service. There is nothing in that letter that states or infers that the Claimant was being placed under a Three Year Review Period.

The Organization has offered nothing other than an allegation that the Carrier placed the Claimant under a Three Year Review Period. Examination of the Carrier's Submission reveals that it never addressed that issue. It appears that the Carrier was not aware of the Organization's complaint as there is no correspondence between the parties over the issue.

The Board is not persuaded that the Carrier placed the Claimant under a Three Year Review Period, however, there was an inference by the parties that may have occurred. Therefore, the Board finds and holds that the issue is remanded to the parties for settlement. The parties are advised that Award No. 217 never contemplated that Claimant should be placed under a Three Year Review Period upon reinstatement as the Award considered the lengthy suspension as being fully corrective of Claimant's offense and the final resolution of the disciplinary matter. The parties are instructed to review the Claimant's Disciplinary Record and if the Claimant was placed under a Three Year Review Period that Review Period should be removed from his record.

AWARD

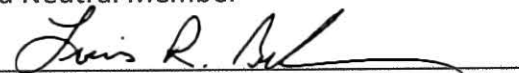
Interpretation Request remanded to the Parties in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: 10-14-20