

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 335, (Case No. 335)**

**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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 3, 2020, when Claimant Irvin A. Livingston (1755420) was assessed a Standard Formal Reprimand with a One Year Review for failure to report for duty at the designated time and place from February 18, 2020 through February 21, 2020.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing August 3, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0151) (Organization File No. 2417-BN40A1-206)**

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 did not report for duty at the designated time and location on February 18 through February 20, 2020, and allegedly did not notify proper authority of his absences and because of that Claimant was directed to attend a formal Investigation on March 3, 2020, which was mutually postponed until March 5, 2020, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report for duty at the designated time and place from February 18, 2020 through February 21, 2020 while working as a Machine Operator on TTPX0001 near Grants, NM.”

On April 3, 2020, Claimant was notified that he had been found guilty as charged and was assessed a Standard Formal Reprimand with a One Year Review Period.

It is the Organization’s position that Claimant received permission to be absent on February 18 through February 21, 2020, from his Foreman, Mr. John Goff, which was substantiated by Mr. Goff’s written statement of March 4, 2020, wherein Goff wrote that Claimant called every day prior to his shift to advise Foreman Goff that Claimant would be absent. Therefore, the Organization argued that Claimant met the requirement to secure proper permission to be absent. It reasoned that the Carrier did not meet its burden of proof and if it had (which it didn’t) the discipline was excessive. It requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Organization’s appeal is procedurally defective because the Organization failed to identify the governing Agreement nor did it cite an alleged Rule violation, therefore, the claim should be denied without reviewing the merits.

Turning to the record the Carrier asserted that the transcript and exhibits show that in this case, Assistant Roadmaster Mackey was the “proper authority” to request and receive permission to be absent and not Foreman Goff. The Carrier asserted that Mr. Mackey testified, on Page 6 of the Transcript, he held a meeting with Claimant’s Gang, with Claimant in attendance, on January 13, 2020, wherein Mackey stated he instructed crew members before marking off to be absent with permission they should secure that permission from him in accordance with El G. 4. It argued that an employee’s primary contact for notification should be your Supervisor and Claimant was informed on at least two occasions that Claimant needed to call his Supervisor, Mr. Mackey, not the Foreman. The Carrier closed that after proving that Claimant was guilty as charged the Claimant was appropriately disciplined. It asked 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 Carrier’s procedural argument. The Board is not persuaded by that argument and it is determined that the case will be resolved on its merits.

Review of the record reveals that Supervisor Mackey testified that the call for a first layoff could be made to the Foreman on the Gang, however, any subsequent call to layoff should have been made to him in accordance with EI G.4. Mackey further testified that Claimant had been instructed on at least two occasions that he needed to call his Supervisor, Mr. Mackey, not the Foreman.

Claimant confirmed Supervisor Mackey's testimony when Claimant admitted that after the first day of his continuing absence Claimant had an obligation to contact Supervisor Mackey to secure permission to be absent. It is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately ten years of service. Claimant's disciplinary record shows that Claimant signed a waiver for a violation of the same subject Rule in 2010 and again in 2016. The discipline was corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

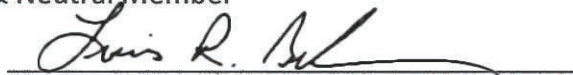
Claim denied.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: July 2, 2021