

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 339, (Case No. 339)**

**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 March 10, 2020, when Claimant Kevin D. Staggs (1079508) was assessed a Standard 30 Day Record Suspension with a One Year Review Period for failure to report to work at the designated time on February 3, 2020, in violation of MWOR 1.15.**
- 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 March 10, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-20-0100) (Organization File No. 2600-SL13A1-202)**

**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 on February 3, 2020, Claimant failed to report to work on time while assigned as a Sectionman on Gang ID TRPX0005 near Thayer, MO, and because of that Claimant was directed to attend a formal Investigation on February 13, 2020, which was mutually postponed until February 20, 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 to work at the designated time on February 3, 2020 in or near Thayer, MO while assigned as a sectionman on gang ID TPRX0005.**

**This investigation will determine possible violation of MWOR 1.15 Duty-Reporting or Absence.”**

On March 10, 2020, Claimant was notified that he had been found guilty as charged and was assessed a Standard 30 Day Record Suspension with a One Year Review Period.

It is the Organization’s position that the Carrier did not provide the Claimant with a “fair and impartial” Investigation because the Carrier did not properly notify the Claimant “in person” to attend the Hearing and then chose to proceed with the formal Investigation without the Claimant being present. Additionally, the Hearing Officer allowed non-pertinent exhibits and/or testimony such as information about Coaching and Counseling Sessions with the Claimant to be introduced during the Hearing showing pre-judgement of guilt. It asked the discipline be rescinded without reviewing the merits.

Turning to the merits, it stated the record shows that Claimant was running late for work on February 3, 2020, and because of such he contacted his immediate superior the Foreman, prior to the morning job briefing that he would not arrive to work on time. The Foreman then informed Roadmaster Mason of the Claimant’s status prior to the job briefing. It argued Claimant notified the Carrier of Claimant’s tardiness in accordance with Carrier’s Engineering Instruction G.4, therefore, it reasoned the Claimant met his obligation to report such in a timely manner and it concluded that no discipline should have been administered. It requested the discipline be set aside and the claim be sustained as presented.

It is the position of the Carrier that there were no procedural flaws in the handling of Claimant’s Investigation. It argued that the Notice of Investigation was delivered to Claimant’s address on file, and sent via certified mail in compliance with Rule 13. It further argued the Transcript shows that it was not possible to hand deliver the Notice because Claimant did not work a full day of service from January 31, 2020 through the date of the Investigation held on February 20, 2020. The Carrier reasoned that Claimant willingly chose not to attend his own Investigation. Lastly, it argued other allegations of procedural misconduct did not exist as the record substantiates that the Organization was not hindered in its defense of the Claimant. It requested that the claim be resolved on its merits.

Addressing the record, the Carrier asserted it was not refuted that the Claimant was tardy on February 3, 2020. It argued that Claimant had been counseled prior to the subject incident on January 31, 2020, wherein Claimant was instructed that in the future Claimant was required to notify both his Foreman and Roadmaster (See Pages 18 and 19 of the Transcript – Testimony of Division Engineer Lopez) if he was going to be tardy or absent. It further asserted Claimant had a history of failing to report to work at the designated time of his assignment. It closed that after showing that Claimant was guilty as charged it disciplined Claimant appropriately. It asked that the discipline not be disturbed and the claim remain denied.

This is a companion case to Award Nos. 340, 341, 342 and 343 and is the first of five discipline cases involving the same Claimant. Chronologically, this incident was the second dispute to arise.

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 Carrier sent the Notice of Investigation and two subsequent Notices of Postponement via certified mail to Claimant's last known address on file. Contrary to the Organization's argument there is no requirement that Carrier must hand-deliver a Notice of Investigation to an employee as the customary delivery is via certified mail and has been the historical practice on the property. Additionally, it was not refuted that Claimant did not work a full day from January 3<sup>rd</sup> through February 20<sup>th</sup>, therefore, it would have been difficult to hand deliver the Notice. It is determined that the Claimant chose not to appear at the Investigation and Claimant has offered no proof that he did not receive the Notice of Investigation. The Carrier did not violate the Claimant's right to a "fair and impartial" Hearing in this instance when it was held in "absentia". In Award No. 145 of this Board it was stated in pertinent part:

**"...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 and Public Law Board No. 6402, Award No. 202...."**

Additionally, the Board has reviewed the Organization's other procedural arguments and do not find them persuasive. The Board has concluded that the Investigation and appeal process met the guidelines of the governing Agreement. The dispute will be resolved on its merits.

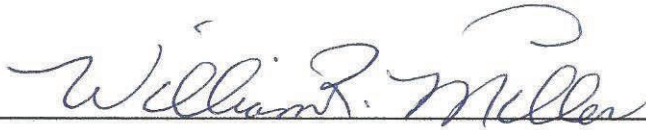
Turning to the merits, the Transcript substantiated that Claimant was tardy on February 3, 2020, and did not advise both his Foreman and Roadmaster that he would be late for work.

Because Claimant was not in attendance at the Formal Investigation there was no rebuttal offered as to why Claimant was late or why he did not personally notify both his Foreman and Roadmaster he would be tardy, as Claimant had been instructed only a few days prior to the instant incident to do such (See Award No. 340). Substantial evidence was adduced at the Investigation 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 18 years of service which included similar 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 the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

**AWARD**

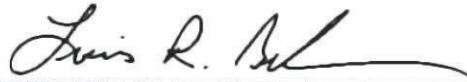
Claim denied.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: July 2, 2021