

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 350, (Case No. 350)**

**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 June 23, 2020, when Claimant James I. Barela (1496595) was dismissed from service for misconduct, conflict of interest when Claimant directed customers to use company owned by his wife for repairs on derailment on industry track in violation of MWOR 1.6, MWOR 1.9 and MWSR 1.2.13.**
- 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 June 23, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0218) (Organization File No. 2415-SL13C5-2021)**

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 Claimant was a Track Supervisor working out of Albuquerque, New Mexico, and during the month of January, 2020, it was alleged that Claimant may have directed customers to use a company owned by his wife for repairs on a derailment on an industry track in Albuquerque, New Mexico, which was a conflict of interest and because of that Claimant was

directed to attend a formal Investigation on May 4, 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 misconduct, behavior that brought criticism to BNSF and conflict of interest on multiple occasions beginning in 2019, including a specific incident in January 2020, when you allegedly directed customers to use a company owned by your wife for repairs on a derailment on industry track that you assessed as Track Supervisor in Albuquerque, NM. The date BNSF received first knowledge of this alleged violation is April 21, 2020.”

On June 23, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization’s position that the Carrier did not provide the Claimant with a “fair and impartial” Investigation because the Notice of Investigation failed to provide the Claimant and the Organization with any knowledge as to what Rules were allegedly violated thus hampering the Organization’s defense. It asked the discipline be rescinded without reviewing the merits.

Turning to the merits, the Organization argued that the record shows that Claimant was divorced and had no affiliation with his ex-wife or her landscaping business. Claimant testified with no rebuttal that his former spouse hated Claimant and had nothing to do with Claimant which would make it impossible for Claimant to direct any work towards her company. Additionally, it asserted that no evidence was provided by any Carrier witnesses that Claimant had committed any malfeasance or had directed any work towards his ex-wife’s company. Instead, it stated the record shows via the statement and testimony of Trainmaster Hart, and statements from the owner of Guzman Tractor Services, Mr. Guzman, and Foreman, Richard Johnson that Claimant did nothing wrong. It concluded that the Carrier had not met its burden of proof and 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 errors in the handling of Claimant’s Investigation and the Organization’s argument that the Notice of Investigation was improper because it did not contain any Rules was in error. It argued that the Notice clearly explained to the Claimant and the Organization the matter under investigation, therefore, the Claimant’s defense was not hindered. It requested the claim be resolved on its merits.

Addressing the record, the Carrier asserted the evidence shows that Claimant had personal interests that conflicted with the interests of the Carrier when he directed work towards

his ex-wife's company and that Claimant displayed dishonest intentions regarding the type of work performed by her company when Claimant stated it was a landscape enterprise that also bought and sold railroad ties when in actuality it did railroad track repair-type work. It determined Claimant was guilty as charged and in light of the seriousness of Claimant's misconduct, dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments as it is clear that Claimant's defense was not hindered as the transcript shows that the Claimant and Organization understood the charges and mounted a solid defense. It is determined that the case will be resolved on its merits.

In presenting its case against the Claimant the Carrier relied heavily on the testimony of Project Manager 2 Compliance, Ms. Courtney L. Austin for the Carriers' Anti-Fraud and Compliance Department. Ms. Austin testified she was assigned to investigate an anonymous tip that was received alleging that Claimant was directing business to his wife's company, Lisa Barcela with LB Enterprises. As part of her investigation, Ms. Austin interviewed the Claimant, Mrs. Barcela (Claimant's ex-wife) and various Carrier employees and Carrier customers American Gypsum, American Publishing, and Builders First Choice all of whom shared an Industry Track on the Claimant's territory where he was assigned as a Track Supervisor and where derailment work was done in early January 2020.

Ms. Austin testified all three companies were concerned of a possible conflict of interest between LB Enterprises and Claimant on the basis that Claimant might be directing work towards his ex-wife's company.

Austin testified on Page 14 of the Transcript, that American Publishing advised her that it had used LB Enterprises to do work for them, but that Claimant had never recommended LB Enterprises to do the work. On Page 15 Austin stated that American Gypsum told her that Claimant had advised American Gypsum he contacted a company to repair and replace track Claimant had taken out of service as part of his duties as Track Inspector. Ms. Austin did not name what company Claimant had allegedly contacted to do the work. The third company Builders First Choice that Ms. Austin interviewed never stated that Claimant recommended LB Enterprises, but only that was the company they paid for work done. On Pages 36 and 37 Ms. Austin concluded her testimony in pertinent part by stating:

"I do not have any proof that Mr. Barela benefitted from these repairs...but it did appear to me to be a conflict of interest."

Review of Roadmaster Gallegos testimony on Page 11 reveals that the Roadmaster stated that the Claimant was a good employee and on Page 51 Gallego further testified he had no knowledge of Claimant profiting due to any work done by LB Enterprises.

Claimant repeatedly testified that he never recommended any contractors to do any railroad repair work for the aforementioned companies (See Page 56) and the only person who recommends contractors to do work was the Trainmaster. Claimant further testified that he and his wife had been divorced since October 18, 2019, (See Page 53) and had been less than cordial since well before that date. Additionally, Claimant testified that the only contractor he dealt with doing the January 2020 repair work was Guzman Tractor (See Page 56).

On Page 73 of the Transcript, Trainmaster Joseph Hart was questioned as follows:

“James Orr: ...Are you familiar with the derailment in January where Mr. Barela’s ex-wife is alleged to have provided some invoicing or work for industry customers?”

Joseph Hart: Yes. I am aware of uh I if it’s the derailment you’re referring to, It’s the one up on Zone 7 hill.

James Orr: All right. Back in January?

Joseph Hart: Yes.

James Orr: Do you remember, at any time in January, did any of those customers contact you and ask for recommendations on who they should use?

James Hart: Yes. There was a couple of customers; one of those was American Gypsum. Another one of the customers that contacted us was Albuquerque Publishing.”
(Underlining Board emphasis)

The testimony and recollection of Trainmaster Hart as to who arranged for American Gypsum’s track repair work is contrary to Ms. Austin’s testimony. Ms. Austin testified that American Gypsum had told her that Claimant arranged for a contractor to do their repair work without any consultation. The Board has no reason to question Ms. Austin’s testimony as to what American Gypsum told Ms. Austin, but it is apparent that American Gypsum erred in its recollection of how or who arranged for repair work in January 2020 as Mr. Hart specifically stated that American Gypsum called him for a recommendation. That coupled with the fact that no testimony was offered that the other two companies on the same Industry Track ever stated Claimant recommended LB Enterprises to do their repair work is consistent with the Claimant’s testimony. Ms. Austin was correct when she testified there was no proof that Claimant

benefitted from any repair work done by LB Enterprises and any suspicions of a conflict of interest Carrier might have had where not sufficient reason for the dismissal of Claimant. It is determined that the Carrier did not meet its burden of proof that Claimant was guilty as charged.

The Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from service, until reinstated in accordance with Rule 13(f) of the Discipline Rule. The Board advises the parties to consider precedential Award No. 287, Interpretation of Award No. 202, of this Board in its settlement of monies owed Claimant.

AWARD

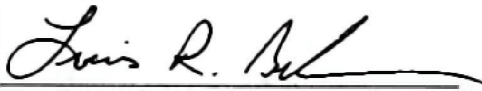
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

AwardDate: March 25, 2022