

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 354, (Case No. 354)**

**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 26, 2020, when Claimant Patrick D. King (0278390) was dismissed from service for theft of time on June 14 and 15, 2019, account of requesting monies for work when absent from service in violation of MWOR 1.6 Conduct.**
- 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 26, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-20-0248) (Organization File No. 2401-BN40D2-194)**

**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 assigned as a Truck Driver on Section Gang TSEC1381. On June 17, 2019, Claimant’s Foreman, Mr. Dan Morsch notified Roadmaster Handzus of some discrepancies in Claimant’s entries for compensation on June 14 and 15, 2019. Claimant’s pay entries reflected that Claimant worked eight hours on each of those dates even though Foreman Morsch did not see him at any time on either date and because of that Claimant was directed to

attend a formal Investigation on July 1, 2019, which was mutually postponed 11 times until June 12, 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 theft of time on 6/14 and 6/15 when you were absent from work but entered time for yourself in EAM while assigned as a truck driver on TSEC 1381. The date BNSF received first knowledge of this alleged violation is June 17, 2019.”**

On June 26, 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 Claimant was denied a “fair and impartial” Investigation because it was held in “absentia”. It argued that the Hearing should have been further postponed to ascertain whether or not the Claimant was medically fit to attend as Claimant was on Medical Leave or if Claimant had some other valid reason why he could not attend and because that was not done it asserted that the discipline should be set aside and the claim sustained without reviewing the merits.

Turning to the merits, it argued that the Carrier failed to meet its burden of proof because it chose not to hear the Claimant’s side of the case. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that it did not err when it held the Investigation in “absentia”. It asserted Claimant’s failure to attend his Investigation was Claimant’s choice, and had Claimant or the Organization contacted the Carrier seeking accommodations related to Claimant’s medical condition, those accommodations would have been met. But to allow multiple postponements to continue while an employee was on a Medical Leave, without any credible evidence showing that a medical condition prevented attendance or that accommodation could not be met, would consequently allow the Claimant too essentially “stonewall” the Investigation indefinitely.

It argued that in the Organization’s appeal it asserted that Claimant was unable to attend his Investigation due to medical complications with Claimant’s cancer treatment and weak immune system associated with that condition and fear of contracting COVID 19 at the Hearing location. However, the Carrier stated that the only medical condition mentioned during the Investigation was an alleged diagnosis of Baroreflex failure by an unidentified doctor on an unspecified date. It further stated no specific details or documents were provided, thus no medical proof was offered by the Claimant or the Organization that Claimant couldn’t attend the

Investigation, therefore, it was correct in holding the Investigation. It requested the claim be resolved on its merits.

Addressing the record, the Carrier asserted the evidence shows that Claimant did not work on June 14 or 15, 2019, Claimant submitted claims for compensation for both of those dates. Exhibit 12 attached to the Investigation proves that Claimant submitted entries for compensation and that Claimant after having been caught, changed those claims for work compensation to FMLA-Medical Leave of Absence the day after he received the Notice of Investigation. Carrier argued that after proving Claimant was guilty as charged it appropriately dismissed Claimant as dishonesty is a Stand-Alone Dismissible Violation. It asked that the discipline not be disturbed and the claim remain denied.

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 is clear that the Carrier had granted multiple postponements of the Investigation and had delayed holding the Hearing for almost one year. Additionally, the record shows that when the Organization made its appeal in behalf of the Claimant on August 20, 2020, the Claimant had still failed to offer any reason why he did not attend the Investigation. It is determined that the Claimant chose not to appear at the Investigation and he offered no proof that he was either ill or unable to attend the Hearing for other reasons. The Carrier did not violate the Claimant's right to a "fair and impartial" Hearing when it was held in "absentia". In Award No. 145 of this Board it was stated:

**"...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...."**

Turning to the merits, the transcript and evidence substantiated that Claimant changed his payroll entries from time worked to FMLA-Medical Leave of Absence on the morning of June 21<sup>st</sup>, the day after Claimant received the Notice of Investigation. Substantial evidence, that was not refuted, 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 offense Claimant had approximately six years of service. Claimant's violation of dishonesty was a Stand-Alone Dismissible offense. In accordance with the Carrier's Policy for Employee

Performance Accountability (PEPA) the discipline was appropriate and 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

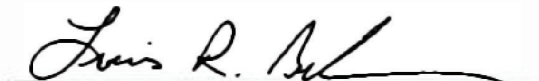
Claim denied.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: March 25, 2022