

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 358, (Case No. 358)**

**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 July 17, 2020, when Claimant Levon Tsabetsaye (1159771) was assessed a Level S 30 Day Record Suspension for failure to report for duty beginning May 4, 2020 through May 18, 2020, while working as an Assistant Foreman on TTPX0056 while working on the Clovis Subdivision 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 July 17, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0263) (Organization File No. 2417-SL13A1-2011)**

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 Assistant Foreman to Gang TP56, in Belen, NM, beginning May 4 through May 15, 2020. The gang was assigned Monday through Thursday from 0500 hours to 1500 hours under the supervision of Roadmaster C. Gallegos. On Monday, May 4th, Claimant did not report for service and his Foreman, A. Torres, was not able to reach

him via telephone. Claimant did not report for service again until May 18, 2020. It was alleged that Claimant may have failed to secure proper approval for the eight days of absence beginning May 4th through May 15th and because of that Claimant was directed to attend a formal Investigation on May 19, 2020, which was mutually postponed until June 26, 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 beginning May 4, 2020 and continuing while working as an Assistant Foreman on TTPX0056 while working on the Clovis Subdivision.”

On July 17, 2020, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a One Year Review Period.

It is the Organization's position that Claimant abided by all Rules while being off beginning May 4, 2020. According to it, testimony shows that Claimant secured an emergency vacation from April 20, 2020, through May 1, 2020, and on April 29th Claimant was contacted by Roadmaster Hernandez about Claimant's family situation at which time Claimant testified he informed Mr. Hernandez he would need additional time off. It asserted that Mr. Hernandez never told the Claimant that Hernandez was relieving a position in Kingman, AZ, on May 4th through 7th and was not returning to Gang TTPX0056 in Los Lunas, NM. It argued that Mr. Hernandez claimed that he contacted Roadmaster Gallegos in Belen, NM, on May 5, 2020, where the gang was located and then Hernandez stated he contacted Claimant on May 7 at which time Claimant assumed Mr. Hernandez had explained the situation to Roadmaster Gallegos. It reiterated that Claimant advised Mr. Hernandez on April 29th that Claimant would need more time off and Claimant had no way of knowing that Roadmaster Hernandez was not going to be his Supervisor between May 4 and 7. It reasoned that there was miscommunication between Roadmasters that led to the confusion over Claimant's status through no fault of the Claimant. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that during the time of absence Claimant was assigned to Mobile Gang TP56. While working in Kingman, AZ, under Roadmaster Hernandez, Claimant secured an emergency vacation for the period of April 20, 2020 through May 1, 2020. After that period the gang was required to mobilize to Belen, NM, and report Monday, May 4th under the supervision of Roadmaster, M. Gallegos. It asserted that the Foreman on the gang for both locations was Mr. Torres. It argued that was important because Claimant had the proper contact information to request additional time off and elected to remain absent without authority. It

further argued Claimant admitted he did not follow up with Mr. Hernandez to gain proper approval for the additional eight days of absences or with his new Roadmaster, Mr. Gallegos. Carrier stated that after proving that Claimant was guilty as charged it appropriately disciplined the Claimant. 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 it is determined that the Investigation and appeal process met the guidelines of Rule 40 of the former BN Agreement.

During the Investigation Claimant testified that he contacted Roadmaster Hernandez to secure permission to be off additional time on April 29th (See Page 15 of the Transcript). On Pages 15 and 16, Mr. Hernandez was recalled for questioning and asked whether or not Claimant called him on April 29th to ask for extra days off. Mr. Hernandez testified that the only time Claimant called him for emergency time off was on April 19th and he had no conversation with the Claimant on April 29th wherein he allegedly granted Claimant additional time off. Mr. Hernandez also testified that prior to the subject incident he had called the Claimant on March 27, 2020, because Claimant's co-workers were concerned about his wellbeing as Claimant did not seem to be his normal self at which time they discussed the Employee Assistance Program (EAP). He further stated that they subsequently had a meeting on April 14th that included Carrier Officer J. Sanchez who referred Claimant to the EAP (See Page 18).

On Pages 32 and 33 of the Transcript the Claimant was questioned as to whether or not he secured approval for the period of May 11 through May 15. Claimant admitted he did not contact anyone from the Carrier to secure permission to be absent.

Review of Claimant's testimony regarding the week of May 4th finds it to be somewhat evasive and not as direct and credible as that of Roadmaster, Hernandez. The Board is persuaded that Claimant did not secure permission to be absent the week of May 4th and that coupled with the fact that Claimant admitted that he was not granted permission to be off the week of May 11th substantiates 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 23 years of service with a clear record, as prior discipline had been worked off. The discipline exercised by the Carrier was 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

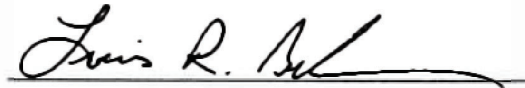
Claim denied.

A handwritten signature in blue ink, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Chairman & Neutral Member

A handwritten signature in blue ink, reading "Michelle D. McBride", is written over a horizontal line.

Michelle McBride, Carrier Member

A handwritten signature in blue ink, reading "Louis R. Below", is written over a horizontal line.

Louis R. Below, Employee Member

Award Date: March 25, 2022