

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 362, (Case No. 362)**

**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 November 5, 2020, when Claimant Martin L. Dawson (0283978) was assessed a Level S 30 Day Record Suspension for violations that occurred on or about 0400 hours, September 2, 2020, at or near MP 65.5 on the Lakeside Subdivision, Cheney, Washington, resulting in a report Claimant operated a Carrier vehicle with a suspended driver’s license in violation of MWSR 12.1.1 and the Corporate Policy on Company Vehicles.**
- 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 November 5, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-20-0409) (Organization File No. 0493-BN40N1-20104)**

**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.

On September 2, 2020, Claimant did not report at the designated time and workplace site as required. While looking into that matter, Assistant Roadmaster T. O’Hotzke was informed by Roadway Equipment Supervisor, Mr. S. Foster that Claimant did not have a driver’s license

because Claimant had some incidents earlier in the year. Mr. O'Hotzke asked the Claimant about his license on September 3<sup>rd</sup> and Claimant told Mr. O'Hotzke that he did not have a driver's license. Claimant stated he had a temporary work permit, but had left it at the hotel that morning.

Company Officers continued to ask Claimant to provide a copy of his driver's license or the temporary work permit he claimed to have, but Claimant never produced a copy and because of that Claimant was directed to attend a formal Investigation on September 15, 2020, which was mutually postponed until October 6, 2020, concerning in pertinent part the following:

**"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with alleged violations that occurred on or about 0400 hours, September 2, 2020, at or near MP 65.5, on the Lakeside Subdivision, Cheney, Washington, resulting in a report of you operating a BNSF Vehicle/equipment with a suspected suspended driver's license, while you working as a Machine Operator, Gang I.D. Alleged violations, include but are not limited to failure to operate a company vehicle/equipment without a valid driver's license."**

On November 5, 2020, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a Three Year Review Period.

It is the Organization's position that the Carrier did not provide the Claimant with a "fair and impartial" Investigation because it was held in "absentia". It argued that the Hearing should have been postponed because the Claimant had checked into an approved Carrier Employee Assistance Program facility and would not be available for at least 30 to 40 days. It further argued that the Carrier failed to render a timely decision within the required time limits of 30 days. Lastly, it argued that it agreed to waive a reading of the Notice of Investigation into the record provided the original Notice with its errors were attached, which wasn't done, therefore, it argued that was a fatal error. It asserted that the discipline should be set aside account of the aforementioned reasons and the claim be sustained as presented.

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 and it did not produce any evidence to show that Claimant drove a Carrier vehicle without a current driver's license. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier there were no procedural errors in the handling of the Claimant's case. It first stated that the decision was rendered with written notice given to the Claimant within the 30 day requirement. It specifically stated:

**“The decision letter is clearly dated November 5, 2020, which is 29 days following the Investigation. Contrary to the Organization’s calculations, day 1 for time limit purposes in this case would be the day following the Investigation, October 7, 2020. But even if the date the United States Postal Service (USPS) belatedly scanned the decision letter into its systems (November 6, 2020, 12:10 am-10 minutes after midnight) is used, the decision was still rendered and given to the Claimant (placed into the mail) within 30 day requirement because November 6, 2020 was the 30<sup>th</sup> day following the Investigation.”**

Secondly, it argued 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. It argued the Investigation was mutually postponed twice and the Investigation was moved from Spokane, Washington to Whitefish, Montana, to accommodate the Claimant. Therefore, there was no question Claimant knew about the Hearing and it further argued Claimant’s representative acknowledged that Claimant chose not to be at the Hearing and there was no request prior to the Hearing for a postponement.

Lastly, it argued there is no requirement to read the Notice of Investigation into the record as it was attached to the transcript which was agreed to by the Organization. It stated that a reading of the transcript shows that the Organization was not “blindsided” by anything that arose during the Hearing and fully understood the Charges. It asked that the claim be resolved on its merits.

Turning to the record, it asserted Claimant operated a Company vehicle without a required unrestricted driver’s license. It argued Carrier Witness O’Hotske testified the fueling records were evidence of the fact that Claimant was driving the Company Van because he was the person that fueled it and that coupled with the fact that Claimant admitted he did not have an unrestricted driver’s license showed he was guilty as charged. It asked that the discipline not be disturbed and the claim remain denied.

This is a companion case to Case Nos. 363 and 364 of this Board. All three cases are discipline cases involving the same Claimant and same time period. Additionally, all of the Investigations were held on the same day and share the same procedural issues.

The Board has reviewed the transcript and record of evidence and will first address the Organization’s procedural argument that Carrier’s decision was untimely. The parties are in agreement that the Carrier was required to render its decision within 30 days following the

Investigation which translated to meaning that the Carrier was obligated to place its decision into the mail no later than the 30<sup>th</sup> day. The Carrier stated it mailed its decision on November 6, 2020. The Carrier is correct that day one (1) for calculating time limit purposes in this case would be the day following the Investigation, October 7, 2020. Using that date for calculating the time limits there were 24 days in October. The decision was written on the 29<sup>th</sup> day, November 5, 2020, and the decision was subsequently mailed on the 30<sup>th</sup> day, November 6<sup>th</sup>. It is determined that the Carrier's decision was timely.

The Board will next address the Organization's procedural argument that the Investigation should not have been held in "absentia". The record is clear the Carrier granted two postponements and a change of venue from Spokane, Washington to Whitefish, Montana, in behalf of the Claimant, that resulted in additional costs to the Carrier. Those changes were made prior to Claimant's voluntary enrollment into an EAP facility and the evidence shows that Claimant was advised of the date of the Hearing and its location. Claimant made no effort to advise the Carrier of his intentions to enroll in the EAP prior to the Investigation, nor did he make any request for an additional postponement of the Investigation. Instead, Claimant relied upon the Organization to ask for another postponement, at the Hearing, after Claimant already knew that the Carrier and Organization had traveled to the new Hearing site. Claimant's non-attendance at the Hearing was voluntary and the Carrier was within its right to hold the Hearing in "absentia".

Other procedural arguments made by the Organization were not persuasive and the case will be resolved on its merits.

Evidence and testimony presented at Investigation showed Claimant had operated a Carrier vehicle while only having a temporary work permit which only allowed Claimant to drive a vehicle while commuting to and from his residence which was a violation of MWSR S-12.1.1. Because the Claimant voluntarily chose not to attend the Hearing the Carrier's evidence was not effectively refuted, therefore, substantial evidence was adduced at the Investigation that the Carrier met its burden of proof and Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately six years of service. The discipline assessed was corrective in nature and 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

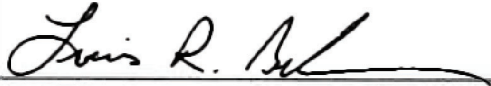
Claim denied.

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

Louis R. Below, Employee Member

Award Date: March 25, 2022