

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 370, (Case No. 370)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 September 8, 2020, when Claimant Tanner Beasley (0239806) was dismissed for conduct leading to a felony conviction while working as a Machine Operator at Ardmore, OK, in violation of MWOR 1.6.2 and MWOR 1.6.**
- 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 September 8, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0291) (Organization File No. 0493-SL13C5-2040)**

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 an assigned Machine Operator on Mobile Gang CG03 for the 2019 work season. The gang was working in Ardmore, Oklahoma, under the supervision of Roadmaster J. White, the week ending Friday, December 13, 2019. That was the last day Mr. White heard from Claimant and the last day Claimant performed service. On December 14th

Claimant requested a Medical Leave of Absence through Carrier's Administrative Leave Department.

On July 29, 2020, Carrier became aware that Claimant was charged with four felonies for an accident to which Claimant was involved. It was reported through various media outlets that Claimant was involved in a fatal accident on December 14, 2019, when operating his personal vehicle. It was alleged Claimant was intoxicated when Claimant's vehicle crossed the centerline of Highway 137 and into the path of a northbound vehicle. The vehicles collided and the passenger of the oncoming vehicle was pronounced dead at the scene. Claimant and the driver of the other vehicle were transported to a nearby hospital.

Claimant was indicted in February 2020, and in July 2020 Claimant entered a guilty plea for a Class B Felony, Death of Another Not a Passenger and because of that Claimant was directed to attend a formal Investigation on August 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 conduct leading to a felony conviction while working as a Machine Operator at Ardmore, OK. The date BNSF received first knowledge of this alleged violation is July 29, 2020."

On September 8, 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 for multiple reasons. It asserted the Investigation should not have been held in "absentia". It argued that the Carrier failed to properly notify Claimant of the Hearing with a hand delivery of the Notice of Investigation and because of that Claimant did not appear at the Hearing. It next argued that the Hearing Officer and Carrier Witnesses had inappropriately discussed testimony prior to the Investigation which was apparent from a reading of the transcript and it further argued exhibits introduced by the Carrier were not verified as being accurate. It asserted that the discipline should be set aside and the claim sustained without reviewing the merits.

Turning to the merits, it argued that Claimant was not at work or on-duty when the alleged events occurred and the Rules Claimant was dismissed for do not apply to individuals that are not on duty. It argued an employee missing a day of work is relieved of duty by adhering to the Agreement and Carrier Rules with notification to supervision. It stated that Claimant was on an approved Medical Leave of Absence, therefore, it suggested Claimant was not liable or held to the same accountability as active employees. It next argued there was no substantive proof

that Claimant was convicted of a felony. Lastly, it argued the Carrier failed to meet its burden of proof. 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 that it complied with Rule 40 – Investigations and Appeals as the Notice of Investigation was delivered to Claimant’s address on file and there is no requirement that Notice of Investigations must be hand delivered to a charged employee. It further stated all other parties received proper notification and were present at the Hearing, showing that the Notice was sent out in a timely fashion. It argued Claimant elected to not attend Claimant’s Investigation. It next argued there was no proof offered that there was any improper collusion between the Hearing Officer and Carrier Witnesses nor was there any evidence to show that the public documents (exhibits) introduced during the Investigation were not reliable. It requested the claim be resolved on its merits.

Addressing the record, the Carrier asserted that in July 2020, Claimant entered a guilty plea for a Class B Felony. It argued it was proven that Claimant did not comply with the Rules referenced in the Notice of Investigation when Claimant failed to notify the Carrier within 48 hours after pleading guilty to a felony. As a result of the evidence and testimony presented at the Investigation, Claimant was properly dismissed. 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 Carrier had a responsibility to hand deliver the Notice of Investigation to the Claimant, pursuant to Rule 40 – Investigation and Appeals and because that was not done the Investigation should not have been held in “absentia”. A review of Rule (c) which pertains to notification of a charged employee to attend a formal Investigation does not support that argument. Carrier properly notified the Claimant of the Investigation via Certified Mail to Claimant’s address on its’ file. It was not refuted that Claimant’s address on file was accurate. The record is also clear that the parties adjourned the Investigation and called the Claimant’s home to inquire if Claimant intended to appear at the Hearing. Claimant did not answer. The on-property handling of the claim further reveals that Claimant never denied that Claimant received the Notice of Investigation at his home or that Claimant might have had some valid reason for non-attendance. 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....”

The other procedural arguments made by the Organization are not persuasive, therefore, the claim will be resolved on its merits.

An examination of MOWR 1.6.2 Notification of Felony Conviction shows that it states:

“The conduct of any employee leading to conviction of any felony is prohibited. Any employee convicted of a felony must notify the proper authority of that fact within 48 hours after the employee receives notice of the conviction.”

The Organization argued that because Claimant was on Medical Leave when he pled guilty to a felony and did not have an immediate Supervisor, Claimant had no responsibility and/or requirement to report the conviction until after the Medical Leave expired. Essentially, it is an argument of immunity. A careful reading of MWOR 1.6 does not support the argument that an employee on Medical Leave does not have responsibility to report a felony conviction as it shows no exceptions to that requirement while on Medical Leave. Claimant was not forthright about his situation when the matter first arose. The record shows Claimant made contact with the Carrier requesting a Medical Leave on December 14, 2019. At that time Claimant had the opportunity to disclose his involvement with an automobile accident resulting in a fatality, the day before, on December 13, 2019. Claimant did not report the incident to anyone, nor did Claimant advise anyone with the Carrier that Claimant pled guilty on July 28, 2020, to a felony conviction. Claimant continued to keep his involvement with the incident and subsequent conviction private, and did not provide the Carrier with that information in violation of MWOR 1.6.2 and MWOR 1.6. 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 seven years of service with a good record, however, Claimant's violation 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

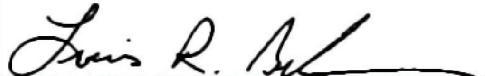
Claim denied.

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

AwardDate: March 25, 2022