

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 380, (Case No. 380)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing June 7, 2021, when Claimant Richard W. Podzemy (1709757) was dismissed for falsifying and not completing required FRA inspections on the Red River Valley Subdivision between April 4 and 10, 2021, in violation of MWOR 1.6, EI 2.2, EI 2.3 and EI 2.3.1.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this dismissal with all rights unimpaired and pay for all wage loss including overtime commencing June 7, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0230) (Organization File No. 0526-SL13C5-2112)**

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 working as a Track Supervisor between April 4 and 10, 2021, on the Red River Valley Subdivision and it was asserted Claimant may not have accurately reported FRA inspections and because of that Claimant was directed to attend a formal Investigation on April 30, 2021, that was mutually postponed until May 25, 2021, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged falsifying and not completing required FRA inspections on the Red River Valley Subdivision between April 4th and 10th, 2021. The date BNSF received first knowledge of this alleged violation is April 16, 2021.”

On June 7, 2021, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately

It is the Organization's position Claimant was denied a "fair and impartial" Investigation and Appeal process because of the multiple roles played by Carrier Officer Devine. It stated Mr. Devine held the following roles: 1.) Carrier Officer that initiated the internal investigation of Claimant; 2.) Carrier Officer listed on Notice of Investigation regarding waivers and postponements; 3.) Carrier Witness against Claimant and 4.) Decision Officer of the Investigation. It argued the aforementioned roles made it impossible for the Decision Officer to be unbiased, therefore, it asked the discipline be set aside and the claim sustained without reviewing the merits.

Turning to the merits, the Organization argued that at the time of the incident Claimant was going through a very emotional time involving the mourning his late brother and wife and made some mistakes which Claimant acknowledged. It argued that despite that acknowledgement that did not allow the Carrier to handle the Investigation and Appeal process in an unfair manner. It requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was well aware of his responsibility to inspect the tracks in his area at least three times a week. It argued Claimant's excuses why the work did not occur does not excuse Claimant of the numerous violations throughout the week of April 4th and even if Claimant could not have effectively performed the inspections that week, Claimant still had an obligation to notify his superiors as to why he couldn't complete the tasks. It further argued the record shows Claimant admitted to the alleged violations, therefore, after proving that Claimant was guilty as charged it appropriately disciplined Claimant in accordance with Carrier's Policy for Employee Performance Accountability (PEPA). In closing 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 arguments that the Judging Officer improperly held multiple roles during the Investigation and Appeal process. The Board is concerned with two of the multiple roles held by Mr. Devine, that being a witness against the Claimant and the Judging Officer. In Award Nos. 30, 55, 58, 360 and 376 of this Board it was determined that if the "trier of facts" was also a prosecution witness who reviewed all testimony that was inherently unfair as he judged the credibility of witnesses' testimony including his own. In Award No. 30 the Board determined in pertinent part:

“...The Agreement guarantees the employee a right to “due process”. That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses’ credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits...”

The facts are clear that the Judging Officer also acted as a primary witness against the Claimant. That dual role was improper because it denied Claimant “due process” since the decision maker assumed the role of judging witnesses’ credibility including his own. The Board will follow the aforementioned property precedential Awards. Therefore, it is determined that the discipline is set aside and the claim is sustained without reviewing the merits.

The Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for all loss of monies since being removed from service, until reinstated. 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.

The Board does not offer any opinion on the merits, but exercises the option to advise the Claimant he should be careful in the future to adhere to all current Rules and Policies because possible violation of some Rules could have terrible results.

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 by the parties.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Jeffery L. Fry, Employee Member

Award Date: April 10, 2023