

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 381, (Case No. 381)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 July 30, 2021, when Claimant Kevin L. Woodard (0372227) was dismissed for being insubordinate and engaging in an altercation with his Supervisor at approximately 0900 hours, on July 1, 2021, near MP 203 on the Arkansas City Subdivision in violation of MWOR 1.6 and 1.7.**
- 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 July 30, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0232) (Organization File No 2405-SL13C5-2133)**

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 Trackman on July 1, 2021. At approximately 9:00 a.m. on the aforementioned date Claimant was located at MP 203 on the Arkansas City Subdivision at which time, Claimant’s Supervisor, Assistant Roadmaster G. Marcellus came to the crossing and noticed Claimant was sitting in his truck. Supervisor Marcellus approached Claimant and asked Claimant why he wasn’t working. Claimant replied he was talking to Manpower. Supervisor Marcellus instructed Claimant to go out and assist the other employees in the removal

and installation of the new tie plates and that Claimant could call Manpower later. Supervisor Marcellus then proceeded back towards his truck. It was alleged Claimant followed Supervisor back to Marcellus' truck rather than complying with instructions given to him by his Supervisor and after Marcellus entered his truck Claimant positioned himself so that Marcellus could not close the truck door. At that point, Supervisor Marcellus moved Claimant backwards so he could close his door and then Claimant allegedly opened the back door of Marcellus' truck and attempted to get in. Supervisor Marcellus instructed Claimant to get out of his truck. Claimant then called the 1-800 number to report the incident. Claimant was then transferred to Agent Yucker to explain the incident to him. Agent Yucker then called HR Director S. Wells to inform her of the situation. Based upon that information Claimant was directed to attend a formal Investigation on July 8, 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 misconduct when you were allegedly insubordinate and allegedly engaged in an altercation with your supervisor at approximately 0900 hours, on July 1, 2021, near MP 203 on the Arkansas City Subdivision, while assigned as a trackman.”

On July 30, 2021, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the Organization's position the record shows that Carrier Officer Marcellus approached the Claimant in a hostile manner accusing Claimant of sitting in his truck when Claimant should have been working with his crew removing and/or replacing tie plates. It argued Marcellus failed to give Claimant an opportunity to explain how the crew had previously determined everyone's responsibility in the process and that Claimant was waiting for his turn in the task and was not avoiding work. It further argued Claimant only followed Mr. Marcellus to Marcellus' truck because Claimant wanted to find out why Marcellus told Claimant that Claimant was going to be out of here. It emphasized that both employees were loud and a couple of mild curse words were exchanged by both employees and it was Supervisor Marcellus that put his hands on the Claimant whereas the Claimant never touched Marcellus. Additionally, it asserted Claimant is a dedicated five-year employee with an excellent work ethic who was dealing with personal family issues with his live-in sister that had recently suffered a heart attack along with worrying about the care of their respective children. It concluded that the Carrier had not met its burden of proof and if discipline had been warranted (which it wasn't) it was excessive, therefore, it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the claim is procedurally defective because the Organization failed to identify the governing Agreement under which its claim is filed. It requested the discipline be set aside without reviewing the merits.

Turning to the record, the Carrier asserted the Investigation Transcript and Exhibits shows that the situation between Claimant and Supervisor Marcellus was an altercation prohibited by Carrier Rules. It argued Claimant would not comply with Supervisor Marcellus' instructions and instead, continued to follow Marcellus, block the door of Supervisor Marcellus' truck so Marcellus couldn't close it, and then even opened the back door of Marcellus' truck to attempt to crawl in and continue the verbal altercation. It argued Claimant could have walked away and complied with his Supervisor Marcellus directives, but chose not to do such. It stated that it is clear from Claimant's own testimony that Supervisor Marcellus tried on multiple occasions to remove himself from the situation by walking away and asking Claimant to leave him alone, yet Claimant continued to be an aggressor following Supervisor Marcellus. It concluded 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 reviewed the transcript and record of evidence and will first address the Carrier's procedural arguments that the claim should be set aside without reviewing the merits. The Board is not persuaded by the Carrier's technical argument, therefore, the case will be resolved on its merits.

Review of the record, reveals that Claimant testified multiple times during the Hearing that Marcellus told him to go out on the track and return to work (See pages 35, 36, 43, 50, 54 and 55 of the Investigation Transcript) and Claimant did not comply with those instructions. The testimony further substantiated that Supervisor Marcellus tried on multiple occasions to walk away from the situation and asked the Claimant to leave him alone. Claimant suggested that Marcellus was the initial aggressor accusing Claimant of "sitting on his ass" and would not listen to Claimant's explanation. Claimant argued he only followed his Supervisor to his Supervisor's truck because he wanted to explain the situation and Claimant was not trying to be confrontational. In Claimant's written statement regarding the incident Claimant wrote in part:

"...Gary then told me to go do whatever it is I do! I then told him, my job was to bring plates and he then told me that my job was to do whatever he told me to do! I then told him when have you ever told me to do anything. I have never even talked to Gary prior to this, Gary has never gave me an order of any kind. I only took orders from the Foreman and the Assistant Foreman. I then asked him to tell me exactly what is he wanted me to do because I can't read minds." (Underlining Board's emphasis)

Claimant's written statement and testimony flies in the face of his argument that Claimant wasn't trying to be confrontational because all Claimant had to do was follow Marcellus' instructions to avoid the incident rather than pursuing Marcellus and continuing the confrontation. Contrary to Claimant's interpretation of his responsibilities, set forth above, Claimant as a

Board is always sympathetic to long-term employees, but in this instance the Claimant has not offered any rationale for his behavior or shown any remorse, therefore, the Board finds and holds that the discipline will not be set aside because it was in accordance with PEPA and it was not arbitrary, excessive or capricious.

AWARD

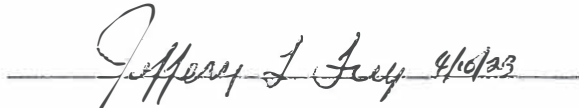
Claim denied.

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

William R. Miller, Chairman & Neutral Member

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

Michelle McBride, Carrier Member

A handwritten signature in blue ink, reading "Jeffery L. Fry 4/10/23", written over a horizontal line.

Jeffery L. Fry, Employee Member

Award Date: **April 10, 2023**