

**Public Law Board No. 7048**

**PARTIES**     ) **Brotherhood of Maintenance of Way Employes Division**  
                  ) **ATSFF System Federation**  
**TO**             )  
                  )                     **and**  
**DISPUTE:**    )  
                  )  
                  ) **BNSF Railway Company**

**Board Members**

**Jeanne M. Vonhof, Chairman and Neutral Member**  
**Michelle McBride, Carrier Member**  
**Jeffery Fry, Employee Member**

**Statement of Claim:**

“We present the following claim on behalf of Burnell Zachary (1729441) Seniority date December 04, 2006, for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service. 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended. 4) health, dental and vision care insurance premiums, deductibles, and co-pays that he would not have paid had he not been wrongfully withheld from service beginning November 02, 2021, and unjustly dismissed from service commencing March 02, 2022, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.”

## 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; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance with the Agreement that established the Board. The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules, or working conditions, nor have authority to change existing agreements or to establish new rules. The Board shall have jurisdiction over the disputes assigned to this Board and such other disputes as may be added during the life of the Board by mutual assent of the parties.

The Claimant, Burnell Zachary, has worked for the Carrier for 15 years. By notice dated March 2, 2022 the Claimant was notified that the Carrier concluded that the testimony and exhibits brought forth during an investigation held on February 11, 2022 established that the Claimant was in violation of MWOR 1.6 Conduct, as well as MWOR 1.6.2 Notification of Felony Conviction, for conduct leading to a felony conviction on October 19, 2021 and his failure to report the conviction within 48 hours. The Claimant was dismissed.

Claimant was charged by the federal government with Theft of Government Money, a felony. The investigation includes a document entitled "Understanding of Maximum Penalty and Constitutional Rights" signed by the Claimant, his lawyer and the U.S. Attorney. He said he signed it in his lawyer's office on September 17, 2021. The document was received by the Clerk of the U.S. District Court for the Western District of Louisiana on October 19, 2021. The document signed by the Claimant states, "I realize that by pleading guilty, I stand convicted of the crime charged... and that the only reason I am pleading guilty is that I am guilty as charged." The Claimant admitted during the investigation that he did make a plea deal on the felony charge, but not on October 19, 2021. He did not provide the date he alleges the plea agreement was formalized.

MWOR Rule 1.6 Conduct prohibits conduct which is dishonest or immoral. MWOR Rule 1.6.2 Notification of Felony Conviction, states more specifically,

"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."

There is no dispute, on this record, that the Claimant engaged in the conduct leading to his felony conviction, which is prohibited under MWOR Rule 1.6.2, as he admitted in his plea agreement and during the investigation. As for the reporting requirement, the Carrier argues that Claimant's Division Engineer Phil Heusler was the proper authority to whom he was required to report his conviction, and Heusler said that the Claimant never reported it to him. Claimant at first said that he did report his conviction to Heusler, but then said that he reported it to Human Resources, within 48 hours.

On this record, the Board concludes that there is substantial evidence that the Claimant violated the Carrier's rules. The Organization's arguments in this case are primarily that the notice

and procedures were so flawed that the claim must be sustained. The Organization argues that the investigation first scheduled for November 11, 2021 was untimely. The notice stated the Carrier's intent to investigate Claimant's "alleged conduct leading to a felony conviction on October 19, 2021 and [Claimant's] alleged failure to report the conviction within 48 hours." According to the Organization, the document introduced in the investigation as evidence of his guilt was signed in his lawyer's office on September 17, 2021, and even the date of October 19 cited in the notice would establish that the investigation was untimely.

Division Engineer Phil Heusler testified that he first became aware of the Claimant's felony conviction on November 1, 2021. Therefore, neither the date of September 17, 2021 nor October 19, 2021 are relevant, because the period during which the investigation must be scheduled begins with the Claimant's supervisor's knowledge of the date of the conduct under investigation. On this record the investigation scheduled for 11 days after Heusler was first notified of the conduct was not untimely.

The Organization also takes issue with the notice's reference to the Claimant's felony conviction on October 19, 2021. The Carrier's Rules clearly include plea agreements in its definition of a felony conviction. The Carrier's disciplinary policy includes, under dismissible offenses:

"Conduct leading to a felony conviction. This includes a plea of guilty, deferred adjudication or any plea that results in a felony conviction where sentencing is delayed or suspended or the felony conviction is subsequently modified or reduced."

If October 19, 2021 is not the precise date of Claimant's guilty plea, this does not demonstrate that the notice of investigation confused the Claimant or the Organization as to the nature of the conduct under investigation, or prevented them from presenting relevant evidence. The Claimant has admitted in his plea agreement and in his testimony that he committed conduct leading to a guilty plea to a felony. There is no evidence of any other felony conduct at issue that might have confused the Claimant or the Organization. In addition, the notice of investigation stated that the investigation was focused on the Claimant's alleged "*conduct leading to a felony conviction*," which is broader than just the conviction itself. Therefore, there is no reason to sustain the claim on the basis that the notice of investigation was faulty because it referred to October 19, 2021 as the date of the Claimant's felony conviction.

The Organization also contends that the Claimant was an Exempt official of the Carrier at the time of this conduct. He was dismissed from his exempt position as a result of the same conduct at issue here, and the Organization contends that he cannot be dismissed a second time from his scheduled position, because that would subject him to "double jeopardy" and "double punishment" for the same offense.

After being dismissed from his exempt position, the Claimant exercised his retained seniority rights to return to the protection of the collective bargaining agreement covering scheduled employees. The Carrier held an investigation and dismissed him, and the Organization filed this claim on his behalf. Under these circumstances the Carrier argues that there is no double jeopardy, citing a number of awards, including NRAB Third Division Aw. No 41486. In that

Award, the Board concluded that there was no double jeopardy under circumstances very similar to those present here. The Board stated in that case,


“First, it [the Organization] contends that Jordan was the victim of “double jeopardy,” that he was “disciplined” twice for the same offense. That argument, however, cannot withstand careful analysis. Initially, on August 3, 2009, Jordan was advised that he was being removed from his “exempt employment relationship . . . as Roadmaster . . .” primarily because his “recent behavior is not in line with our leadership model.” Some of that “behavior” no doubt involved his alleged violation of various Carrier Rules mentioned earlier in this Award. But because a Roadmaster is not a bargaining unit position and hence is not entitled to the protection offered by the Collective Bargaining Agreement, Jordan had no right to protest his removal. Nor could he be considered to have been “disciplined” within the terms of the Collective Bargaining Agreement. That being so, it seems clear that when the Carrier later, on September 18, 2009, chose to give Jordan a 30-day record suspension and a three-year probationary period, he was being “disciplined” for his misconduct for the “first” time. For purposes of the Collective Bargaining Agreement, he had not been subjected to “double jeopardy.”

Similarly, in this case the Claimant was not “disciplined” under the terms of the Collective Bargaining Agreement, as a result of any actions taken by the Carrier while he served in an exempt position. Therefore, the Board concludes that the Organization has not established a claim of double jeopardy, because the Claimant has not been disciplined twice for the same conduct under the terms of the CBA.

Conduct which leads to a felony conviction is dismissible under the Carrier’s disciplinary policy. Here the Claimant’s conduct involved substantial dishonesty, resulting in a plea agreement in which he is obligated to pay more than \$75,000 in restitution. The Carrier must be able to trust its employees, who are distributed all over the country and often work without close supervision, and the Board cannot conclude that dismissal for conviction of a fraud of this magnitude is excessive or arbitrary.

## **AWARD**

Claim denied.

Signature 

Jeanne M. Vonhof  
Neutral Member and Chairperson



Michelle D. McBride

Carrier Member



Jeffery Fry

Employee Member

RESERVE DISSENT

Date of Award: August 28, 2024