

**Case No. 397**  
**Award No. 397**  
**BNSF File No. 14-22-0081**  
**BMWED File No. 2413-SL13C5-2203**

**Public Law Board No. 7048**

**PARTIES**     ) **Brotherhood of Maintenance of Way Employees 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 Jaime Hernandez (1619048), Seniority date August 23, 2004, 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 January 19, 2022, and unjustly dismissed from service commencing March 07,2022, 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, Jaime Hernandez, has worked for the Company since 2004. An investigation was held on February 9, 2022 over an allegation that the Claimant had fueled his personal vehicle with the Company's WEX card on January 16, 2022 while working as a Roadmaster in Kingman, AZ. The Carrier concluded from the testimony and exhibits brought forth in the investigation that the Claimant had violated MWOR 1.6 Conduct and MWOR 1.25 Credit or Property. The Claimant was dismissed via letter dated March 7, 2022.

The Claimant admitted during the investigation that after fueling his Company vehicle using the Company's gas card, he took the gas nozzle out of the Company vehicle, laid it on the ground near the fuel pump, moved his vehicle forward and fueled his personal vehicle as well in the same purchase. He received only one receipt for \$71.63, for the cost of fueling both vehicles using the Company credit card. According to the Carrier, a citizen observed the incident and reported it to the Carrier. When questioned, the Claimant admitted that he had filled his own vehicle using the Carrier credit card.

The Carrier has therefore established by substantial evidence that the Claimant used the Company gas credit card to fuel his personal vehicle. In doing so he violated MWOR RULE 1.25, which states in relevant part,

"Credit or Property. Unless specifically authorized, employees must not use the railroad's credit and must not receive pay or pay out money on the railroad account. Employees must not sell or in any way get rid of any railroad property without proper authority."

Claimant was not authorized to use the Carrier's credit card to buy gas for his own vehicle. In doing so he also violated MWOR 1.6 Conduct, which prohibits dishonesty.

The Organization argues as a procedural matter that the notice of dismissal makes clear that the Claimant was working as an exempt officer of the Carrier at the time of the alleged incident in question. According to the Organization, the Carrier may not dismiss the Claimant from his position as a Roadmaster and also dismiss him from his scheduled position under the collective bargaining agreement for the same incident, because that would be disciplining him twice for the same conduct. The Carrier argues, however, that the Claimant's relationship with the Carrier as an

exempt employee was terminated January 19, 2022. Because Claimant retained his scheduled BMW seniority by paying a seniority retention fee to the BMWED, he was permitted to return to his bargaining unit position and then was issued an investigation notice which was scheduled to be held nine days after his exempt relationship with the Carrier was terminated. 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. After being removed from his exempt position, he exercised his seniority rights to bump back into a bargaining unit position. Only then was he noticed for investigation for potential discipline under the CBA. 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.

The Organization also argues that the notice of investigation provided to the Claimant was unclear, because it stated that BNSF first had knowledge of the incident on January 19, 2022, when in fact the Claimant’s immediate supervisor, Ms. Sherri Miller, testified that she was first informed about the incident late in the day on January 16, 2022, and first spoke to the Claimant on January 17. The Claimant admitted the conduct to her at that time, and he was placed on administrative leave at that time, pending further investigation.


Human Resources was waiting for the police report concerning the incident before concluding that the Claimant had done something that merited a formal investigation. That report arrived on the 18 or 19. Furthermore, the primary purpose for stating a date when the Carrier first has knowledge of the conduct under investigation is in order to toll the date from which to assess whether an investigation is timely. There is no allegation here that the investigation was untimely, even if the Carrier first had knowledge on January 16 or 17, 2022. Under these circumstances the Board cannot conclude that the notice of investigation was so faulty that the claim here should be sustained on procedural grounds.

The Claimant stated that he thought the gas card worked like a Company credit card, which may be repaid if the employee accidentally uses it for dinner, for example, when he should have used a personal credit card. However, there is no evidence that he was ever told that it was acceptable to use the Company gas card for personal gas purchases and repay the Company. Furthermore, there is no evidence that this was an accidental mistake, as might be the case in pulling out the wrong credit card to pay for a meal. Claimant did not accidentally use the Company card for a separate purchase of gas for his vehicle. Here he accurately recorded the Company vehicle number, but then stopped midway through his purchase, put the nozzle down on the ground and moved up his personal vehicle. He used part of the gas purchase attributed to the Company vehicle for his personal vehicle.

Furthermore, it would be very difficult for the Company to track what happened here from the gas receipt or the gas credit card charge, because there was no separate purchase of fuel for Claimant's car, but rather a combined purchase of gas for the two vehicles listed under the Company vehicle's number. This is unlike the case where there is a separate charge for an unauthorized dinner or other purchase which clearly appears on a Company credit card and can be questioned. In addition, with this conduct there is no way to track exactly how much of the combined purchase of gas was used for his personal vehicle, and even the Claimant gave an imprecise amount at the investigation, saying he took \$10 or \$15 worth of gas. The Company must be able to trust its employees to use their Company credit cards honestly and under these circumstances the Board cannot conclude that the penalty of dismissal for dishonesty is excessively harsh.

## AWARD

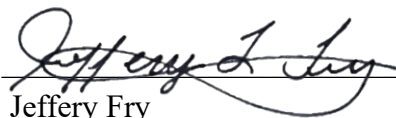
Claim denied.

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