

Case No. 398
Award No. 398
BNSF File No. 14-22-0101
BMWED File No. 2405-BN40C5-2213

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 Nichols Roland (0116251), Seniority date of 3-5-12, for the removal of the Claimant’s Dismissal. In addition, we request all record of discipline removed from the Claimant’s record. The Claimant shall be made whole as a result of being withheld from service starting April 26, 2022. The Carrier’s violation, including the following compensation(s):

1. Straight time pay for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);
2. Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service, including any and all 401k contributions including any market adjustments;
3. Overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on

overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;

4) Health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly Disciplined commencing December 4, 2020, 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, Nicolas Roland, has worked for the Carrier for about 10 years. On May 5, an investigation was held in order to determine whether the Claimant had violated MWOR Rule 1.6 for failure to follow instructions, insubordination, combativeness, quarrelsome behavior and use of profanity, resulting from his conduct on April 26, 2022 at approximately 1100 hours at or near MP 412.0 on the Creston subdivision while working as a Machine Operator on Gang TTSX0007. The Carrier concluded through the investigation that the Claimant was in violation of MWOR Rule 1.6 and dismissed him via letter dated May 25, 2022.

On April 26, 2022 the Claimant was assigned to operate a backhoe, pulling and replacing ties. He testified that this was the first day he had operated the backhoe to which he was assigned and that he had only been operating a backhoe for about six weeks, when he joined this gang. He did a safety briefing with Foreman Brian Brown and others and then was assigned to operate the backhoe from Track 2, pulling ties. He went to the work area with Assistant Foreman Rob Swain and others on the gang. Claimant and Assistant Foreman examined the worksite and Claimant discussed with Swain that he was an inexperienced operator and he did not feel safe performing the work from Track 2, because of the steep drop-off on the side of the track. Claimant discussed with Swain setting up on or near Track 1, he did so, and they began pulling ties.

According to the Claimant, Brown was performing other work about 300-400 feet away. Eventually Brown came over and noticed that the Claimant was working from Track 1, not Track 2. McSwain presented a statement stating that he explained to Brown that the Claimant did not feel comfortable working from Track 2 and the Claimant repeated this explanation when asked by Brown. According to Brown's statement, he ordered the Claimant again to work from Track 2, concluding that site was safer than Track 1. There is a dispute in the evidence over whether the Claimant asked or told Brown to show him how to perform the work from Track 2. Brown then

called Assistant Roadmaster Sulayman Jallow. The Claimant said that he told Brown to call Jallow.

When Jallow arrived with his supervisor, Assistant Director Maintenance Production (ADMP) Greg Rickard, they called the Claimant over to meet with them. They read him MWOR Rule 1.6 and he said that he wanted Union representation. He called a Union representative but was unable to reach him on the telephone.

Jallow and Ricard began questioning the Claimant, even though the Claimant contended at the time that this was not the proper procedure. Claimant told them that he had not followed the instruction to work from Track 2 because he did not feel safe. Jallow reported that the Claimant was using profanity, throwing his hand up as if to say, “don’t talk to me,” and accused Jallow of lying about the Claimant’s earlier request to be disqualified from the backhoe operator work. Jallow and Ricard conferred and agreed to take the Claimant out of service.

Jallow then gave the Claimant a 45-minute ride back to where his car was located. Jallow testified that during this ride the Claimant refused to tell him whether he was wearing his seatbelt and also asked him for his card because he planned to refer him to BNSF’s 800 line. Jallow said that the Claimant also referred to Jallow as a “douche bag Roadmaster” when talking to Claimant’s wife on the phone; said something like, “How did you get your job, Black?” and said, “suck my dick” when he left the car. The Claimant denies making any of the latter three comments.

The Board concludes that there is not substantial evidence on this record that the Claimant engaged in insubordination. In this case the evidence establishes that the Claimant discussed with the Assistant Foreman the safety of the setting of the backhoe once they arrived at the actual jobsite. There is evidence that he had re-briefed with the Assistant Foreman and had the Assistant Foreman’s agreement to proceed with the work with the safety accommodation Claimant had suggested of setting up the backhoe as he did, rather than on Track 2. When Brown came and again instructed him to set up on Track 2, he continued to say that he felt unsafe working from Track 2, and they elevated the issue to the Assistant Roadmaster. He repeated to Jallow and Ricard that he felt unsafe performing the job as assigned. He raised the Company’s “empowerment” policy at that time.


The Carrier argues that the Claimant simply refused to carry out the instruction given by Brown, several times. However, there is no evidence that the Claimant was trying to get out of performing work by falsely raising a safety issue. The evidence demonstrates that he was following the instruction to perform the work of pulling ties, but from another location than Track 2. However, he reasonably believed that the instruction regarding how to pull the ties had been changed or modified by his discussion with the Assistant Foreman over the safety issue he raised.

The Board concludes, however, that the Claimant did not handle the situation in a courteous way, particularly in his exchange with Jallow. As there were no other witnesses, there is not substantial evidence on this record that the Claimant made the comments Jallow attributes to him, and Claimant was not charged under the Carrier’s anti-harassment policy. However, even if Claimant did not make all the comments attributed to him, he has acknowledged that he was frustrated and was not communicating well in his conversations that day. Perhaps if he had been able to remain calm and courteous, the situation could have been resolved that day without going

any further. The Board concludes that there is substantial evidence that he was discourteous and that significant discipline is appropriate for this conduct. However, given the circumstances, where the Claimant was called to explain to several Management representatives his failure to comply with an order, and was defending a safety objection without Union representation, the Board concludes that dismissal is excessive.

AWARD

The claim is sustained in part. The Claimant is reinstated, but without backpay. The dismissal and the time out of service are converted to a Level S Actual Suspension, with a Twelve-Month review period.

Signature 

Jeanne M. Vonhof
Neutral Member and Chairperson



Michelle D. McBride
Carrier Member



Jeffery Fry
Employee Member

Date of Award: August 28, 2024