

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7394

AWARD NO. 12, (Case No. 12)

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

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 5, 2009 when Mr. Clayton W. Watkins was dismissed for his alleged violation of MOW Operating Rules 1.6-Conduct, 1.19-Care of Property, and 1.25-Credit or Property on October 5, 2009 in connection with the alleged misuse and sale of a BNSF chainsaw.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the Claimant be returned to service at once, charges be removed from his personal file, and paid for all time lost."
(Carrier File No. 12-10-0028) (Organization File No. B-3136-1)

FINDINGS:

Public Law Board No. 7394, 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 that on October 5, 2009, Division Engineer D. F. Befort sent the Claimant a letter which stated in pertinent part the following:

"This is to advise that effective immediately you are hereby dismissed from employment with BNSF Railway for your violation of Maintenance of Way Operating Rules 1.19 - Care of Property, MOWOR 1.25 - Credit and Property

and MOWOR 1.6 - Conduct for taking Railroad property (chainsaw) from the workplace and selling it to a third party approximately two weeks ago and then on Friday, October 2, 2009 tried to get a Railroad Special Agent to fill out a stolen report and back date the report."

On October 6, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on October 30, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged removal of Railroad property (chainsaw) from the worksite, taking it home and then sold to third party approximately two weeks ago and then on Friday, October 2, 2009 tried to get a Railroad Special Agent to fill out a stolen report and back date the report."

On November 4, 2009, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. The Organization first argued that the Claimant was denied a fair and impartial Investigation because two primary witnesses against him did not attend the Hearing. It further argued that the Claimant did not steal a chainsaw from the Carrier, nor did he sell it to another person. It pointed out that the Carrier had no bill of sale from the accuser that he ever purchased a chainsaw from the Claimant and no proof that the chainsaw belonged to the Carrier. It suggested that the accusation by the accuser, Mr. Moran, was an attempt by him to destroy the Claimant's career because of a personal relationship he had with Moran's ex-wife. It asserted that what actually happened is the Claimant borrowed a chainsaw to cut up a pecan tree that had fallen in his yard which he returned. According to the Organization, the worse possible scenario that could be proven was that the Claimant misused company property without permission. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the Claimant received a fair and impartial Hearing and was guilty as charged. It argued that the record verifies that the Claimant removed a company chainsaw from the property without permission and subsequently sold it to a third party. It also argued that he lied to Special Agent Connell when questioned about the chainsaw. It asserted that Claimant told Connell that he had filed a stolen property report two days earlier with Special Agent Schaffer then immediately started calling Schaffer to try to get a backdated stolen property report to cover the fact that he had taken the chainsaw home without permission and sold it to Mr. Moran. It further argued that the Claimant changed that testimony during the Hearing by claiming that he never told Special Agent Connell that the chainsaw was stolen, but then

admitted he tried to get Special Agent Schaffer to back date a report that the chainsaw had been stolen. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's argument that the Investigation was not fair and impartial because two primary witnesses against him did not attend the Hearing. Mr. Moran who allegedly bought the chainsaw from the Claimant provided a written statement to the Carrier, but did not appear at the Hearing. Countless arbitration Awards have stated that the Carrier has no subpoena power to force the attendance of a non-employee at an Investigation, thus, his non-attendance was not a violation of the Agreement. Additionally, it was explained during the Hearing, that Special Agent Schaffer did not attend in person, but testified telephonically, because he was on special assignment in California for over six weeks. Schaffer was available for questioning by the Claimant and his representative during the Hearing via the telephone and there is no showing that his non-attendance harmed the Claimant's defense. The record substantiates that the formal Investigation was held in accordance with Rule 91 of the Discipline Rule and the Claimant was not denied his "due process" Agreement rights.

There is no dispute between the parties that the Claimant took a company chainsaw off of Carrier property for personal use without securing permission. The question at issue, is did he subsequently attempt to sell the chainsaw or allow it to be stolen from his possession. The Organization did an excellent job in its defense of the Claimant as it argued that there was no proof that the chainsaw given to the Carrier by Mr. Moran belonged to the Carrier. It pointed out that the Carrier had no receipt or bill sale with a serial number proving ownership of the chainsaw. It further argued there was no proof offered that Claimant sold the chainsaw to Moran for \$200.00 as alleged by him as he had no receipt. Additionally, it argued there was no property report filed for a missing chainsaw. Claimant also testified that he was not stupid enough to throw away his career for \$200.00. He asserted that his ex-girlfriend and her ex-husband (Moran) had reunited, but Moran was intent on destroying his livelihood because of his former personal relationship with his ex-wife. Simply put he argued that Moran had set him up to get fired. The Organization's argument is almost persuasive except for the fact that the Claimant's actions and testimony were contradictory. On page 65 of the Transcript he stated he returned the chainsaw to the Carrier and again on page 73, Line 19, of the Transcript the Claimant was questioned by the Hearing Officer as follows:

"Q And you did bring the chainsaw back?"

A Yes. (*Underlining Board's emphasis*)

On pages 75 -76 of the Transcript. when questioned by his representative Claimant reaffirmed that he allegedly returned the chainsaw when he testified as follows:

"Q But you're not denying the fact that you brought it home without permission?

A No, I'm not denying that.

Q Well, that's very commendable on your part.

A And I did bring it back. *(Underlining Board's emphasis)*

The Claimant emphatically testified several times that he returned the chainsaw to the Carrier stating that he put it in the Patrol Gang Truck.

Special Agent P. Connell recounted a different story when he testified on page 24 of the Transcript about what the Claimant told him regarding the whereabouts of the chainsaw. He said that the Claimant told him the chainsaw **"...was actually stolen from him by Mr. Moran..."** On page 25 Connell continued to testify as to what the Claimant told him about the chainsaw having been stolen. He stated the following:

"...He said that he had filed a report two days prior to this, which would have been on Wednesday that the chainsaw was stolen from him. I said okay, I said who did you file the report with? He said Senior Special Agent Bryan Schaffer, which is out of the Birmingham, Alabama Office. I said okay, so I asked, we spoke a little bit more about it. I re-asked him a second time, are you sure you filed a report with Senior Special Agent Bryan Schaffer? He said yes. That's when I told him he couldn't have. He said why? I said Bryan is not in Birmingham; our office is covering his territory. Bryan is on an operation. At that time, he said I got to go, I got to call Bryan, click, and he hung up...."

Agent Connell went on to state that Senior Special Agent Schaffer sent him an email stating that the Claimant had contacted him wanting him to backdate a report, two days, regarding the alleged theft of a company chainsaw from him. Schaffer wrote in pertinent part the following:

"...Watkins advised that he needed me to write out a police report for the stolen chainsaw and date it two days prior...."

On pages 50 -51 of the Transcript Agent Schaffer was questioned about the chainsaw and testified as follows:

"Q Okay, thank you, Um, so Mr. Watkins did call you concerning a chainsaw that he had in his possession?

A That is correct.

Q And he explained to you that the chainsaw had been stolen?

A That is correct.

Q And he wanted you to backdate it, is that correct?

A That is correct.

On page 73 of the Transcript Claimant was questioned whether he asked Mr. Schaffer to backdate the report and he said the following:

"A I said that I needed it yesterday, which means in a hurry to me, but if you want to say that, yes."

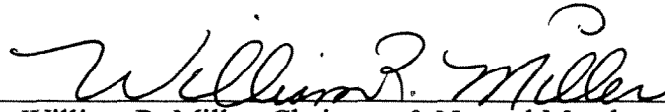
Claimant tried to semantically hedge a little on the backdating, but in the end he admitted that he asked Schaffer to backdate a report for a stolen chainsaw which leads to the inescapable conclusion that he did not return the chainsaw. If the Claimant had returned the chainsaw as he testified, then the obvious question is why did he tell Special Agents Connell and Schaffer that it had been stolen from him instead of saying it was in the Patrol Truck. Despite the Organization's vigorous and inventive defense the facts indicate that the Claimant used a company chainsaw without permission and did not return it to the Carrier, after which he attempted to cover up his actions with a lie and a request of a Special Agent to backdate a false stolen report in his behalf. The aforementioned actions contradict his testimony that he returned the chainsaw. The question as to whether or not the Claimant stole the chainsaw with the intent to sell or had it stolen from him is not clear. The Carrier's position is built upon an inference of guilt, based upon the Claimant's behavior when questioned about the chainsaw. However, that inference is not persuasive enough to convince us that he stole it for profit as it is equally possible that Mr. Moran might have stolen it from him and then alleged that the Claimant sold it to him as a means to harm him. Nonetheless, it evident that substantial evidence was adduced at the Investigation that the Claimant violated portions of Rules 1.6, 1.19 and 1.25 when he misused a company chainsaw and then clumsily tried to cover-up his misdeeds.

The only issue remaining is whether the discipline assessed was appropriate. The two charges were of a serious nature and it is clear that the Claimant was not forthright about what he did with the chainsaw, but as stated above the evidence was not sufficient to prove that the Claimant stole a Carrier chainsaw with intent to sell. The Board does not excuse the Claimant's behavior, however, in this instance we do not believe that dismissal was appropriate. The Board finds and holds that the discipline was excessive and it is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated on a **"last chance basis"** with seniority intact and all other rights unimpaired, but with no monetary back pay. Upon return to service

Claimant's disciplinary status pursuant to PEPA will be considered as being one level from dismissal. The Claimant is also forewarned that he needs to be careful in the future to adhere to Carrier Rules and Policies.

AWARD

Claim sustained in accordance with the Findings and the Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in cursive script, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Chairman & Neutral Member

Award Date: 12-13-10