

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 23
Carrier File No. 12-08-0136
Organization File No. B-2699-2
Claimant: Samuel P. Starks

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on July 18, 2008, when Claimant Samuel P. Starks was dismissed for violation of Maintenance of Way (MOW) Operating Rules 1.6 and 1.6.2 in connection with conduct that led to a felony conviction and the Claimant's failure to report that conviction.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charges be removed from the Claimant's record, the Claimant be returned to work, and paid for all time lost.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Samuel P. Starks, was dismissed for violation of Maintenance of Way Operating Rules 1.6 and 1.6.2 because the Carrier alleged that he failed to notify the appropriate BNSF Supervisor that he had been convicted of a felony, for which he was sentenced on August 6, 2008. MOW Rule 1.6.2 requires such notice of a conviction for a felony within forty-eight hours to the Employee's Supervisor.

The Carrier also predicated its decision to dismiss the Claimant from all service on the fact that he had been convicted of driving while under the influence, a Class D felony in the state of Missouri. Conviction of a felony is also listed as a dismissible offense in the Carrier's Policy for Employee Performance Accountability (PEPA).

The Organization grieved the imposition of discipline as being improper and in violation of the parties' Agreement. According to the Organization, the Claimant had properly notified a BNSF representative when he told the EAP Counselor about his arrest, trial and conviction for DWI. The Organization also cited the acknowledgment by the Claimant's last Supervisor at the investigative hearing that the Claimant had discussed the arrest, trial, and ultimately his conviction for DWI with the Supervisor on or about August 11 or 12, 2008. The Organization also

cited the Claimant's fifteen year record of service, the fact that the DWI occurred while the Claimant was off duty, and the fact that the Claimant was on an approved medical leave for rehabilitation treatment through April 24, 2008 as further evidence that the Claimant had substantially complied with the requirements of Rule 1.6.2.

The parties were unable to resolve their dispute, and the matter was submitted to this Public Law Board for adjudication.

FINDINGS AND DECISION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

The basic facts underlying the instant case are largely undisputed. The Claimant was obligated to report his conviction for DWI to an appropriate Carrier representative within forty-eight hours. In a conversation initiated by Mr. Faulkner, the last Supervisor to whom the Claimant had last been assigned approximately nine months earlier, the Claimant revealed the details of his conviction. Because the Claimant was on an approved medical leave of absence through August 24, 2008,

it is not clear that a delay from August 6 through August 11 or 12, 2008 did not constitute compliance with the time limit for such notification. That the Supervisor initiated the conversation in which the Claimant candidly acknowledged that he had been convicted of the DWI felony on August 6, 2008 is immaterial.

The Organization has argued persuasively that sufficient lack of clarity exists regarding the procedure for complying with Maintenance of Way Rule 1.6.2. For example, it was not clear in this situation whom the Claimant should notify, as he had not had an assigned supervisor since he last worked for Mr. Faulkner on November 29, 2007. The definition of a conviction is sufficiently spelled out to trigger a clear start to a forty-eight hour reporting period upon conviction rather than sentencing. Thus, the Claimant's deferral of notice to the Company to the date he was actually sentenced was not reasonable under the circumstances, despite his best efforts to change the conviction by participating in an in-house rehabilitation program before he was sentenced.

Moreover, the Claimant's erroneous assumption that his EAP contact was a BNSF employee is irrelevant to the instant case, as the Claimant made actual disclosure to his last Supervisor, Mr. Faulkner. The Carrier may wish to clarify the rule further by explicitly stating an employee's obligation to report a conviction within forty-eight hours even

if the employee is on furlough. Thus, the Board need not consider whether disclosure solely to the EAP counselor, who is employed by a contractor, was sufficient to satisfy the contractual requirement of disclosing all felony convictions in a timely manner to a representative of the Carrier.

The evidentiary record established persuasively that the Claimant told Mr. Faulkner about the phases following his arrest for DWI, including the trial and disposition. The Claimant was not required to utter the word "felony" in order to comply with Rule 1.6.2. Having disclosed that he was convicted of DWI, the Claimant satisfied his obligation under the Maintenance of Way Operating Rules.

For all these reasons, the decision to dismiss the Claimant based on his failure to disclose his conviction of a felony on or about August 6, 2008 cannot be sustained. Nevertheless, both the PEPA and the Maintenance of Way Operating Rules specify that conviction of a felony is grounds for summary dismissal. Although the Claimant's DWI occurred while he was off duty, he was nevertheless convicted of a Class D felony. Regardless of the Board's opinion of whether this offense should or should not constitute proper cause to terminate an employee after fifteen years of service to BNSF, or whether DWI is a type of felony contemplated under the PEPA or the applicable Rules, it is not for the

Board to determine whether DWI should be excluded from the felonies contemplated under the Maintenance of Way Operating Rules or under the Carrier's Maintenance of Way disciplinary policy. DWI is a very serious infraction, constituting a presumptively proper basis for the Carrier to dismiss the Claimant. Given that sufficient substantial evidence exists in the evidentiary record, there is inadequate basis for the Board to overturn this judgment.

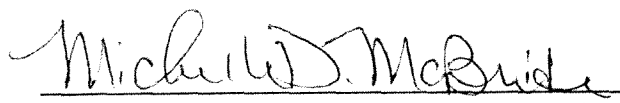
Therefore, based on the evidence submitted, the Carrier did not violate the Agreement by dismissing Claimant Samuel P. Starks for violation of Maintenance of Way Operating Rule 1.6 because he had been convicted of a felony. The instant claim is hereby denied.

We so find.


Daniel F. Brent, Impartial Chair

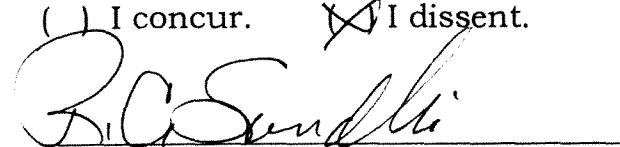
Dated: 9-3-09

☒ I concur. () I dissent.


Michelle D. McBride, Carrier Member

Dated: 9/8/09

() I concur. ☒ I dissent.


R.C. Sandlin, Organization Member

Dated: 9/11/09