

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 29, (Case No. 29)

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 12, 2009 when Claimant S. D. Bailey (6479117) was dismissed. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6 - Conduct and Engineering Instructions 15.1. The incident concerned alleged prohibited use of a company vehicle for personal use.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 2, 2009, continuing forward and/or otherwise made whole."**

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; 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 March 12, 2009, Claimant was dismissed for alleged prohibited use of a company vehicle for personal use. The Organization protested the Carrier's action and pursuant to Rule 13(a) the Discipline Rule and Appendix No. 11 it requested a formal Investigation. The Investigation was convened on March 17, 2009, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, in connection with your alleged prohibited use of a company vehicle for personal use. The alleged violations occurred between January 23 and March 1, 2009 and the Carrier became aware of this on March 2, 2009."

On March 25, 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 dismissing the Claimant. It argued that the Claimant was denied a fair and impartial Hearing because the ultimate decision was pre-determined prior to the formal Investigation and on that basis alone the discipline should be set aside.

On the merits the Organization argued that the facts substantiate that the Claimant used a company vehicle to pay some bills on his rest day as his personal vehicle was not available as it was on Carrier property. At the time of the incident he thought a 2006 Carrier Policy directive allowed him to use the company vehicle to handle the paying of personal bills. It further argued that he did not intentionally violate the Policy and when it was brought to his attention he quickly acknowledged and apologized for his misunderstanding. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant was afforded his contractual rights and was not denied a fair and impartial Hearing. It further argued that the record verifies that Claimant improperly used a company truck for personal business and in the process violated the aforementioned charges, therefore, it reasoned the discipline was appropriate and it asked that it not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the parties Agreement allows for the Carrier to exercise discipline prior to a formal Investigation being held. In this instance discipline was exercised and the Organization requested a formal Investigation pursuant to Rule 13(a) the Discipline Rule and Appendix No. 11. The formal Investigation was then held in accordance with the aforementioned Rules and there is no showing that the Claimant was denied his Agreement "due process" rights account of alleged pre-judgment.

Having determined that there were no procedural violations in the handling of this case the Board turns its attention to the merits and notes that this is the first in a series of four cases involving the same Claimant. The facts reveal that Claimant was assigned as a Foreman of a Patrol Gang and was furnished a company Hy-Rail pickup to be used for company business only.

Testimony as well as GPS tracking of the vehicle indicates that on February 22, 2009, Claimant was observing a rest day and he used a company vehicle for personal business. During the Investigation the Claimant argued that a Carrier directive of 2006 allowed for the use of a company vehicle for personal business, such as that done by him on February 22nd. After the Claimant made that affirmative defense the Hearing Officer required Supervisor Knight (a Carrier witness) to produce that document which was Engineering Newsletter #2006-25 dated April 28, 2006. Examination of that document proves that Claimant's affirmative excuse was in error as the Newsletter did not allow employees to use the vehicle as Claimant did. During the Investigation Carrier witnesses testified that when Claimant was first questioned he told them he used the vehicle because he was bored and decided to drive around, which the Claimant adamantly rebutted and denied. Nonetheless, whether the vehicle was used to pay personal bills and/or to drive around, substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

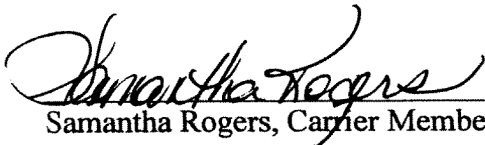
The only issue remaining is whether the discipline assessed was proper. At the time of the offense Claimant had 13 plus years service with a clean record. However, during this same time period his disciplinary record became less than stellar with two additional dismissals (one of which was upheld by this Board in Award No. 32), therefore, the Board finds and holds that the discipline will not be disturbed as it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

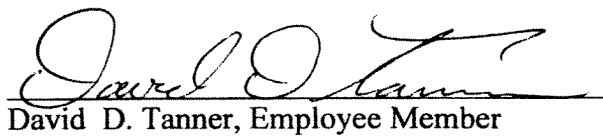
Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 8/6/10