

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 30, (Case No. 30)**

**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. The incident concerned alleged false and dishonest reporting of FRA qualifying inspection for February 13, 2009, a day on which he did not traverse the track.**
- 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 Board notes that this is the second in a series of four cases involving the same Claimant. The facts indicate that on March 5, 2009, Claimant was dismissed for allegedly having entered a FRA qualifying inspection report for February 13, 2009, a day on which it was contended that he did not traverse the track. 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 false and dishonest reporting of FRA qualifying inspection for February 13, 2009, a day on which you did not traverse the track. The Carrier became aware of this incident 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 because the officer who dismissed the Claimant prior to the Hearing subsequently issued the dismissal after the Hearing and on that basis alone the discipline should be set aside. Additionally, it argued that the decision maker also acted as a witness against the Claimant which denied him the right of "due process".

On the merits the Organization argued that the facts substantiate that the Claimant was not given sufficient training in how to correctly fill out and report a FRA Track Inspection Report using the TIMS system. It further argued that the Claimant made repeated requests for additional training which was never granted. It closed by stating that the Claimant did not deliberately falsify any track inspection documents and it requested 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 proves that the Claimant submitted a false FRA Report because he failed to inspect the area, he reported inspecting. It concluded that 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 convened. 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 after which the Hearing was held. On the property in its letter of April 28, 2009, the Organization specifically argued the following:

"...Explain to this Organization how a Carrier Manager can hold a hearing

with the Claimant on March 5, 2009, determined him to be guilty from this hearing, issue a letter under his signature dismissing the Claimant from his job. Having this Organization and the Claimant request a formal hearing on the Claimant's behalf, then this Carrier Manager testifies against the Claimant in the hearing and then after the hearing on March 17, 2009, issue a letter dated March 25, 2009 once again upholding his previous dismissal. How is this fair and impartial?...*" (Underlining Board's emphasis)*

On July 9, 2009, the Carrier responded to the Organization's argument as follows:

"...The Organization's appeal focuses on the investigation was not handled in fair and impartial manner. The Organization is just plain wrong when it states the Claimant was prejudged with Mr. Widerholt's letter of March 12, prior to the investigation. Per the Rule 91 of the Frisco Agreement the Claimant was issued the discipline in letter of March 12, 2009 and then requested an investigation which was held March 17, 2009. There is no violation of the Agreement. Rule 91 of the Frisco Agreement, is the Agreement in which the Claimant worked, and there is no procedural error as the Organization claims. The Claimant thought and testified that the hearing was fair and impartial, as shown with his testimony on page 74...."

Examination of the Carrier's response reveals that it did not address the issue of the Carrier Manager being a witness and the subsequent decision maker other than it argued that the Claimant testified that the hearing was fair and impartial, therefore, it was its contention that the Claimant waived any alleged procedural violations. However, on pages 76 - 77 of the Transcript the Organization was asked the following:

"Q. Has this investigation been held in a fair and impartial manner under the provisions of your agreement?

A. Well, I'll wait and see what the outcome is, wait till I get the transcript...."

It is clear that the Organization did not waive any procedural and/or technical arguments and because of that the Board will address its "due process" arguments.

The issue of Hearing and Charging Officer's improperly holding multiple roles in the formal Investigation process has been the subject of countless Awards and authority can be found on both sides of several issues raised in the instant case. Consistent with the reasoning

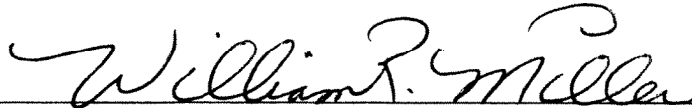
expressed in Third Division Award No. 31774 we find no language in the parties Agreement which prohibits the officer who initially rendered the discipline prior to the Investigation from issuing the same after the Hearing. However, in this instance there is an additional element, as that same officer was also a witness against the Claimant. In Third Division Award No. 24476 the Board discussed the multiplicity of roles that can be held by a Hearing Officer and it stated in pertinent part the following:

"...We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system...."

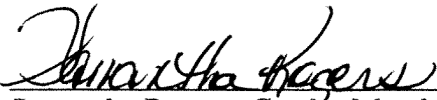
We believe that same reasoning applies in this dispute as well. The Agreement guarantees the employee a right to "due process". That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits. However, the Claimant will **not** be reinstated nor is he due any monies as that issue is moot because this Board upheld his dismissal in Award Nos. 29 and 32.

AWARD

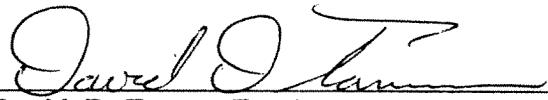
Claim sustained in accordance with the Findings.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 8/6/10