

**PUBLIC LAW BOARD NO. 7425**

**PARTIES ) SMART - TRANSPORTATION DIVISION  
TO )  
DISPUTE ) BNSF RAILWAY COMPANY**

**STATEMENT OF CLAIM:**

**Claim of Montana/Dakota (3<sup>rd</sup>) Seniority District (Glasgow) Student Engineer D. Deweese for removal of Level S, Thirty (30) Day Record Suspension and Three (3) Year Review Period and pay for all time lost as the result of the investigation held on August 29, 2014. (Organization File No. D1840-347-14; Carrier File No. 50-15-00041)**

**FINDINGS:**

**The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.**

**The discipline here on appeal was assessed the Claimant in a Carrier determination that testimony and exhibits brought forth at an August 29, 2014 investigation show that he was guilty as charged of a failure to comply with instructions issued to him by Superintendent Operating Practices Mizelle during a phone conversation at approximately 1312 hours on August 12, 2014. The Claimant was said to have been in violation of GCOR Rule 1.13, "Reporting and Complying with Instructions."**

**Rule 1.13 reads:**

**Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties**

**At the investigation it was testimony of Superintendent Mizelle in part here pertinent as follows:**

**I was, uh, contacted by Geo- by my, uh, Road Foreman George Lehman the evening of the late evening of the, uh, late evening of the 11<sup>th</sup>, uh, to inform me that he had an Engineer Student, uh, Mr. Deweese that, uh, apparently called him up and reported a possible, uh, case where he was, uh, drugged and potentially raped, uh, in, uh, Hettinger, North Dakota and, uh, at that time I thought, okay, this, we**

have an employee here that, that's had a crime committed against him, uh, analyze this in the morning and, uh, I'd, then discuss this with Trent Kale the Superintendent, Acting Superintendent down here. . . . so we called Mr. Deweese, uh, to ascertain if in fact this report is true. Uh, after a brief conversation, uh, with Mr. Deweese it was quite apparent that, uh, he was, uh, fairly nervous. He did indicate that, uh, that the, uh, report was true, that he had, uh, uh, informed my Road Foreman, uh, of, of those possibilities and then I went to, uh, question Mr. Deweese a little further and he immediately, uh, wanted Union representation. . . . our first concern is with our employee, the health and welfare of our employee but, uh, the fact that he was, uh, working for us at, at away from home terminal in a BNSF lodging facility that, you know, I have a responsibility to, uh, investigate this matter, so, uh, he, he, you know, again I asked him a couple of questions and, you know, he did answer the fact that he did go to the hospital and that, uh, he was tested for rape and that in fact, uh, it turned out negative . . . and so at this point Mr., uh, Deweese he sounded very nervous and again he said I, I, I don't want to make any more comments until I talk to my Local Chairman; so I afforded Mr. Deweese the opportunity. At that point I said here's uh, here's your instruction, go ahead call your Local Chairman and talk to your Local Chairman and then you call me back today and then I reiterated you call me back today. (Emphasis added.)

It was the further testimony of Superintendent Mizelle that the Claimant did not call him back as directed on August 12, 2014 and that on August 14, 2014 he asked the Claimant's Local Chairman to have the Claimant call Acting Superintendent [Terminal Manager] Kale at 1300 hours because he had other things that he had to do, and that the Local Chairman agreed to do so. Asked if was of a belief that in failing to follow his instructions the Claimant was in violation of Rule 1.13, Superintendent Mizelle replied in the affirmative.

Testimony of Terminal Manager Kale was in part pertinent as follows:

Nick Mizelle and I were in Nick Mizelle's office, we call Mr. Deweese around 1300, if I remember. Mr. Deweese answered. Um, we asked him how he was doing, because we had heard that there was some, some pretty, some pretty bad allegations going around and then we started to question Mr. Deweese in terms of what happened in the early morning of August 9<sup>th</sup>, 2014, in Hettinger, North Dakota. Um, at that point we asked him directly if he had been, had alleged through Road Foreman Lehman that he had been potentially drugged and potentially sexually assaulted and he said that, yes, that was correct that he thought he had been. . . . Mr. Deweese said I need a

Union rep if I'm going to continue with this conversation. At that point, Mr. Mizelle said we just need your statement, it would be fine for, if you have Union rep, we don't have a problem with that but we need to understand as Supervisors what happened in Hettinger . . . At that point Mr. Deweese asked again for a Union representation to which we agreed and he was instructed on the phone to call Mr. Mizelle back today after contacting his Union rep. (Emphasis Added.)

Questioned as to whether at that time he believed that the conversation with the Claimant was inconclusive for his determination, Terminal Manager Kale said:

Yes and allegations like these are, are rare so if you hear something along these lines you feel compelled to investigate it further just out of employee welfare and his peers' welfare down in Hettinger, North Dakota. It causes a lot of concern when you hear something of that magnitude but at the same time, um, he said he believed he may have been sexually assaulted but also said he had went to Forsyth Medical Clinic and it was determined that he had not been.

Subsequent testimony of Terminal Manager Kale was that the Claimant did not as instructed return a phone call on August 12, 2014 and it was not until the afternoon of August 14, 2014 that the Claimant called and e-mailed him a written statement.

Although not relevant to the charge of record, the written statement as provided by the Claimant under date of August 14, 2014 reads:

Hello, Mr. Kale. My name is Brian Deweese. I'm an employee with BNSF Railway. This is my statement as to the events that transpired in Hettinger, North Dakota. After a work day in which I was able to learn an exceptional amount about locomotives, myself and my Engineer decided to attempt to grab something to eat in Hettinger. We went to the American Legion to unwind and finish our day. After but a few drinks the last thing I clearly remember was placing money in the jukebox in that establishment. The next recollection I have is being woken up by my Engineer in my room. I can recall not one thing between those time periods. Brian Deweese, Student Engineer, BNSF Railway.

In part, the Claimant offered testimony at the investigation in defense of his actions for not being in contact with Superintendent Mizzelle on August 12 as that of not being aware that he had been given an instruction as opposed to a request; he did feel there was any sense of urgency; the conversation with the Carrier supervisory officials initially seemed to be very supportive of him, but as it continued he felt it became more hostile with questions that seemed more leading as though they were

trying to coerce an answer from him that he could not give or might be used against him; he was on mandatory rest and did not believe that he had to speak with supervisory officials at such time; and, he wanted to speak with his Local Chairman because he thought he might be facing discipline.

In the light of the above referenced testimony and overall study of the rather extensive hearing record the Board finds the Carrier to have shown sufficient support for its determination that the Claimant subjected himself to discipline in a failure to comply with instructions issued to him by Superintendent Mizzelle to be in contact with him on the afternoon of August 12, 2014 after the Claimant, as requested, had the opportunity to confer with the Local Chairman of the Organization about personal incidents that he had reportedly experienced while at his away from home terminal in Hettinger, North Dakota and which incident had been earlier reported to a Road Foreman of Engines. The nature of the alleged incidents as reported by the Claimant clearly involved matters of concern for the Carrier and were in need of timely investigation by Carrier supervisory officials and police officers of the Carrier and those of a local jurisdiction.

The Board finds no basis to comment upon the personal incidents as reported by the Claimant; they are irrelevant to the charge of record which only goes to the matter of the failure of the Claimant to have complied with instructions of a supervisory official of the Carrier. Instructions which the Claimant, as stated above, the Claimant failed to comply with in a timely manner. The claim will, therefore, be denied.

Award:

Claim Denied.



Robert E. Peterson  
Chair & Neutral Member



Melissa A. Beasley-Coke  
Carrier Member



J. Michael LaPresta  
Organization Member

Fort Worth, TX

Dated: 4/18/17