

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37268
Docket No. MW-37869
04-3-03-3-237

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 3 with five (5) day actual suspension] imposed under date of January 24, 2002, upon Mr. E. Wieszorek for alleged violation of Union Pacific Safety Rule 70.3 and Maintenance of Way Rules 42.3, 42.4 and 42.4.2 in connection with charges that while working as section foreman on Gang 4813 occupied Main Track Two at CP 16 on South Morrill Subdivision with the hy-rail section truck without proper authority within switch limits at CP 16 on December 14, 2001 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File W-0248-158/1317890).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. Wieszorek's record shall be cleared of the Level 3 discipline and he shall be paid for all lost compensation for the five (5) days he was withheld from service.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time of the incident on December 13, 2001, the Claimant established and held seniority and was assigned as a Section Foreman in the Track Subdepartment. On the date in question, the Claimant was assigned to Gang 4813 working the hours of 10:00 P.M. until 6:30 A.M.

On December 13, 2001, the Claimant and his gang reported for duty at their assigned headquarters in Martin Bay, Nebraska, at 10:00 P.M. Shortly after their workday began, the Claimant conducted his daily routine job briefing concerning safety. At approximately 4:00 A.M., the Claimant was contacted by Supervisor S. Foster regarding a possible broken rail. The Claimant proceeded with his gang to CPW 16 as instructed and patrolled the track between CPW 16 and CPW 9. The Claimant secured track and time authority from the Dispatcher, briefed his gang and assisted in setting the hy-rail section truck on Track No. 2 at CPW 16. However, his permit indicated "Switches-No." It appears that the Claimant had patrolled the same area a year earlier, but since that time, switches had been installed. The Claimant informed his gang of the permit, but made no mention of the status of his authority over switches. The Claimant then instructed the hy-rail driver to get on Track No. 2 at CPW 16 and the Claimant and his gang traveled eastbound. Shortly thereafter, the Dispatcher became aware of a vehicle on the track without authority and contacted Signal Maintainer Holmquist to inform him that a track was occupied without proper authority. Holmquist responded by informing the Dispatcher that the Claimant's gang was traveling eastbound on Track No. 2, east of CPW 16. The Dispatcher in turn contacted the Claimant, verified that his permit read "Switches- No," forbidding him from occupying CPW 16, and ordered him off the track.

By letter dated January 4, 2002, the Claimant was notified of an Investigation to "develop the facts and place responsibility, if any, that while working as Section Foreman on Gang 4813, you allegedly occupied Main Track Two at CP 16 on South Morrill Subdivision with the hy-rail section truck without proper authority within switch limits at CP 16 on December 14, 2001." The Claimant was also informed that these alleged actions indicated possible violations of Union Pacific Safety Rule 70.3 and Maintenance of Way Rules 42.3, 42.4 and 42.4.2. The Investigation took place on January 9, 2002.

In a letter dated January 24, 2002, the Claimant was assessed a Level 3 (5-day suspension) for his violation of "Union Pacific Safety Rule 70.3 . . . and Maintenance of Way Rules 42.3, 42.4 and 42.4.2. . . ."

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization claims that the Carrier failed to afford the Claimant a fair and impartial Hearing because the discipline was issued to the Claimant by an individual other than the Hearing Officer. In addition, the Organization claims that the Hearing Officer repeatedly asked leading questions at the Hearing and offered testimony in the form of questions. Further, the Organization claims that contrary to the Carrier's claim, the Claimant did conduct an adequate job briefing with his gang prior to occupying Track No 2. Finally, the Claimant was unfamiliar with the switch changes at CPW 16 and the Carrier had failed to provide updated general information. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all lost wages, including lost overtime, and to make him whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimant violated Union Pacific Safety Rule 70.3 and Maintenance of Way Rules 42.3, 42.4 and 42.4.2:

“Union Pacific Safety Rule 70.3 - Job Briefing

Use the Job Briefing Process:

Before work begins, when all persons, including employees and contractors, are present.

After work begins, if person(s) arrive who missed the original job briefing.

When changes occur to the work plan or conditions change.

Each work plan must consider hazards, assign specific responsibilities, and explain those assignments.

Maintenance of Way Rule 42.4.2 Using Track and Time Authority

* * *

When the limits are designated BY A CONTROL POINT and the permit includes “SWITCH NO,” the limits extend only to the signal governing movement through that control point. However, when the track and time permit includes “SWITCH YES,” the limits will include that switch, or those switches, and the track in the direction lined between absolute signals governing movement through that control point.”

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier’s, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier’s actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier’s discretion. (See Second Division Award 7325, Third Division Award 16166.)

The Board finds that there was substantial evidence to sustain the Carrier's position in whole. We note that the Carrier proved that on December 14, 2001, the Claimant violated his track authority in violation of Union Pacific Safety Rule 70.3 and Maintenance of Way Rules 42.3, 42.4 and 42.4.2. It is clear that the Claimant was on Track No. 2 at CPW 16 without a proper permit. It was the Claimant's responsibility to insure that the permit that he received included authority over switches. However, he did not do so. This is a clear violation of the applicable Rules.

Further, we find that the Level 3 discipline imposed was reasonable and we will not disturb it.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 5th day of November 2004.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37269
Docket No. MW-36373
04-3-00-3-619

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Patrick Construction) to install trench drains and bank stabilization work at Mile Post 160.5 near Stanford, Montana on the Montana Division beginning July 9, 1998 and continuing (System File B-M-628-F/MWB 98-12-10BF BNR).
- (2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.
- (3) The Agreement was further violated when the claim filed by Vice General Chairman G. E. Frank under date of August 31, 1998 to Carrier Representative K. L. Parenteau was not denied by Ms. Parenteau pursuant to Rule 42 and shall now be allowed in accordance with said rule.
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Foreman G. W. Sinclair, Group 2 Machine Operators R. C. Rodriguez, M. W. Sinclair, J. W. Peltier, G. L. Sinclair, K. R. Johnson, F. L. Linquista, Laborers R. Patacsil and L. Spiller shall each '... receive an equal and proportionate