

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41430
Docket No. MW-41536
12-3-NRAB-00003-110127**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline [Level S thirty (30) day record suspension and a three (3) year probation] imposed upon Mr. D. Russell by letter dated November 18, 2009 for alleged violation of MOW Operating Rules 1.1 Safety, 6.3.1 Main Track Authorization-Overlapping Authority effective October 31, 2004 and Engineering Instructions 1.1.3 Job Briefings, Revision: April 1, 2002 for setting on his hyrail on MT 2 within UC01's Form B limits and allegedly without authorization and alleged failure to job brief when working conditions changed, with the roadmaster or foreman on UC01 prior to setting on, while working at/or near Mile Post 268.8, Main Track 2 on the Sand Hills Subdivision, at approximately 1020 hours on September 4, 2009, while assigned as Sand Hills track inspector on Gang TINS 1402, headquartered at Mullen, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-4/10-10-0037 BNR).
2. As a consequence of the violation referred to in Part (1) above, Claimant D. Russell shall now receive the remedy prescribed by the parties in Rule 40(G).”

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.

On September 8, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 18, which was mutually postponed until October 22, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged setting hyrail on main two within UC01's Form B limits without authorization and alleged failure to job brief when working conditions changed, with the Roadmaster or Foreman on UC01 prior to setting on, while working at or near MP 268.8, main track 2, at approximately 1020 hours on September 4, 2009 on the Sand Hills Subdivision while assigned as Sand Hills Track Inspector on Gang TINS 1402, headquartered at Mullen, Nebraska.”

On November 18, 2009, the Claimant was found guilty as charged and was assessed a Level S 30-day record suspension and a three year probationary period.

It is the position of the Organization that the Carrier failed to meet its burden of proof and the Investigation was not “fair and impartial.” It argued that the Notice of Investigation was not precise and the Claimant was charged with one violation and disciplined for Rule violations never set forth in the Notice. It further argued that the conduct of the Hearing Officer was neither fair nor impartial as exemplified by the fact he indicated that the questioning was complete and asked the Organization's representative to make his closing statement, after which he decided to ask additional questions of a Carrier witness. It asserted that because of those procedural errors, the claim should be sustained without even reviewing the merits. Turning to the merits, it

argued that the facts reveal that the Claimant did nothing wrong because he had a job briefing with two Foremen at the work location and everyone was in agreement as to how to proceed throughout the work day. According to the Organization, the testimony reveals that D. Kerr, the Employee in Charge (EIC) did not take exception to the Claimant being on Main Track 2 and the Claimant never told anyone that he was no longer working within their work groups, nor was he in any danger of colliding with a train or any other equipment because he had exclusive track and time authority to occupy the track. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the facts show that the Claimant was afforded a "fair and impartial" Investigation and he was guilty as charged. It argued that the Hearing transcript conclusively proves that the Claimant violated the cited Rules when he set his hyrail on Main Track 2 within Undercutter Gang UC01's Form B limits without proper authorization, and that he failed to conduct a job briefing with the Foreman of the Undercutter Gang prior to setting his hyrail on Main Track 2. It asserted that the testimony of Carrier witnesses, as well as that of the Claimant, supports the Carrier's position that the Claimant failed to obtain proper authority to occupy the main track that was under the protection of Undercutter Gang Foreman D. Kerr's Form B. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and transcript. We are not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits or that the Claimant was denied his Agreement "due process" rights.

Our examination of the record reveals that the parties had a distinctive disagreement over the phrase in the Notice of Investigation that states: "... failure to job brief when working conditions changed. . . ." The Carrier's interpretation as it pertained to this case was exemplified by the Hearing Officer's questioning of Roadmaster Pacheco, who was asked the following:

"Les Kulhanek: If you departed the area of which you briefed for a substantial amount of time, upwards of over an hour, upon returning would that be a change in conditions to the original briefing?

Lee Pacheco: Yes, it would." (Emphasis added.)

The Organization's interpretation of the same phrase was that after a complete review of the transcript and, in particular, the testimony provided by Employee In Charge (EIC) Foreman Kerr, it was clear that at no time did any work conditions change that would have required the Claimant to conduct an additional job briefing with EIC Foreman Kerr to occupy the Form B restriction in place.

The Carrier also suggested that the Claimant did not have permission to return on Main Track 2. Foreman Kerr was questioned as follows:

“Roy L. Miller: Then I'll re-give it to you. Mr. Kerr, now you said that in your initial briefing in the morning with Mr. Steggal and Mr. Russell, the three of you came to an agreement that Russell would be considered for at least the time period when he worked in your area, Mr. Russell would be considered as part of Mr. Steggal's work group, is that what you said?

Douglas Kerr: That is correct.

Roy L. Miller: And that, would that cover both your track and time authority and your Form B authority?

Douglas Kerr: That is correct.

Roy L. Miller: So once you established the authorities that you were using and went out on the main track did Mr. Steggal's work group at any point in time have to re-contact you and re-establish authority in the Form B or your track and time authority?

Douglas Kerr: No, they did not.

Roy L. Miller: You all had the understanding that he could come and go through either authority as necessary.

Douglas Kerr: That is correct.” (Emphasis added.)

Foreman Kerr further testified that he took no exception to the Claimant coming back to Mullen and setting on Main Track 2. Foreman Kerr reiterated that the Claimant had the authority re-enter and was covered by his Form B limits and that Claimant did not need to request permission because he already had the authority.

The Board concludes that based on the unique facts and circumstances of this case, and on a non-precedential basis, the Organization's interpretation as to whether or not another job briefing was needed, was on point and will be followed in this instance.

The record substantiates that the Claimant had a proper job briefing with Foreman Kerr at which time it was determined that the Claimant had permission to occupy the Form B limits and would be considered as part of Foreman Steggall's work group for the entire day. The record further reflects that during the job briefing, the Claimant, Foreman Kerr and Steggall agreed that the Claimant would be allowed to come and go through either authority as needed without re-contacting Kerr. The fact that the Claimant was not sure that he was covered by Kerr's Form B limits when he first occupied Main Track 2 does not negate the fact that Foreman Kerr testified that he was covered and Kerr's testimony was not refuted. It is clear in this instance that the Carrier failed to satisfy its burden of proof.

The Board finds and holds that the discipline shall be rescinded and removed from the Claimant's disciplinary record and the claim sustained as presented. The Claimant shall be returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of September 2012.