

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41433
Docket No. MW-41591
12-3-NRAB-00003-110217**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 30 day record suspension with a one (1) year probation commencing on May 28, 2010] imposed upon Mr. B. Brown for alleged violation of MOWOR 6.2.1 Train Location, in connection with the charges of alleged failure to ascertain the correct mile post location of BNSF 6304 South after receiving track and time authority to confirm that it had passed the location where the track would be fouled or occupied at/or near Mile Post 100.1 on the Angora Subdivision on March 28, 2010 at approximately 0436 hours while assigned as Bridgeport track inspector on Gang TINS 1509, headquartered at Bridgeport, Nebraska, was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-10-D040-26/10-10-0327 BNR).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant B. Brown 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.

The undisputed facts indicate that on March 28, 2010, the Claimant was working as a Track Inspector at M.P. 100.1 on the Angora Subdivision at Bridgeport, Nebraska. The Claimant obtained authority to occupy the track at the aforementioned location. Two southbound trains BNSF 6086 and BNSF 6304 passed M.P. 100.1 and in accordance with MWOR 6.2.1, the Claimant was required to radio both trains and confirm that neither would be occupying the same track that he was on. It was alleged that he failed to ascertain the mile post location of BNSF 6304.

On April 5, 2010, the Carrier directed the Claimant to report for a formal Investigation on April 12, which was mutually postponed until May 6, 2010:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to ascertain the correct milepost location of BNSF 6304 South after receiving track and time authority to confirm it had passed the location where the track would be fouled or occupied at/or near MP 100.1 on the Angora Subdivision on March 28, 2010 at approximately 0436 hours while assigned as a Bridgeport Track Inspector on gang TINS1509, headquartered at Bridgeport, Nebraska.”

On May 28, 2010, the Claimant was found guilty as charged and was assessed a Level S 30-day record suspension and a one year probationary period.

It is the position of the Organization that the Investigation was not “fair and impartial” because not all employees with pertinent knowledge testified at the Investigation, and it was evident that the guilt was pre-determined by the wording of the Notice of Investigation. In addition, the Organization’s closing statement was

not attached to the transcript, but instead was transcribed into the transcript. It asserted that because of those procedural errors the claim should be sustained without even reviewing the merits. Turning to the merits, the Organization argued that an audio exhibit to the transcript verified that there was a conversation between the Claimant and a crew member of BNSF 6304, which confirmed that he had a direct communication with a crew member relative to the train's location. According to the Organization, the Claimant explained very clearly that he had identified both of the trains that he was to follow with his track authority and he knew they were clear of the location where he would first foul the track. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record shows that the Claimant received a "fair and impartial" Investigation and he was guilty as charged. It argued that the transcript proves that during the Investigation, the Claimant admitted that he failed to ascertain the mile post location of BNSF 6304. It argued that when the Claimant decided that he was not going to obtain a mile post location from the aforementioned train because he saw it pass, he violated MWOR 6.2 because he had no authority to get on the track until he complied with the Rule. The Carrier closed by asking that the claim remain denied.

Following the Board's thorough review of the record and transcript, we conclude that the Organization's procedural arguments do not rise to the level so as to permit setting aside the discipline without reviewing the merits. It is clear that the Claimant was afforded his "due process" Agreement rights.

This case deals with the identical issue addressed in Public Law Board No. 7048, Award 67, involving the same parties. Therein MOWOR 6.2.2, Train Location, was relied upon by both parties. The Rule was quoted, in pertinent part, as follows:

"Prior to fouling the track at the location where the track will be first occupied, employees who receive authority to occupy the track after the arrival of a train or to follow a train(s) must:

* After receiving the authority, establish direct radio contact with a crew member of the train(s).

- * Confirm the train's identity by engine initials and number.
- * Ascertain the train(s) MP location, confirming it had passed the location where the track will be fouled or occupied . . .”

Award 67 determined, in pertinent part, the following:

“The Manager of Operating Practices testimony recognized the crux of the issue when he stated the three bullet points refer to the body of the Rule. The Carrier argued that the three bullet points all require radio confirmation. That argument is based upon an inference and is not without some appeal, but it is not persuasive in this instance because the directive to make radio contact is not within the body of the Rule prior to the three bullets as it was only set forth in the first bullet.

Claimant testified and it was not refuted that he did a roll by of BNSF 8858 West which the train crew acknowledged as they passed him. The record further indicates the Claimant complied with the intent of the Rule as it existed on May 11, 2010. He received authority as required, established direct radio contact with a crew member of the train and confirmed the train's identity by engine initials and numbers. He also ascertained the train's Mile Post location through both visual and verbal communication even though he did not memorialize such on the radio. The Organization was correct that the Rule 6.2.1, Train Location, was subject to multiple interpretations, which may explain why it was subsequently revised on May 21, 2010, wherein it was changed in pertinent part to read as follows:

‘. . . After receiving authority behind a train(s) and before occupying or fouling the track, the employee must establish direct radio contact with a crew member of the train(s) and verbally:

- * Confirm train(s) identity by engine initials and number
- * Determine train(s) location by MP

The employee must use this information to verify the train(s) has passed the location prior to occupying or fouling the track.'

System General Order No. 15 which was an exhibit to the Investigation transcript explained why the Rule was changed as follows:

'MWOR 6.2.1 is amended to clarify that information which must be obtained by the employee through direct radio contact with a train crew member after receiving authority behind a train.'

The change and clarification of the Rule emphasizes the fact that the Claimant did not violate the Rule prior to its revision and substantiates that the Carrier did not meet its burden of proof."

The record is clear that on the morning of March 28 the Train Dispatcher informed the Claimant that he would have to wait before he could set on because there were two trains, identified as BNSF 6086 South and BNSF 6304 South, that needed to pass through the area where the Claimant intended to work and before he could set on the single main track with his hy-rail vehicle to perform any work. The Claimant waited and watched both trains pass, after which the Claimant again contacted the Train Dispatcher and obtained track authority, after which he called BNSF 6304 South to let the train know that he had obtained track and time behind it and to confirm that he passed Mile Post 100.1 and that the train was not heading back into the area where the Claimant was ready to set on the single main track and perform work. BNSF 6304 South also advised the Claimant that it had passed Mile Post 100.1 and if it needed to stop and back up into the area where the Claimant had his track and time authority, it would let him know. The Claimant also contacted BNSF 6086 South to clarify that it had continued southbound in front of BNSF 6304 South. The Claimant's situation was almost identical, other than a different date and location, to that of the Claimant in Award 67 and both incidents occurred prior to May 21, 2010, when Rule 6.2.1 was revised. Based upon the same reasoning and rationale expressed in the aforementioned Award the Board concludes that the Carrier failed to meet its burden of proof.

The Board finds and holds that the assessed discipline must be rescinded and removed from the Claimant's disciplinary record. The claim is sustained in accordance with Part 2 of the Statement of Claim.

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.