

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41483
Docket No. MW-41248
12-3-NRAB-00003-100090**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 - thirty (30) day record suspension] imposed upon Mr. S. Miller by letter dated February 26, 2009, for alleged failure to protect men and machines, an alleged Five Critical Rule violation in accordance with Maintenance of Way Operating Rule 6.3.1, Main Track Authorization, while assigned as foreman with SC10 at Raceland, Louisiana, Mile Post 40.0, on the Lafayette Subdivision on January 22, 2009 as allegedly discovered on January 23, 2009 when he allegedly failed to properly document the Track Warrant form for TP10 working as a multiple work group under his supervision was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-09-D040-4/10-09-0217(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Miller shall now have this discipline removed from his personal record.”**

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.

This dispute involves a three-day period (January 22, 23, and 24, 2009) and two gangs working on track maintenance. Surfacing Gang SCIO consisted of more than 60 employees and was under the supervision of Foreman S. Miller. Tie Gang TP10 consisted of just four or five employees and was under the supervision of Foreman J. Rodriguez. The two gangs worked in close proximity to one another, each being independently responsible for the on-track protection of its employees and machines. The Surfacing Gang's protection was set forth in a Track Warrant; the Tie Gang's protection was set forth in a Form B. Each gang had tied up at the end of its workday at a different location - the Surfacing Gang at Raceland Siding and the Tie Gang at Valier Siding. At least these had been the arrangements in mid-January. Both gangs were under the overall supervision of Roadmaster M. Heinbaugh.

Sometime late on January 21 or early on January 22, Management believed that it was necessary to change the tie-up location for Tie Gang TP10 from Valier to Raceland. That was apparently announced at the pre-work safety briefing on the morning of January 22. Both Miller and Rodriguez and their gangs were at this meeting. Rodriguez realized that his Tie Gang did not have on-track protection for the move to Raceland Siding on his Form B. He determined that this could be corrected by "piggy-backing" on the protection provided by the Surfacing Gang SC10's Track Warrant. To accomplish that, he had to contact Miller, who was the Foreman and Employee-In-Charge (EIC) for Surfacing Gang SC10. He asserts that he called Miller "on the radio" and had the following conversation:

“... I ... informed him [Miller] of our intentions ... telling him that we [the Tie Gang] would need his Track Warrant to clear up to Raceland ... because our [Tie Gang] Form B would not cover us [Tie Gang] to Raceland [and] ... Miller then informed me he would not release his Track Warrant until I cleared into Raceland. ... [Then, referring apparently to a later time that same day] ... Miller never asked if we [Tie Gang] were in the clear before he released his time. ...” (Emphasis added)¹

Miller, on the other hand, asserted at the Investigation that “I was never contacted by ... Rodriguez that he wanted to piggyback on my [Surfacing Gang] track authority to come into the hole [evidently, a reference to Raceland Siding]. . . .” (Emphasis added). Thus, Miller denied that Rodriguez made a request to share the track protection afforded Miller’s surfacing gang. Miller’s gang ended its January 22 workday on Raceland Siding. And it was followed there by Rodriguez’s gang.

Had Rodriguez’s gang move to Raceland Siding been discussed with and approved by Miller, then Miller would have been obliged by Operating Rule 6.3.1 to do the following:

“Multiple Work Group - Job Briefing

When two or more work groups are using the same authority, the EIC [Employee in Charge, here Miller] of the authority must have a job briefing with each group.

Multiple Work Group - Documentation

The employee in charge of the authority must document the following on the ‘Multiple Work Groups Using the Same Authority’ form:

- Authority number
- Name of each work group using the authority

¹ This statement was written by Rodriguez on January 30, 2009, about one week after the events in question, in the course of the Carrier’s preliminary investigation.

- Time acknowledgment received
- Time authority limits are cleared
[and so forth]”

Miller did not document his Track Authority Form (TAF) to show his gang would be sharing certain track with Rodriguez’s gang at a certain time of day. Miller believed he had not received a request from Rodriguez to do so. He was the EIC for the two gangs for purposes of administering his Track Warrant. The following day, November 23, the Carrier discovered this apparent lack of documentation – a serious safety violation in Management’s view. It called for a preliminary investigation, which led to the formal Investigation on February 4, 2009.

The Carrier’s ruling on February 26 was that Miller was guilty of violating Operating Rule 6.4.1 when he “failed to properly document the Track Warrant form for [Tie Gang] TP10 working as a multiple work group under your [Miller’s] supervision. . . .” It issued him a Level S 30-day record suspension. The Organization protested, urging that: (1) Miller had been denied a fair and impartial hearing, referring to the Investigation before Officer M. Heille (2) the Carrier’s witness before Heille gave “contradictory, inaccurate, and unreliable” testimony (3) the Carrier failed to show Miller was guilty of the charges made against him, and (4) the discipline imposed (assuming guilt) was arbitrary, capricious excessive, and in violation of the Agreement.

The precise reason for the discipline in this case is set forth in the Carrier’s February 26, 2009 written notice to Miller:

“. . . Your alleged failure to protect men and machines . . . in accordance with . . . Operating Rule 6.3.1 . . . on January 22, 2009 . . . when you allegedly failed to properly document the Track Warrant form for [Tie Gang] TP10 working as a multiple work gang [with Surfacing Gang SC10] under your supervision. . . .”
(Emphasis added)

This charge was based on three separate and distinct allegations: (1) Rodriguez, who was the Foreman of Tie Gang TP10, made a radio call on January 22 requesting Miller to provide protection for TP10 under Miller’s Track Warrant so that the two gangs would be a “multiple work group” on a shared piece of track

(2) Miller granted Rodriguez's request and (3) Miller subsequently failed to document this "multiple work" on his Track Warrant as required by the Operating Rules.

However, the second allegation was contradicted by Rodriguez's own January 20, 2009 written statement several days before the formal Investigation. He wrote that Miller stated, in response to Rodriguez's request, that he would not release his Track Warrant until the Tie Gang TP10 had "cleared into Raceland." And there is no persuasive evidence that Miller saw Rodriguez "clear into Raceland." That being so, there was no reason for Miller to document a revision of his Track Warrant. Nor is there anything in the record establishing that Miller was required by the Operating Rules, in these particular circumstances, to grant Rodriguez's request. The Carrier never really explained why it disregarded Rodriguez's significant admission that his request to "piggyback" on Miller's Track Warrant was rejected by Miller.

Of course, there is still the underlying conflict between the two Foremen as to whether Rodriguez even called Miller on the radio to request "piggybacking" on Miller's Track Warrant. Rodriguez contends that he did call, but Miller insists he received no such call. Even assuming that Rodriguez made this call, there may be other possible explanations for the conflict. Perhaps Miller was distracted for a few moments when the call was received; perhaps his memory of detailed conversations with employees is not particularly good. In short, there are no compelling reasons why the Board should embrace either Rodriguez's explanation of what happened or Miller's denial that he received a call from Rodriguez. And, as we observed earlier, Rodriguez contradicted himself more than once during the course of the Investigation.

For all of these reasons, we find that the Carrier's charge against Miller is not supported by "substantial evidence." Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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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 13th day of December 2012.