

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41435
Docket No. MW-41602
12-3-NRAB-00003-110222**

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 June 8, 2010] imposed upon Mr. G. Rasmussen by letter dated June 8, 2010 for alleged violation of MOWOR 6.2.1 Train Location, in connection with charges of alleged failure to get an exact mile post location after receiving track and time authority #399-13, before fouling track behind BNSF 5851 east on Main Track 1 of the Sand Hills Subdivision, April 26, 2010, at/or near Mile Post 178 while assigned as foreman on Gang TSEC0384, headquartered at Ansley, Nebraska was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-10-D040-31/10-10-0366 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant G. Rasmussen 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 April 26, 2010, the Claimant was working as Foreman on Gang TSEC0384 headquartered at Ansley, Nebraska. The Claimant obtained authority to occupy Main Track 1 at Mile Post 178 on the Sand Hills Subdivision. Train BNSF 5851 passed Mile Post 178 and in accordance with MWOR 6.2.1, the Claimant was required to radio the train and ask a specific set of questions in order to ascertain the train's location and that it would not be occupying the same track. It was alleged that he failed to ascertain the mile post location of BNSF 5851.

On April 29, 2010, the Carrier directed the Claimant to report for a formal Investigation on May 11, which was mutually postponed until May 12, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to get an exact milepost location after receiving track and time authority #399-13, before fouling track behind BNSF 5851 east on main track 1 on the Sand Hills Subdivision, April 26, 2010 at/or near mile post 178 while assigned as Foreman on gang TSEC0384, headquartered at Ansley, Nebraska.”

On June 8, 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. Moreover, it was not provided the audio recordings between the Claimant, the Train Dispatcher and Train BNSF 5851 prior to the Investigation. 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 the transcript reveals

that the Claimant received track and time authority behind BNSF 5851 East on April 26, 2010, and he made direct radio contact with a crew member on BNSF 5851 during which time he briefed the crew member about his exact milepost location and what his intentions were in correlation to the train. According to the Organization, the Claimant was in compliance with the cited Rules. 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 testimony developed at the Investigation, as well as the exhibits presented, prove that the Carrier's Remote Auditing group, located in Fort Worth, Texas, listened to the audio recording of the Claimant's conversation with BNSF 5851, which substantiates that the Claimant failed to ascertain the mile post of the train as required by MOWOR 6.2.1. 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 to set aside the discipline without reviewing the merits. On the contrary, it is clear that the Claimant was afforded his "due process" Agreement rights.

This dispute deals with the identical issue addressed in Public Law Board No. 7048, Award 67 and Third Division Award 41433. Other than a different date and location, there was no substantive change in the arguments advanced by the parties. For the sake of brevity, the Board will not reiterate its reasoning, but instead refers the parties to Award 41433. Because the same rationale expressed in that decision is applicable in this instance, the Board concludes 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. The claim is sustained in accordance with Part 2 of the Statement of Claim.

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 5th day of September 2012.