

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41492
Docket No. MW-41616
12-3-NRAB-00003-110237

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [removed and withheld from service by letter dated March 24, 2010 and a Level S 30 day record suspension with a three (3) year probation commencing on April 9, 2010, by letter dated April 19, 2010] imposed upon Mr. B. Walker for alleged violation of MOWOR 11.3 Fouling the Track, MOWOR 11.5 On-Track Safety Procedures in Effect and MOWSR S1.6.1 Movement of Equipment, for allegedly occupying and fouling Main Track 2 without authority, causing an east bound load to go into emergency stopping short of D-car at approximately 0930 on March 23, 2010 at/or near Mile Post 450.39 on the Butte Subdivision while assigned as track inspector on Gang TINS0318 headquartered at Crawford, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-23/10-10-0324 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Walker 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.

This case concerns the discipline assessed B. D. Walker, a Track Inspector, on April 19, 2010, for his alleged violation of several Operating and Safety Rules while serving as a Pilot (or Escort) for a Herzog Detector Truck (D-car). The Carrier asserts that he failed to give a timely warning to the Driver of the D-car that he had driven onto the wrong main track without authority, thereby "fouling" such track and placing men and equipment in great danger from an oncoming coal train. The Organization insists that the discipline was unjustified for any of three reasons: (1) Walker did provide an appropriate warning to the D-car Driver and was hence not guilty of any Rule violation (2) the discipline assessed was in any event "excessive," and (3) furthermore, the Carrier failed to provide Walker a fair and impartial Investigation. It urges that the discipline was unjustified, that the discipline be removed from Walker's personnel record, and that he be reimbursed for his loss of earnings or other benefits.

Herzog is a contractor that regularly performs maintenance work for the Carrier in this area of Nebraska. Its D-car is a four-wheel truck capable of movement on standard roads or railroad tracks. After the D-car is mounted on the track and its front and rear rail wheels are lowered onto the track, it is capable of traveling at a reasonably high speed while testing the rails for signs of defects. It is in effect an early warning device for avoiding accidents and enhancing the safety of any railroad workers (Carrier or contractor) their equipment, and any rail cargo.

Herzog provides the D-car Driver. The Carrier provides an Escort (Pilot or occasionally referred to as the Employee-in-Charge [EIC]). The latter two positions are described in the Operating Rules or Engineering Instructions as follows:

“Escort – An employee familiar with the territory and assigned by the employee-in-charge to assist the movement of equipment operated by employees, contractors, or other outside personnel unfamiliar with the territory.

“EIC – A (R)ules qualified [Maintenance of Way] employee who is assigned the duty of being responsible for the protection and direction of [him]self and . . . co-workers in any engineering work activity.

“Engineering Instructions . . . Division Responsibility . . . Provide a qualified [E]scort to obtain track authority for the [D-car] and to supervise its movement on the railroad . . . to ensure that [the D-car people] work safely and efficiently.”

Moreover, there are usually two crews to support the D-car. One of them, the D-car maintenance gang, follows closely behind the D-car to help identify, mark, and correct (when feasible) the rail defect the D-car testing has discovered. The other, the Crawford West Section crew, is ordinarily further away. There are also several contractor personnel in the back of the D-car who apparently assist in some way with the D-car’s test procedure.

On March 23, 2010, the D-car Driver was W. Jauncey and his Escort (Pilot) was Claimant B. Walker. A job briefing was held by Walker at the Crawford depot at 7:30 A.M. The goal for the day was to test rails on the single Main,¹ Main Track 1, and Main Track 2 from Ardmore to Edgemont. Everyone then proceeded to Ardmore where Walker called the Train Dispatcher, advised her of the testing plan for the day and requested “track and time authorization” for such test work. Then, after a short wait, he was provided the requested “authorization.” He was advised

¹ This “single Main” split into two parallel lines, Main Track 1 and Main Track 2, in the vicinity of Ardmore, Nebraska.

that the test work was to be done on Main Track 1 between Ardmore and Mile Post 445.1. He passed this information on, directly or indirectly, to the contractor personnel and Carrier employees. There is some disagreement as to the precise order in which these preliminaries occurred, but there is no need to deal with that matter. Another "job briefing" took place at Ardmore. The D-car and the crews then proceeded toward the location where the work was to be done.

What happened next and the time period involved is very much in dispute. The following accounts are based largely on the transcript made of testimony at the formal Investigation held on April 1, 2010.

According to Jauncey, he drove the D-car up to the area where he believed the test work was to begin. He "crossed" one set of tracks and "assumed" he was "setting on Main 1. . . ." He asserted that it took the crew "quite a while . . . about 10 minutes to set the [D-car] . . ." on the Main Track. The D-car had to be properly positioned; its air bags released; its rear and front steel wheels had to be lowered onto the track; some of that had to be done with the guidance of an employee on the ground. Then, just moments later, he heard a train coming toward them and "assumed" it was traveling on Main Track 2 because, as noted earlier, the test work on the rails was to be done on Main Track 1. He opened the D-car window to talk to the ground employee and promptly realized that the on-coming train was on the same Main Track as his D-car. He admitted that he "did not know for sure which track was Main [Track] 1 and which track was Main [Track] 2." But he and the others in the D-car knew then they were in real danger and had to get the D-car off of Main Track 2 as quickly as possible.

Jauncey and his crew promptly began the steps necessary to remove the D-car from Main Track 2. According to Jauncey, at that point, but not before, Walker spoke up and told Jauncey that they were on the "wrong track," Main Track 2 instead of Main Track 1, and "to get off." Prior to that, Jauncey asserted that Walker had been busy talking to the other crews about their test work "authorization" for the day. And Jauncey was finally able, with the help of his crew, to remove the D-car from Main Track 2. It appears, however, that the oncoming train was able to make an emergency stop and avoid a collision. The train stopped before the D-car was removed from Main Track 2. In other words, had the oncoming train been unable to stop, there would have been a collision.

According to Walker, he knew from his conversation with the Train Dispatcher that the test work was to be done on Main Track 1. He and Jauncey passed that information on to the others involved in such work. While busy with such conversations, he realized that Jauncey had driven “across the tracks and started to back up onto Main [Track] 2.” Walker, knowing the D-car belonged on Main Track 1, “immediately told [Jauncey] . . .” he was on Main Track 2. When Jauncey did not respond, Walker again told him he was on Main Track 2. Once again Jauncey did not respond and Walker made himself even clearer, “You are on the wrong Main . . . there is a train coming . . . you need to get off [Main Track 2]” Walker then jumped off the D-car and made calls to both the Roadmaster and the Train Dispatcher. While he was doing so, the D-car was removed from the Main Track 2. As noted above, the oncoming train had made an emergency stop and had come to a halt 1,850 feet short of the D-car. It appears that the D-car was removed from Main Track 2 after the oncoming train had stopped.

The Carrier began its preliminary investigation by taking statements from a variety of people, both Carrier employees and contractor personnel. A formal Investigation was held on April 1, 2010, to ascertain the facts and “Walker’s responsibility,” “if any, in connection with [his] alleged occupying and fouling Main Track 2 without authority, causing an eastbound load to go into emergency . . . [and] his alleged dishonesty. . . .” In addition, Walker was “withheld from service pending completion of the investigation.” The Carrier concluded, following the Investigation, that Walker was guilty of having violated several Rule violations and assessed a Level S, 30-day record suspension coupled with three years’ probation. It withdrew its charge of “alleged dishonesty.”

The Organization protested.

The first issue is whether Walker was guilty of a violation of the Operating and Safety Rules in question, particularly 11.3, which reads in part:

“Each roadway worker is responsible for determining that on-track safety is provided before fouling any track

1. Assume individual responsibility to make the move safely.

2. Foul the track only after determining it is safe to do so
(Emphasis added)

Other Rules indicate that a Pilot/Escort, the job Walker was assigned on the day in question, is responsible for supervising the movement of the D-car to ensure that it is operated safely. That responsibility would obviously include making sure the D-car is on its authorized track. Here, Walker was “individually responsible” for the safe movement of the D-car. He knew from the Train Dispatcher’s authorization that the testing work was to be done on Main Track 1; he knew he had no authority to be on Main Track 2. Yet he spent ten minutes in the D-car on Main Track 2 before he realized he was fouling Main Track 2 without authorization.

Several defenses have been raised on Walker’s behalf. None is persuasive. Surely, Walker cannot rely on Jauncey’s experience as a D-car Driver in this particular area. For Walker was assigned as a Pilot/Escort precisely because he had greater knowledge of the area, and because he offered a kind of “insurance” against a Driver’s mistake or inexperience. Nor does the record evidence support Walker’s assertion that he “immediately” notified Jauncey that he was on the wrong track as soon as he backed up next to Main Track 2. The evidence shows that Jauncey had the D-car on or next to Main Track 2 for ten minutes or more before both Jauncey and Walker reacted to the mistake. The fact that they reacted quickly when the mistake became apparent does not excuse Walker’s carelessness. He was communicating to the crews about track and time authorization while Jauncey was driving onto Main Track 2 and setting up for the testing work. However experienced and knowledgeable a Driver may be, a Pilot/Escort cannot escape his own responsibility by relying on another.

Indeed, Operating Rule 6.26 provides further reason for additional caution when dealing with “Multiple Main Tracks.” It reads:

“Unless otherwise indicated in . . . special instructions, multiple main tracks will be designated as follows:

When using main tracks in a northbound or eastward timetable direction, they will be numbered from left to right, beginning with Main 1.

When using main tracks in a southward or westward timetable direction, they will be numbered from right to left, beginning with Main 1.”

These instructions could certainly confuse someone with limited experience. They serve to explain why close consideration of a D-car Driver’s moves by a Pilot/Escort is necessary.

Walker was guilty of a violation of the Operating and Safety Rules. Thus, discipline was justified.

The second issue is whether the discipline assessed Walker was “excessive.”

The Board recognizes that Walker did not intentionally ignore Rule 11.3. Nor was he reckless. He was guilty of carelessness, apparently assuming that because he had worked with Jauncey for several days doing this test work he could trust Jauncey’s judgment as to whether the D-car was properly located. However, the Carrier’s assignment of a Pilot/Escort to the D-car is made precisely because the D-car Driver is almost certainly less informed than the Pilot/Escort and because of the terrible consequences which might ensue from a Driver’s mistake. In this case, had the speed of the oncoming train been greater, or had the Locomotive Engineer initiated the emergency brake application somewhat later, a serious accident would likely have occurred. Given these circumstances, the Board finds that the discipline imposed was not “excessive.”

The third issue is whether the Carrier failed to provide Walker a fair and impartial Investigation.

A good part of the Carrier’s argument rested on the fact that various written statements by Carrier employees or contractor personnel were introduced in evidence without the Organization having had an opportunity to cross-examine the authors of such statements. Either they were not present at the formal Investigation

or their presence was not demanded by the Organization. The Board has no information as to why they did not testify at the Investigation. But we have not relied on such written statements in arriving at our conclusions in this case. Our attention has been focused entirely on the testimony of the two principal witnesses – Walker and Jauncey. It is their statements that were crucial to the findings of fact in this case.

A thorough review of the voluminous record made by the parties does not support the Organization's view that the Carrier denied Walker "fair and impartial" treatment.

We find, accordingly, that the discipline assessed Walker was justified. Therefore, the claim must be denied.

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 13th day of December 2012.