

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41865
Docket No. MW-41689
14-3-NRAB-00003-110316**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes 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 [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. J. Yancey by letter dated September 3, 2010 for alleged violation of MOWOR 2.14.2 Before Reporting Clear of Authority Limits in connection with charges of failure to inform the train dispatcher/control operator that all employees and multiple work groups using the authority were clear of track while working on the Brush and Pikes Peak Subdivisions at approximately 1315 hours on July 2, 2010 while working as foreman headquartered in Denver, Colorado was arbitrary, unwarranted and in violation of the Agreement (System File C-10-D040-35/10-10-0484 BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now ‘. . . remove this Level S 30 day record suspension with one (1) year review period from Mr. Yancey’s 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.

The Claimant in this matter has seniority as a Section Foreman with more than five years of service.

On July 2, 2010, the day addressed in this dispute, the Claimant, as Foreman, and a Truck Driver were assigned the task of dropping off a short piece of rail ("the tail rail of a frog") near a main line track. In order to do this, the Claimant needed to traverse the track with a hy-rail to carry the rail to its designated spot.

The Claimant asked for and obtained authority to occupy the track. When he was finished, he did not inform the Train Dispatcher, as required by Maintenance of Way Operating Rule (MOWOR) 2.14.2, that, "all employees and multiple workgroups using the authority were clear of the track(s)."

MOWOR 2.14.2 states:

"Before Reporting Clear of Authority Limits

Before a field employee reports clear or releases a portion of authority limits, and the Train Dispatcher/ Control Operator accepts the information, the following must occur:

- The employee will provide their name or other identification and the authority number to the Train Dispatcher/ Control Operator.
- The Train Dispatcher/ Control Operator will have the required form or computer screen displayed for data entry and confirmation.

- The employee will inform the Train Dispatcher/ Control Operator that all employees and multiple workgroups using the authority are clear of track(s).
- The Train Dispatcher/ Control Operator and field employee must carefully match the verbally transmitted information against the authority form to insure the information matches and is correct.” (Emphasis added.)

During an audit for another purpose, Roadmaster Alton Fry, the Claimant’s immediate supervisor, noticed the Claimant’s omission in the conversation between the Claimant and the Train Dispatcher. To be sure of what had taken place, the Roadmaster obtained an audio tape recording of the conversation between the Claimant and the Train Dispatcher. The tape confirmed the omission and became an exhibit at the Investigation. Roadmaster Fry’s assertions about these matters at the Investigation were not controverted.

During the Claimant’s appearance at the Investigation the following exchange took place. The questioner was the Conducting Officer.

“BUTCH COLE: When you released authority 445-61 on July 2, 2010, did you state that all employees and multiple work groups were in the clear?”

JACOB I YANCEY: No, I did not have a multiple work group.”

The Board notes that the question put to the Claimant inquired about employees and multiple work groups. Although the Claimant did not have multiple work groups on the project, he did have a fellow employee. We perceive the Claimant’s response to the question as an evasion, not an answer.

We also deem the following argument to be an attempt to evade the central question. In its Submission, the Organization contends:

“. . . [I]t is crystal clear that the Claimant did not violate MOWOR 2.14.2 because (1) he did ensure that all employees using his track authority(s) were clear of the track and (2) he did not have to report that multiple work groups were clear of the track because there were

not multiple work groups using his track authority(s) on the day in question. Once again, Dispatcher Morgan was fully aware that there were not multiple work groups using the Claimant's track authority(s) and this is the reason she accepted and authorized the Claimant's request to release the track authority(s) that were in effect at the time."

The Claimant acknowledged during the Investigation that he did not state that all employees and multiple work groups using the authority were clear of the tracks. His response implied that he did not have to make the assertion because he was not working with multiple work groups. The Organization's argument echoes this point. However, the Claimant was working on the tracks as was a fellow employee, and a clear purpose of the MOWOR was to insure that no person remained in harm's way before the tracks in question were cleared for normal operations.

In his appearance at the Investigation Roadmaster Fry identified MOWOR 2.14.2 as a "critical decision" and defined that as follows: "A critical decision is a decision that if done incorrectly puts men and equipment in harm's way, possibly risking serious harm or death."

The contents of the audiotape of the conversation between the Claimant and the Train Dispatcher, the testimony of Roadmaster Fry, and the acknowledgement of the Claimant during his appearance at the Investigation undermine the Organization's argument that the Carrier failed to meet its burden of proof.

The Claimant's failure to recite the required announcement was a violation of MOWOR 2.14.2.

After being postponed three times by mutual agreement of the parties, the Investigation was held on August 6, 2010. On September 3, 2010, the Carrier assessed the Claimant a Level "S" 30-day record suspension with a one-year review period for the violation of MOWOR 2.14.2

The Organization argues that the Claimant was deprived of a fair and impartial hearing because:

- Conducting Officer met with the Carrier's witness before the Hearing, thus prejudicing the case.

- **The Carrier refused to present the Train Dispatcher as a witness at the Hearing, thus prejudicing the case.**

The record does not support the Organization’s statement, “. . . [T]he conversation between the two (2) men seemed to suggest that the hearing officer was attempting to coach and prep Roadmaster Fry as to the type of questions that would be asked of him at the investigation.” Fry testified that the discussion was to familiarize the Hearing Officer with the event (“instance”) so that he might develop his questions for the witness and denied that it served to prepare the witness for the Hearing. Whatever one might think about the wisdom of such a conversation, the record does not show that it adversely affected the fairness of the Hearing. The following colloquy is from the transcript of the Investigation. The questioner is the Brotherhood of Maintenance of Way Employees Division Local Chairman and the Claimant’s representative at the Investigation. The person being questioned is the Denver Terminal Roadmaster; the Claimant’s immediate supervisor.

“BARRY E SMYTH: Mr. Fry, before the hearing, did you have any conversation with the Hearing Officer about the incident?

ALTON D FRY: Yes.

BARRY E SMYTH: And what nature was those discussions?

ALTON D FRY: Asking me questions about the incident.

BARRY E SMYTH: Could you be more specific?

ALTON D FRY: He asked me questions about the instance, the, a list of what kind of questions he was going to ask me.

BARRY E SMYTH: So he prepped you for the questioning?

ALTON D FRY: No.

BARRY E SMYTH: You just said he asked you questions would you repeat what you just said?

ALTON D FRY: He asked me questions about the incident, so he can develop his questions.”

In its Submission, the Organization’s quotation of the exchange was incomplete. It ended with, “He asked me questions about the instance, the, a list of what kind of questions he was going to ask me.”

The facts of this case distinguish it from Fourth Division Award 2158, for in that case, the Conducting Officer was present at a meeting “at which all the prosecuting witnesses were present . . . [and that was deemed to have] tainted the subsequent investigation.”

The Organization contends that the absence of the Train Dispatcher at the Investigation indicated that the Carrier did not “desire to fully demonstrate the factual circumstances of the Carrier’s case.” The Organization cites Third Division Award 19910 which states, “As to the calling of witnesses, a carrier’s role is that of judge: a carrier is, by rule and by the general principle of fairness, obligated to obtain all the essential facts related to the charge. This means that a carrier must call all witnesses who possibly might be able to throw factual light on the occurrences involved.”

This is not a case in which the facts are in dispute and for which testimony from additional witnesses might resolve conflict between what is asserted as facts. The facts of this case are not in dispute - the Claimant did not do what MOWOR 2.14.2 required him to do. He did not “inform the Train Dispatcher/Control Operator that all employees and multiple work groups using the authority are clear of the track(s).” Neither the Claimant nor the Organization is persuasive by pointing to the fact that at the job site in question, the Claimant did not have a multiple work group. Neither is the Organization persuasive when it states – without a scintilla of evidence – that the Train Dispatcher “was fully aware that there were not multiple work groups using the Claimant’s track authority(s) and this is the reason she accepted and authorized the Claimant’s request to release the track authority(s) that were in effect at the time.”

Even if the Train Dispatcher had been called – given the facts of the case and the purpose of her testimony, she would have had to have been called as a witness for the Claimant – and had given support to the Organization’s surmise as to why she did not follow that portion of MOWOR 2.14.2 that requires that “The Train Dispatcher/Control Operator and field employee must carefully match the verbally transmitted information against the authority form to insure the information matches

and is correct.” All that would have added to the record is that two employees did not follow the work Rule. The Board notes that although the matter was raised at the Investigation, the Organization did not argue disparate treatment in its Submission.

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 16th day of June 2014.