

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41867
Docket No. MW-41757
14-3-NRAB-00003-110369**

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 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 [Level S thirty (30) day record suspension and a three (3) year probation commencing on April 30, 2010] imposed upon Mr. D. Timmens by letter dated April 28, 2010 for alleged violation of MOWOR 6.2.1 Train Location in connection with alleged failure to communicate with the train crew after track authority had been granted behind BNSF 6265 at approximately 1013 hours on March 1, 2010 at/or near Mile Post 415.0 MT2 on the Butte Subdivision while assigned as grapple truck driver on Gang TTDX0414 headquartered at Hemmingford, Nebraska was arbitrary, capricious and in violation of the Agreement (System File C-10-D040-22/10-10-0323 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Timmens 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.

At the time of this dispute, the Claimant, a Truck Driver with 39 years of railroad service, was working out of Hemingford, Nebraska, as a Grapple Truck Driver. On March 1, 2010, he was assigned to pick up scrap rail lying alongside the track at Milepost (MP) 419.8 on the Butte Subdivision. The Claimant determined that in order to remove the scrap, he would have to foul the track; that is, get within four feet of the rail or close enough to be hit by passing railway equipment or objects extending from that equipment.

Because of that danger, he was required to contact the Train Dispatcher. He did so. During the conversation with the Train Dispatcher, he learned that BNSF 6265 West, a helper engine, was near his position. The Train Dispatcher instructed the Claimant to contact BNSF 6265 West to determine its location. He did so. He reported the location and direction of travel to the Train Dispatcher who gave him permission to occupy the track between the Belmont crossover and the East crossover at MP 419.8 (Track Authority 388-68).

The problem that led to the discipline currently under review was that the Claimant did not comply with Maintenance of Way Operating Rule (MOWOR) 6.2.1 that, in its effect in this matter, called upon him to contact a crew member of BNSF 6265 West after receiving Track Authority 388-68. MOWOR 6.2.1 states:

“6.2 Initiating Movement

6.2.1 Train Location

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 has passed the location where the track will be fouled or occupied.**

When an authority is issued voiding a previous authority and identifying additional train(s) to be followed, movement must stop until direct radio contact is established to ascertain the location of the additional train(s).

Direct radio contact is not required when employees are occupying the track with authority following a train(s) and additional authority is received to follow the same train(s).

An electronic device cannot be used to ascertain the train(s) has passed the point where the track will be occupied."

The Claimant acknowledged that he had not complied with MOWOR 6.2.1 on March 1, 2010.

The dispute between the parties is whether the discipline issued for this admitted Rule violation was justified.

The Organization asserts that the Claimant's Rule violation was inadvertent and argues that it will show that:

". . . [T]he Carrier failed to prove that the Claimant violated MOWOR 6.2.1 in the context it alleged and that the discipline imposed upon the Claimant was arbitrary and capricious."

The Carrier counters that it applied MOWOR 6.2.1 in a consistent manner and sees in the Organization's effort to obtain a modification of the discipline issued in this instance the ability to argue disparate treatment in future cases. It notes that the work Rule is designed to protect employees from serious injury or death and must be enforced.

The Organization correctly notes:

“ . . . [T]he Claimant has only received one (1) prior disciplinary action from the Carrier since his employment began in 1972. Hence, it is clear that the Claimant has meticulously followed and adhered to Carrier rules throughout his entire career and understands the importance of safety in the railroad industry.”

What the Organization fails to note is that this one prior incident for which the Claimant was given a Level S 30-day Record Suspension with a 12-month review period took place on February 23, 2010 – one week prior to the matter now under consideration.

The Carrier states:

“BNSF Policy for Employee Performance and Accountability (PEPA) . . . states that a second serious incident within the specified review period will subject the employee to dismissal. In this case, the Claimant received his second serious incident within the 12-month review period of his earlier rule violation, but was granted leniency when he was not dismissed, but instead granted a Level-S 30-day Record Suspension.”

In the final analysis, the Board must concur with the observation made by the Carrier:

“Here, the Organization is essentially reduced to asking for leniency for Claimant.”

As the Carrier also points out:

“There is a settled principle established by adjustment board awards that the boards do not grant pleas for leniency or compassion, but deal with discipline cases on the bases of rights of the employees not to be unfairly disciplined. If leniency or compassion is to be granted in this case, as a matter of grace, this is for the management and not for the Board.” (Public Law Board No. 4340, Award 20 (Lazar)).

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.