Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41868
Docket No. MW-41801
14-3-NRAB-00003-120025

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

(Brotherhood of Maintenance of Way Employes 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 (dismissal) imposed upon Mr. D. Russell by letter dated September 17, 2010 for alleged violation of EI 2.1, EI 2.2.3, EI 2.3, EI 2.9.3, MOWOR 1.6, MOWOR 6.50.2 and MOWSR S-1.2.3 for alleged failure to identify and protect a washout at/or near Mile Post 166 Main Track #2 after being called out to do a flood inspection at approximately 0001 hours on July 21, 2010 between Mile Posts 156 and 197 on the Sand Hills Subdivision while assigned as a relief track inspector on Gang TINS1454 headquartered at Broken Bow, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D070-14/10-10-0573 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Russell 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 involved in this dispute, the Claimant was assigned as a Relief Track Inspector working out of Broken Bow, Nebraska. His work hours were from 7:30 A.M. to 4:00 P.M. and his rest days were Tuesday and Wednesday. His immediate supervisor was Tyson Pate.

The events that gave rise to this dispute took place on Sunday, July 11, 2010 starting at approximately 12:22 A.M. At that time, the Claimant was roused from sleep by a call from Roadmaster Scott Taylor who told him that he was needed to look at a section of track on the Sand Hills Subdivision because there had been a flash flood warning.

The warning had been issued at 10:19 P.M. on July 10, 2010. The major storm had gone through the area between 9:18 P.M. and 11:30 P.M. and, according to the Weather Warning, it was to pass through the Sand Hills Subdivision between Mile Post 156 and MP 197.

Because of the storm warning, trains were instructed to proceed at restricted speed and to look out for and report any hazardous conditions. Restricted speeds are maximums of 50 MPH for passenger trains and 40 MPH for freight trains. At the Investigation, Supervisor Pate stated that if a hazard is found, "Restricted speed, which would be no more than 20 [M.P.H.] and be able to stop half the sight of distance."

Roadmaster Taylor assigned Russell to perform a track inspection between Mile Posts 150.6 and 205 of the Division, or 54.4 miles; however, the area between Mile Post 195 and 150.6 is "double main" – Main Track 1 and Main Track 2. Thus, except for a ten-mile stretch between MP 195 and 205, there were parallel tracks to be examined.

The purpose of the inspection was to determine if the storm had had any deleterious impact on the track structure. (Example: a washout: "Washout's an area where water is ran [*sic*] through or over the track, washed out the ballast creating an unstable track structure."

We first address an argument made by the Organization for which the Board finds no merit. In its Submission, the Organization writes:

> **"Inasmuch as the Carrier's notice failed to cite the correct date of the Claimant's track inspection that is in dispute (July 11, 2010 not July 21, 2010), the Carrier's allegation(s) within the July 13, 2010 investigation notice are unclear as to what the specific charges or rule violation(s) are that are being placed against the Claimant. Therefore, it is clear that the Carrier's Notice of Investigation was improper and did not comply with the Agreement."**

It is true that the Dismissal Letter dated July 13, 2010, states the time and date of the alleged failure in performance as being "at approximately 0001 hours on July 21, 2010." However, the Carrier corrected this error by letter dated July 15, 2010. The Organization's claim asserted the incorrect date. The Board also notes that the Carrier, in its Submission, referred to the matter as having taken place on July 21, 2010.

We note that there was no confusion on the part of the Organization and the Claimant at the Investigation held on August 24, 2010, for both dealt with the events and allegations relevant to July 11, 2010. Indeed, although the Conducting Officer misspoke on several occasions and cited the date as July 21, the Claimant corrected her on one such occasion.

We also fail to agree with the Organization that by not citing the specific Rules that the Claimant was deemed to have violated in its Notice of Investigation, the Carrier "failed to provide the Claimant his right to a fair and impartial investigation." That communication stated that the Investigation was to be held:

> **". . . [F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to identify & and protect a washout at/or near MP166 main track 2 for**

> **approximately 20 ties after being called out to do flood inspection at approximately 0022 hours on July 11, 2010 between MP156 and MP197 on the Sand Hills Subdivision while assigned as Relief Track Inspector on gang TINS1454 assigned at Broken Bow, Nebraska."**

We are of the view that this notice provided the Claimant with sufficient specificity of the charges he was to address. We believe that this case is distinguishable from those cited by the Organization:

- **In Third Division Award 11019, issued in 1963, the Board held that a violation of the Rule requiring specificity was violated because, "The notice given in this case did not specify any charge. It merely said that an investigation was to be held to determine cause and place responsibility."**

- **Third Division Award 11222 (1963) addressed a call to an Investigation wherein, "You are hereby charged as follows: To determine responsibility in connection with derailment . . . ."The Board noted: "The charge presented herein does not inform the Claimants of any misconduct or inform them that they have violated an operating rule."**

Third Division Award 14801 (1964) states that the Notice of Investigation alludes only to "violation of Rule 702, Rules of the Transportation Department" while noting that "Rule 702 contains five paragraphs with at least twenty separate transgressions concerned" and concludes that this does not meet the requirement that the claimant be advised of the "precise charge or charges."

- **Third Division Award 16330 (1968) reports that the Notice of Investigation directed the employee "to present yourself for investigation in connection with alleged violations of Reading Company Instructions Governing Signal Department . . . concerning Signal No. 1555, on April 6, 1966, to determine your responsibility, if any, in this matter."**

In the matter now before the Board, the Claimant was provided the following specifics: ". . . your alleged failure to identify & protect a washout at/or near MP

166 main track 2 for approximately 20 ties . . . on July 11, 2010 between MP 156 and MP 197 on the Sand Hills Subdivision." This statement is in contrast with the marked lack of specificity in the rather dated cases cited by the Organization in support of its contention.

Having said that, the Notice of Investigation gave the Claimant sufficient notice of what he needed to prepare for in advance of the Investigation. The Board notes that given the assessment of guilt expressed in the Dismissal Letter, we are compelled to make the following observations.

The Carrier's citation in the Dismissal Letter of the several Rules that the Claimant was found to have violated placed upon the Carrier the additional burden of insuring that the record supported those specific conclusions. There is a difference between establishing "alleged failure to identify & and protect a washout at/or near MP166 main track 2 for approximately 20 ties" and establishing specific violations of several specific Rules.

We pause in our discussion of the contents of the Dismissal Letter to make the following observations. Although it is likely that the washout was in existence at the time that the Claimant passed by, the record does not establish this as a fact. We note that the Carrier did not counter the Claimant's assertion that after a rain, the area can drain for hours. There is no indication in the record that any of the trains passing over Main Track 2 gave any notification of a washout. The record indicates that Track Inspector Anderson discovered the washout during his shift. The Track Authority Review indicates that he passed the area of the washout sometime between 9:20 A.M. and 9:50 A.M. The record also indicates that the pictures of the washout that were introduced at the Investigation were taken that afternoon. Moreover, as the pictures make clear, the washout removed ballast from that side of Main Line 2 that was most distant from a hy-rail travelling on Main Line 1.

The Dismissal Letter states, in relevant part:

> **"It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of EI 2.1, EI 2.2.3, EI 2.3, EI 2.9.3, MOWOR 1.6, MOWOR 6.50.2 and MOWSR S-1.2.3."**

As noted, those Rules were not identified prior to the Investigation. By not identifying the specific Rules to be relied upon in assessing guilt prior to the Investigation, the Carrier gave itself permission to cherry-pick the offenses during and after the Hearing.

The following illustrates the concern. The Notice of Investigation alerted the Claimant that he was to deal with the washout between MP 156 and MP 197. Part of his "conviction" was for violating MOWOR 6.50.2, which states:

> **"On-track equipment must approach all grade crossings prepared to stop and must yield the right of way to vehicular traffic. If necessary, flag crossing to protect movement of the on-track equipment. The use of horns at grade crossings by all roadway machines and hy-rail equipment is optional at the discretion of the operator."**

The Notice of Investigation provided no indication that the Claimant needed to defend against a charge that he was in violation of this Rule. During the Investigation the Conducting Officer drew attention to a crossing in one of the photographs of the washout area. In the following portion of the transcript, the Conducting Officer is questioning the Claimant's immediate Supervisor:

> **"DEBRA J SMITH: Do we have regulations that work with regard to somebody approaching the crossing what must they do?**
>
> **TYSON J PATE: Hy-rail vehicles or machines you approach crossing prepared to stop.**
>
> **DEBRA J SMITH: So if he was approaching this crossing that indication means he should have been slowing down before he entered this, this area with the debris?**
>
> **TYSON J PATE: That's correct. Our operating rules 6.50.2 Approaching Road Crossings states that on track equipment must approach all grade crossings prepared to stop."**

We have two concerns about the Carrier's conclusion that the Claimant violated MOWOR 6.50.2. (1) The data may indicate that he was approaching the

crossing at or near 26 miles per hour, but there is nothing in the record that indicates that the Claimant was approaching the crossing not prepared – or able – to stop. (2) If the Carrier planned to address the matter of the Claimant's approach to the crossing as a specific in judging his conduct, it was obligated to specify this in the notice so that the Claimant could be prepared to provide his side of the story about his speed at that time at that place. This is quite a different matter from just citing the speed as a detail in support of the contention that he was negligent in performing his responsibilities that night by showing (as distinct from merely claiming) that travel at that speed "might," "could," or "would" adversely impact his work.

We have the following concern about the Carrier's conclusion that the Claimant violated MOWOR 1.6. That Rule states:

> **"Employees must not be:**
>
> **1. Careless of the safety of themselves or others**
> **2. Negligent**
> **3. Insubordinate**
> **4. Dishonest**
> **5. Immoral**
> **6. Quarrelsome**
> **or**
> **7. Discourteous**
>
> **Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated."**

Roadmaster Pate testified as to his conclusion, "Failure to protect that, that washout shows me that he's negligent. His FRA, his TIMS report, he shows no, no conditions there, which is dishonest falsifying documents." It is difficult to understand how one can be both negligent (failed to exercise enough attention to discover the washout) and dishonest (discovered it, but reported that there was no condition there). Moreover, these conclusions are based upon the totally unsupported premises that the washout was in existence at the moment the

Claimant passed by and that, if in existence, the Claimant was aware of the washout.

The dismissal notice indicates that the Claimant was in violation of Maintenance of Way Safety Rule S-1.2.3. MOWSR S-1.2 is entitled "Rights and Responsibilities" and states:

> **"We have the right and responsibility to perform our work safely. Our training, skills, work experience, and personal judgment provide the foundation for making safe decisions about work practices."**

The provision continues:

> **"S-1.2.3 Alert and Attentive**
>
> **Assure that you are alert and attentive when performing duties."**

In the instant case, one must remain aware of the fact that the Claimant was called on his off time, roused from sleep at minutes past midnight, and sent out to inspect two lines in the dark of night. Even when one is fully rested, it is difficult to be perfect in daylight, let alone in total darkness. Assuming that the washout was in existence when the Claimant passed by, the mere fact that he missed the problem does not establish that he was not alert and attentive.

Engineering Instruction 2.1 is entitled "Purpose of Track Inspection, and states:

> **"Track inspection has two basic purposes:**
>
> - **First, it allows employees to detect, correct, and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds.**
>
> - **Second, it allows a planned program of repairs and improvements to ensure that employees are productive and use materials efficiently.**

> **Perform at least the minimum track inspections required in this section."**

Throughout, the Carrier's position in this case seems to be if one is sent out in the dark of night to check on damage from a possible flash flood, one cannot err. In our view, the position that an employee should not err without risking discipline is unreasonable.

The assumption that an employee should not err is also shown in the Carrier's citation of Engineering Instruction 2.2.3 as one of the Rules that the Claimant violated:

> **"Authority and Responsibility of Inspectors.**
>
> **When an inspecting employee finds conditions that make the track unsafe for trains moving at authorized speed or finds deviations greater than those permitted by the FRA track safety standards, the employee has the authority and responsibility to do one or more of the following:**
>
> - **Make repairs.**
> - **Place temporary speed restrictions.**
> - **Remove track from service.**
> - **Complete all required FRA reports correctly and on time."**

The provision states clearly the responsibilities of an Inspector when that employee <u>finds</u> conditions "that make the track unsafe for trains moving at authorized speed." There is no evidence in the record that the Claimant found such conditions. The central point of the Carrier's position is that the Claimant <u>should</u> have found the washout. He didn't. Even if the Board were to assume that the washout was in existence when the Claimant passed by and that he did not find it because of neglect, the fact is that he did not find it. Therefore, EI 2.2.3 cannot apply.

The Carrier also asserts that the Claimant violated Engineering Instruction 2.3. That provision states:

> **"Inspection Method.**
>
> **Perform inspections on foot or by riding over the track in a vehicle at a speed, at a speed that allows you to visually inspect the track structure."**

The following is the Claimant's comments on the realities that he faced that night while riding over the track in a hy-rail:

> **"And you know I will just say this about my speed on the track. I'll tell you what when you're watching all these things it is really hard. <u>You can't set the cruise.</u> So you're trying. I don't know if you ever go down the road and try to drive 20 miles an hour, 21 miles an hour, 22 miles an hour. I'll tell you what, that is hard to do because you're concentrating on so many things and all of a sudden you're going. You look down, darn, you know and so you slow down again. You know and then you're going too slow, you know, and then you're back up because you're not sitting there watching your speedometer. You're sitting there watching to make sure you didn't miss anything." (Emphasis added.)**

There is nothing in the record to indicate that the Carrier disputed this account by the Claimant of the reality that he faced with regard to controlling the speed of the hy-rail he was driving.

The Carrier also asserts that the Claimant violated Engineering Instruction 2.9.3. That provision covers more than four pages and it was not until the testimony of Roadmaster Pate that the specific portion of the EI was articulated. Pate was asked, ". . . [P]lease explain what you are going to present from this exhibit?" Pate responded by reading Section D of Exhibit 11b to Carrier's Exhibit Number 1:

> **"Flashflood Inspection Process**
>
> **When local maintenance personnel become aware of current conditions that might produce flash flooding or when flash flood alert or flash flood warning is issued, they:**

- **Confirm with the dispatcher that proper speed restrictions are in place.**

- **Inspect the track for washouts, side scour wash, surface irregularities and or water over the rail.**

- **Carefully inspect bridge foundations and drainage structures paying careful attention to bridges with sills, erosion behind abutment walls and head walls for erosion around piers and footings and obstruction from drift and debris.**

Note: If the water level, turbulence or other conditions make a thorough inspection impossible at the site of such a bridge, all train operations will reduce to no more than restricted speed until it is possible to make a proper inspection.

- **If, during the initial track inspection, the safety of train operations over bridges is in doubt, immediately call the qualified structures employee. Any speed restrictions placed on bridges will not be lifted until authorized by the structures employee.**

- **Track and bridge Foreman must continue to patrol past their respective territories if an adjoining territory is likely to have been damaged and such damage might not have been discovered.**

- **Appropriate speed restrictions must be in place to protect trains against unsafe conditions discovered during flash flood inspections."**

The Carrier's expectation of performance without flaw without consideration of factors faced by the Claimant was unreasonable.

We now turn to the specifics of the allegations and the bases therefore.

Because this is a termination case, the burden of proof is on the Carrier. As the Carrier correctly points out:

> **"In railroad disciplinary hearings, the burden of proof is substantial evidence . . . . *** [That] is a term that traces its roots to the United States Supreme Court in an opinion by the Honorable Chief Justice Charles Evans Hughes, which reads:**
>
> **'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"**

In its Submission, the Carrier makes the following assertions

1. **"[A]t the time of the Claimant's 'inspection' there was an existing washout near MP 166 on Main Track 2."**

2. **". . . the Claimant reported that he had inspected both Main Track 1 and Main Track 2, but in reality, he consciously chose not to inspect Main Track 2."**

3. **"Due to the debris on the tracks from this storm and the trains that were running on Main Track 2, the Claimant only performed a cursory visual inspection."**

4. **"He did not traverse Main Track 2 or go back to inspect those areas that were admittedly 'hard to see.'"**

5. **"Nor did he bother to sweep off the debris from the tracks when doing his visual inspection."**

The support the Submission offers for its assertion that the washout was in existence at the time the Claimant passed by MP 166 is the testimony of Roadmaster Pate that he stated to the Claimant, "[D]id you know you missed the washout at 166?" This is not substantial evidence.

In his appearance at the Investigation, the Claimant described his observations during the inspection:

1. **"As I was going down the track, it was evident it had rained but there was no water standing. I mean there was, there was nothing resembling flash floods.**

2. **. . . [W]hen I got . . . to approximately 172 . . . I started seeing a lot of debris on the track and still not a lot of rain . . . . What it was there was a tremendous amount of leaves and branches and stuff that had gotten blown on the track.**

3. **And what had happened was they had had a tremendous hail storm. You could tell there was a lot of wind because some of the trees were quite a ways off the track. *** [T]here was a lot of leaves and small branches and stuff on the track. And so as I went along still not water standing. On, on my end of the track, we have a lot of water standing on the west end. I mean its just drainage problems and lots of rain. On the east end where I was traversing there was no water standing.**

4. **There was, there was nothing that even resembled anything like a flash flood.**

5. **I knew there was a lot of wind simply by the fact how far some of the leaves and the branches had come.**

6. **So the fact that there might be some debris in the track didn't cause me to believe. I mean you know there has been a flash flood or anything. *** The ditches were nearly dry."**

The Claimant noticed that a cross buck sign had been washed onto the tracks. He attributed that to "when it rained, the water came right down the middle of the road and onto the track. It had washed my cross buck sign onto the track. * But when I said there was water on the tracks, there was water on the tracks but it wasn't because this huge volume of water came down the ditch. *** There wasn't any water in the ditches. I mean there was a little bit but there was still nothing that showed me that there was anything other than a violent windstorm with some rain and, and some hail.**

Except for the Claimant's reports about his clearing of the tracks in connection with the fallen cross buck sign, the Carrier's assertion that the Claimant did not clear the tracks of debris is correct, but it is also unreasonable. The Claimant was assigned to perform a track inspection between Mile Posts 150.6 and 195. The area between MPs 195 and 150.6 is "double main," meaning that the Claimant was assigned to inspect some 90 miles of track and obligated to do it at restricted speed. He started his assignment at 1:30 A.M. on July 11; by the time he was finished, day was breaking. His regular shift was due to start at 7:30 A.M.

It is true that the Claimant did not traverse Main 2. There is no requirement that the Claimant needed to traverse both tracks. It was a judgment call. The Claimant testified without contradiction that at the start of his inspection, he contacted the Train Dispatcher and was told that because of the amount of traffic on Main Track 2, he was to start his inspection on Main Track 1. This complies with the first bullet point in EI 2.2.3 D.

The Claimant traversed Main Track 1 and observed Main Track 2 by other means. The Claimant stated:

> **"When I'm hy-railing what I try to do is you try and get your spotlight so you can see both main tracks. You can't set your spotlight so it shoots right off the end of your truck because then your concentration goes from here to here and then back. So what you do is you set your light out about 150 feet in front of you where you can watch both main and see both mains at the same time. And that's what I did."**

When Roadmaster Pate was asked by the Conducting Officer of the Investigation, "Would he have been able to inspect main two while traversing main one given the close centers," Pate responded, "With the spotlight yes he would have been and had there been any doubt of being able to inspect it, should ride the other main."

Other concerns of the Carrier were implied. As the Claimant travelled over tracks that were in the area of what was <u>later</u> determined to be a washout (MPs 167.002–165.886), his speeds were recorded as 13, 17, 22, 22, 26, 26, and 26 MPH.

A fair assessment of the Claimant's performance must be made considering the realities that he faced at the time of his inspection. In our view, a fairer assessment of his tracking speeds is revealed by a review of the mileage record over the totality of his inspection. The following table presents a summary of the entire tour:

Mileage Readings	# Lines with that mileage	# Lines in washout area
0	2	
3	1	
5	3	
6	2	
7	1	
8	7	
9	9	
10	3	
12	6	
13	8	1
14	11	
15	3	
16	1	
17	9	1
18	8	
20	3	
21	5	
22	6	2
23	3	
24	4	
26	8	3
28	3	
29	2	
30	1	

During his appearance at the Investigation, Roadmaster Pate was asked:

". . . [W]hat do you think a reasonable speed would be if you were traversing on main one inspecting main two and how could you

> **inspect another track if you were on main one? How could you inspect main two?"**

Pate did not answer the first part of the compound question put to him, but he did respond to the second part:

> **"Well you have spotlights or track inspectors had spotlights that [they] can use. We have headlights for the main you're on, can run your spot light to the opposite lane. That particular area you have close butt centers and from a hy-rail vehicle with spotlights wouldn't be very difficult to see that and if I have any doubt of not being able to see, I would either get out and walk it or hy-rail the other main."**

Later, Pate was asked:

> **"DEBRAH J. SMITH: And that's up to whose discretion?**
>
> **TYSON J PATE: Whoever is doing the inspection."**

Looking at a picture that was taken in daylight Pate stated:

> **"During a flood inspection that amount of debris, that kind of stuff, that's the things you look for. That's a telltale sign that there are issues that, you know, you need to slow down, look, get out and walk the area, make sure nothing is going on there."**

The Claimant was in the area of the washout between3:14 A.M. and 3:16 A.M., or about three hours after he had been awakened, about two hours and 45 minutes into his inspection tour, and about three and one-half hours after the end of the two hour and 12 minute storm as predicted by the Weather Warning. The Carrier shows little awareness of the differences between an inspection in darkness while moving and a study of still photographs taken in daylight. Moreover, the Carrier shows no evidence of having considered the Claimant's report (regarding his exercise of discretion) about the debris that he saw on the tracks and the reasons he determined that the debris was from the wind associated with a hailstorm rather than a water runoff.

There is no indication that the Carrier considered the Claimant's comment about what was visible from his vantage point on Main Line 1:

> **"Where it was washed out was totally invisible to me. The angle and these pictures there is not a single picture taken from the angle I can see, not a single one, and there's a reason for that. It's because you couldn't see it. You couldn't see any ballast over the top of that. And so as you come across there, that didn't trigger anything with me to stop and walk it simply because there was no evidence that it had even rained."**

In its Submission, the Carrier characterizes the Claimant's performance as a "Dismissible Violation" because it is:

> **"Gross negligence, indifference to duty, intentional destruction of company property, malicious rule violation, insubordination."**

The Submission then goes on to state,

> **"Claimant's negligence is all the more inexcusable in light of his three years of experience as a track inspector as well as his training – all of which he ignored in this instance."**

It is not appropriate to treat "negligence" and "gross negligence" as synonyms. The Carrier's assertion requires the Board to consider the meaning of the terms "negligence" and "gross negligence." Following are some dictionary definitions of the terms. The first two are from a dictionary of the English language; the second two are from a law dictionary.

> **"neg·li·gence *noun* *****
> ***plural* -s**
> **1**
> **a : the quality or state of being negligent**
> **b : a failure to exercise the care that a prudent person usually exercises – opposed to *diligence* *****
> **"Negligence." Webster's Third New International Dictionary, Unabridged. 2014. Web. 26 Feb. 2014.**

"gross negligence *noun*

Negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to the consequences of an act – compare ordinary negligence, slight negligence"

"Gross Negligence." Webster's Third New International Dictionary, Unabridged. 2014. Web. 26 Feb. 2014."

The following definitions are from Joseph R. Nolan and Jacqueline M. Nolan-Haley. Black's Law Dictionary, Abridged Sixth Edition. St. Paul: West Publishing Co., 1991.

"Negligence. The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do whatever person of ordinary prudence would have done under similar circumstances. Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; is a departure from the conduct expectable of a reasonably prudent person under like circumstances.

The term refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized differently by inadvertence, thoughtlessness, inattention, and the like, while 'wantonness' or 'recklessness' is characterized by willfulness. The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of particular case. Doctrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result."

"Gross. ***

Out of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice; gross carelessness or negligence. Such conduct as is not to be excused."

Under the Carrier's Rules, gross negligence is a dismissible offense, even for a first offense. This is not the case with ordinary negligence. Even if one were to consider the Claimant's performance to have been negligent, there is no showing that it rose to the level of gross negligence. Moreover, the Carrier's lack of awareness of a difference between the two renders its assessment of the Claimant's performance as a dischargeable offense as unjustified. For this and for other substantive and procedural concerns addressed in this Award, we must sustain the claim.

The Claimant shall be reinstated and be made whole. It is the intent of this make whole remedy that with regard to wages, benefits, seniority and other terms and conditions of his employment, the Claimant shall become as he would have been had the termination not taken place.

AWARD

Claim sustained.

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 16th day of June 2014.

SERIAL NO. 420

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 41868

DOCKET NO. MW-41801
NRAB-00003-120025 Old
NRAB-00003-170506 New

NAME OF ORGANIZATION: **(Brotherhood of Maintenance of Way Employes**
(Division -IBT Rail Conference

NAME OF CARRIER: **(BNSF Railway Company**

Award 41686 was adopted by the Third Division on June 16, 2014. As a result of that Award, Claimant D. Russell was reinstated to employment with the Carrier.

In its original claim, the Organization asked, "As a consequence of the violation referred to in Part (1) . . . [of this claim], Claimant D. Russell shall now receive the remedy prescribed by the parties in Rule 40 (G)." The Award stated, "Claim sustained," and the Board ordered that an award favorable to the Claimant be made." In the body of the Opinion, the Board stated,

> **"The Claimant shall be reinstated and be made whole. It is the intent of this make whole remedy that with regard to wages, benefits, seniority and other terms and conditions of his employment, the Claimant shall become as he would have been had the termination not taken place."**

Writing on October 16, 2017, the Organization contended, "The Carrier has not fully complied with the Award as of this date by failing to: (1) make the award effective within thirty (30) days of the date the award was transmitted to the parties; and (2) pay the Claimant the full amount due him as a result of the award." In response to a request for clarification made during the Interpretation Hearing, the representative of the Organization confirmed that with the exception of point (2), all aspects of the Award have been properly addressed and that point (1) referred only to the Organization's contention that the Claimant had not been paid the full amount due him as a result of the award.

In the cover letter to its Submission, the Organization charged, ". . . [T]he Carrier has failed to properly implement the award by refusing to reimburse the Claimant for his medical expenses and insurance premiums that he was required to pay as a result of his unjust dismissal."

Each party included past Board decisions as part of its Submission. The Carrier included Second Division Award 6383, and Third Division Awards 21426, 28449, 29226, and 20348. The most recent Carrier inclusion was from 1990. (Carrier's Exhibit No. 9, August 16, 1990.) The Organization included Interpretations (Interpretation No. 1 to Award 41529 and Interpretation No. 1 to Award 41708) and Third Division Awards 42266, 42270, 42274, 42279, 42293, 42362, 42370, 42378, 42381, 42614, 42616, 42618, 42699, 42700, 42706, 42714 as well as Award 50 of Public Law Board No. 7585. During the Interpretation Hearing the Organization's representative asserted that the last twenty decisions on this question were decided for the Organization. The Carrier's representative did not disagree, but argued that the older decisions were the ones that were correct.

Central to the Carrier's argument is the following statement:

> **"The National Plan contains controlling language that describes in great detail how Health premiums are to be treated when a dismissed employee is returned to service with back pay and reads in pertinent part:**
>
> > **'Suspended or Dismissed Employees**
> > **If you are suspended or dismissed, and**
> >
> > *** * ***
> >
> > **If you are awarded full back pay for all time lost as a result of your suspension or dismissal, your coverage will be provided as if you had not been suspended or dismissed in the first place.'"**

The Carrier argues:

> **". . . [T]he terms of the National Plan were negotiated and bargained for at the national level and have been undisturbed for the past 50 years. The reason that it has remained untouched is because, on its face, there is only one reasonable interpretation: coverage will be provided, but the repayment of insurance premiums will not."**

The Board notes that the above commitment addresses coverage but not reimbursement to the Claimant for insurance premiums and other out-of-pocket medical costs. The Board did not find that that promise (or any other provision in the National Plan) precludes the reimbursement of the premiums requested by the Organization nor did it find any prohibition to the reimbursement ordered in the Award addressed in this Interpretation.

Interpretation No. 1 to Award 41708 (Employes' Exhibit B-3) is lengthy, in large part because it presents a range of quotations from arbitration literature that show, among other matters:

> **"It is fairly well-settled that benefits are a form of wages and should be included in back pay awards as part of a make-whole remedy." (Employes' Exhibit B-3, Sheet 19.)**

Interpretations of what has been agreed to by the parties in this industry must be rooted solely in this industry's history, but consideration of how this matter is addressed elsewhere shows that the reimbursement ordered in Award 41686 is far from rare within this country's collective bargaining community. The Awards and Interpretations cited by the Organization indicate that, at least in present years, this is also true of this industry.

The Awards and Interpretations cited by the Organization and its observation uncontested by the Carrier that the last twenty decisions issued on this matter supported the Organization's position undercuts the contention made on page 2 of the Carrier's Submission that it followed "long-established precedent for reinstating employees to service."

Interpretation: The Claimant shall be reimbursed for out-of-pocket insurance premiums and other out-of-pocket medical costs that were in excess of what he would have paid had he continued to work.

Referee Burton White who sat with the Division as a neutral member when Award 41708 was adopted, also participated with the Division in making this Interpretation.

Referee Burton White who sat with the Division as a neutral member when Award 41868 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of November 2017.