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

Award No. 41885
Docket No. MW-42008
14-3-NRAB-00003-120359

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 (withheld from service following letter dated August 2, 2010 and dismissal by letter dated September 8, 2010) imposed upon Mr. D. P. Urbin for alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.9.1 Special Instructions – Hot Weather, MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.6 Conduct, MOWOR 2.2.3 Authority and Responsibility of Inspectors and MOWOR 6.50.5 Hy-Rail Limits Compliance System for alleged failure to comply with Engineering Instructions 2.9.1 – Hot Weather Inspections and Roadmaster Nilsen's instructions concerning heat runs on July 31, 2010, which allegedly resulted in the derailment of Z-PTLCHC9-30A at MP 299.5 near Hinsdale, MT at approximately 1520 hours on Saturday, July 31, 2010 and alleged critical decision failure in connection with charges of failing to properly test HLCS Unit in BNSF Vehicle 22475 in accordance with Maintenance of Way Operating Rule 6.50.5 after setting on track on July 31, 2010 was arbitrary, capricious, on the basis of unsupported allegations and unproven charges and in violation of the Agreement (System File B-M-2248-M/11-11-0007 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. P. Urbin shall now '. . . be cleared of the charges and

> **proceedings of this investigation (File Number MON-MOW-10-0312). We also request that Mr. Urbin be made whole for any loss of earnings from the time withheld from service on August 3, 2010, until he is returned to service. We further request Mr. Urbin be made whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.'"**

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 facts indicate that on July 31, 2010, the Claimant was working as a Track Inspector on the Milk River Subdivision in Montana. The record shows that the ambient temperature was over 90 degrees on that date. Track Inspectors are required to perform heat inspections of tracks on hot days. It was asserted that on July 31, the Claimant may not have performed his hot weather track inspections between Noon and 8:00 P.M. and that might have led to a train derailment. As a consequence, charges were brought against the Claimant.

On August 2, and then on August 4, 2010 (Corrected Notice) the Carrier directed the Claimant to report for a formal Investigation on August 9, 2010, concerning, in pertinent part, the following charge:

> **". . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with both Engineering Instruction 2.9.1 - Hot Weather Inspections and Roadmaster Nilsen's instructions concerning heat**

runs on July 31, 2010, which resulted in the derailment of Z-PTL CHC9-30A at MP 299.5 near Hinsdale, MT at approximately 1520 hours on Saturday, July 31, 2010, and an alleged critical decision failure when you allegedly failed to properly test HLCS Unit in BNSF Vehicle 22475 in accordance with Maintenance of Way Operating Rule 6.50.5 after setting on track July 31, 2010."

On September 8, 2010, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that is the first of two discipline cases involving the same Claimant before this tribunal.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation, which was evidenced by the fact that the Carrier removed the Claimant from service prior to the Hearing. The Organization further asserted that the Claimant's defense was prejudiced by the fact that the Hearing Officer refused to release, play or disclose specific dispatch tapes from July 31, 2010, which the Organization believed would conclusively support its position that Roadmaster Nilsen spoke with the Claimant at approximately 2:00 P.M. on that date and told him not to go back out and inspect the track and also to revise a slow order. It argued that the Carrier's decision not to play the tape impeded its defense. It further argued that the instant case was linked with a second case regarding the events of July 31, 2010, and should have been combined, but were separated as an attempt to "pile up" the subsequent discipline and was almost a form of "double jeopardy." Lastly, it argued that during the post-Hearing handling of the Claimant's case, the Carrier failed to answer its final appeal in a timely manner. It stated that it was acknowledged by the Carrier that it had received the Organization's January 11 appeal on January 12, 2011, and it asserted that it did not receive the Carrier's declination until March 14, 2011, which was the 61st day. Therefore, it reasoned that the claim should be allowed as presented in accordance with Rule 42A. It asks that based upon those procedural errors, the discipline should be set aside without reviewing to the merits because the Hearing and review process were unfair.

Turning to the merits, the Organization stated that a review of the record and transcript reveals that the Claimant's normal tour of duty is from 6:00 A.M. to 2:30 P.M. with a 30 minute lunch period. The Claimant, along with a number of other

employees, typically worked through their meal period when circumstances allowed, so they could leave at 2:00 P.M. instead of 2:30 P.M. The practice was an informal one, but it was widely known, accepted and practiced across the Carrier's property and known by the Claimant's immediate Supervisor, who did not object to the practice.

The Organization argued that on July 31, the Claimant used his Carrier-issued hy-rail truck to inspect more than 120 miles of track that fell within his area of authority, during which time he paid special attention to certain "trouble areas," – places where there had been prior alignment trouble or derailments. By 1:30 P.M., the Claimant had completed all of his inspection duties and worked on cleaning out his vehicle, checking into fixing its broken windshield and dealing with various other maintenance matters. It asserted that at approximately 2:00 P.M., some eight hours after starting his tour of duty, the Claimant received a call from Roadmaster Nilsen at which time they discussed the status of a specific "trouble area" and whether a slow order should be revised. According to the Claimant, it was agreed that a slow order should be put in place for the "trouble area" discussed and it was not necessary for the Claimant to go back out and re-inspect the area. The Claimant testified that he notified the Train Dispatcher pursuant to Roadmaster Nilsen's instructions and changed the slow order. Even though the ambient temperature had reached almost 90 degrees and because his Supervisor had told him not to go back out, the Claimant believed that he was released from service inasmuch as the Carrier had made a point of not granting any overtime and the Claimant figured that his Roadmaster did not want a hot weather inspection in an effort to keep overtime down. The Organization further argued that the subsequent minor derailment was not at a "trouble area" and it was later revealed that a surfacing gang had recently worked on that section of track; in addition, a Federal Railway Administration car had also recently passed through the area without issue. Therefore, even if the Claimant had performed a hot weather inspection, he would not have been in the area of the derailment because he would have been checking "trouble areas." It reasoned that the Carrier did not meet its burden of proof and concluded by requesting that the discipline be rescinded and the claim sustained as presented.

In its Submission the Carrier addressed the Organization's allegation that its response was allegedly untimely. It stated that the record shows that the Carrier placed its declination into the hands of UPS on Friday, March 11, 2011 – the 58th day from its receipt of the Organization's appeal – for delivery by overnight mail

and a package sent by UPS "Next Day Air" on a Friday would not arrive until the next business day, which was a Monday. It argued that there is a long history of arbitral precedent including – one on-property Award – that stands for the proposition that notification is defined as when the declination was mailed – not when it was received. It further argued that even assuming, arguendo, that the Organization's position was correct, the application of National Disputes Committee Decision No. 16 mitigates against the Organization's conclusion because it – as well as many other Awards – determined that the Carrier's late declination is not fatal to its case, but merely subjects the Carrier to damages - in the form of backpay – for the number of days its declination is overdue. (See, for example, Public Law Board No. 4370, Award 63).

On the property the Carrier asserted that the Organization's argument that the Claimant was subjected to "double jeopardy" and/or an attempt to inflate the Claimant's disciplinary record was in error. It argued that the two cases involved distinctly separate issues deserving singular consideration and there was no showing that the cases were separated so as to allegedly stack up the assessed discipline. Additionally, it argued that there was no showing that the Claimant's defense was impaired by the Hearing Officer. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier stated that the facts show that the Claimant failed to perform required heat inspections of track in his territory on July 31, 2010, when the temperature exceeded 90 degrees, and failed to test the HLCS unit as required by Carrier Rules. It argued that was affirmed by the testimony of the Claimant, and because of that admission, it correctly disciplined the Claimant in accordance with its discipline policy. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural arguments. The Organization argued that the Carrier pre-judged the Claimant, which was evidenced by the fact that it removed him from service prior to the Hearing. That argument is not persuasive. Countless Boards have determined that the Carrier is within its right to withhold employees from service if their alleged violations are considered to be of a serious nature. In this instance, the Carrier did not err when it removed the Claimant from service. Additionally, the Organization argued that the instant case should have been combined with the case that culminated in Third Division Award 41886 because the

disputes were intertwined, but were separated in an attempt to "pile up" the alleged offenses. The Board agrees that for convenience sake the two cases could have been handled together, but there is no showing that the Carrier separated them in an effort to inflate the Claimant's disciplinary record. The Board further recognizes that the Claimant's defense, which was raised in each case, is interwoven; thus, although the Organization's argument that the two cases should have been combined into one Hearing has some merit, but it does not prove that the Carrier did anything nefarious. The Organization further argued that the Hearing Officer erred when she failed to produce a requested tape of a conversation between the Train Dispatcher and the Claimant, which it asserted would have supported its position that Roadmaster Nilsen spoke with the Claimant at about 2:00 P.M. on July 31 and told him not to go back out in the field to perform additional work. The tape requested was not of the conversation between the Claimant and Roadmaster Nilsen, but was that of a conversation between the Claimant and the Train Dispatcher who had no first-hand knowledge of what had been said between the Claimant and the Roadmaster. Although the Hearing Officer made an unsuccessful attempt to obtain that tape, her decision to continue with the Hearing was not a fatal error in the instant case because the Board is not persuaded that an employee not privy to a conversation between two other employees could add much light to that matter other than to regurgitate what the Claimant might have said. However, the Board notes that in the companion case to this dispute (Third Division Award 41886 the tape was of greater significance, because in that case, the Claimant was accused of working less than eight hours while claiming eight hours' pay and if, in fact, the Claimant's conversation with the Train Dispatcher was after 2:00 P.M., it might document that he had worked at least eight hours. Be that as it may, we conclude that in the instant case there was no showing that the Claimant's Investigation was not "fair and impartial."

Lastly, the Organization argued that the Carrier failed to answer its final appeal in a timely manner. The Organization asserted that its appeal of the claim was not timely declined because it was not received until the 61st day, which was a violation of Rule 42A. The Carrier responded by arguing that it sent its declination on the 58th day and the date of mailing is the controlling date rather than the date of receipt. This is not a new issue and there are multiple Awards throughout the industry that have supported both parties as to the controlling date – some supporting the "date of receipt" theory and others the "date of mailing" theory. In the instant dispute, the Carrier did not raise its defense regarding "date of mailing" while the claim was being handled on the property. Therefore, the Organization's

argument that the Carrier's final declination was untimely stands as an unrefuted fact.

The Carrier further argued that assuming for the sake of argument that its declination was not timely, that violation was not fatal to its case, but merely subjected it to damages, in the form of backpay, for the number of days that its declination was overdue. It relied upon on-property Third Division Award 32889, which discussed the application of NDCD No.16, and Public Law Board No. 4370, Award 63. The parties throughout the industry have debated for years whether National Disputes Committee Decision No. 16 is applicable to discipline cases. The Board has chosen, in this instance, to not enter into that fray and offer an affirmative position for either side of the debate, because on this property the parties have abided by the aforementioned decisions. Therefore, the Board concludes that in the instant case the Carrier was tardy in its response and it is liable for damages in accordance with the reasoning set forth in the Awards referenced above.

It has been asserted by the Carrier that the Claimant allegedly failed to abide by the directions of Rule EI 2.9.1 Hot Weather and MOWOR 6.50 Hy-Rail Limits Compliance System (HLCS) that state the following:

> **"EI 2.9.1 Hot Weather**
>
> **The Division Engineer (or General Director Maintenance) determines the ambient temperature at which employees will increase their routine track inspections and communicates this requirement to MW employees before the warm season.**
>
> **When the ambient temperature reaches or exceeds this threshold temperature, inspect the following track every day between noon and 8:00 p.m., or as instructed by the Roadmaster.**
>
> - **Track where speed limits exceed 40 MPH**
> - **Track where unit trains operate at speeds over 25 MPH**
> - **Other tracks as instructed by the Roadmaster"**
>
> **MOWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS)**

Required Visual Display Unit (VDU) Test

The equipment operator must test the LED displays and audible tones of the VDU as soon as practical during each work assignment requiring the HLCS to be activated. To perform this test the equipment must be:

- *** Communicating with an HLCS capable base station (NET light illuminated)**
- *** Positioned greater than 1.1 miles from either end of authority limits to which the system has been associated**
- *** Stopped when not positioned on track**
- *** Press the VDU test button once and allow one minute for the system to complete the test cycle."**

The Board will address the latter Rule first and whether the Carrier showed that the Claimant violated the directives of that Rule. During the Hearing, the Claimant was questioned as follows:

"Debra J. Smith: Okay. Are you also responsible to understand and comply with system general orders?

David P. Urbin: Yes.

Debra J. Smith: What about the HLCS? Did you properly test your HLCS unit on the date of July the 31st?

David P. Urbin: <u>I did not</u>.

Debra J. Smith: You did not.

David P. Urbin: <u>I completely forgot all about it</u>." (Emphasis added.)

The Board is persuaded by the Claimant's admission of guilt that he failed to properly test the HLCS unit in BNSF Vehicle No. 22475 in accordance MOWOR 6.50.5 after setting his vehicle on the track on July 31, 2010.

The Board will next address the allegation that the Claimant failed to make proper heat inspections that resulted in the derailment of Z-PTLCHC9-30A at MP 299.5 near Hinsdale, Montana at approximately 3:20 P.M. on July.

In his defense the Claimant asserted that he worked his regular position from 6:00 A.M. to 2:00 P.M. and performed all required duties. After receiving a phone call from Roadmaster Nilsen, he was led to believe that he should not perform a hot weather inspection beyond his normal tour of duty because the Roadmaster instructed him to put in place a slow order with the Train Dispatcher between MP 317.3 and MP 319, and when he asked Roadmaster Nilsen if he should go out and inspect the area, his Supervisor told him "no." Based upon that instruction the Claimant surmised that Roadmaster Nilsen did not want him to work overtime and further argued that because he had not been allowed to work hardly any overtime over the past several months, he assumed that his superior was trying to keep costs down by not allowing overtime.

Conversely, the Carrier argued that the Claimant was required to be in the field between the hours of 12 Noon and 8:00 P.M. if the ambient temperature exceeded 90 degrees, and as a longtime employee, the Claimant understood that requirement. It further asserted that the Claimant knew that it was an automatic requirement and he did not have to seek authorization to work that overtime or be told to work overtime. In this regard, Roadmaster Nilsen was questioned as follows:

> **"Duane L. Maier: Did you instruct and authorize Mr. Urbin to work overtime on July 31st to make heat inspections?**
>
> **David H. Nilsen: Heat inspections are communicated that no matter what hours of work that they be completed." (Emphasis added.)**

The Claimant was questioned about his working overtime as it related to performing heat inspections. He testified as follows:

> **"Debra J. Smith: In the past when you have done heat inspections or when you have been called out Mr. Maier asked you in relationship to Rule 31, has there ever been an objection to whether or not it was all right for you to have overtime regarding something as critical as VTI or?**

David P. Urbin: No. Nobody has ever said boo either way.

Debra J. Smith: It's just considered part of the job?

David P. Urbin: Yeah. They call me up, ask me to go look and off I go." (Emphasis added.)

It is clear from the testimony of the Claimant and Roadmaster Nilsen that the Claimant was expected to perform heat inspections when the ambient temperature exceeded 90 degrees and he was not required to secure permission to work overtime, but was expected to work it. The Claimant was further questioned in this regard as follows:

"Debra J. Smith: You, you are a Track Inspector? You worked as a Track Inspector on July 31st, correct?

David P. Urbin: Yes, I did.

Debra J. Smith: You did not perform your duties for heat inspection, correct?

David P. Urbin: Correct." (Emphasis added.)

In the final analysis, the Board concludes that not only did the Claimant understand that he had a responsibility to perform heat inspections, he also understood that he was not required to secure permission to work overtime when he needed to perform heat inspections. It is undisputed that he did not perform heat inspections on July 31.

The final question to be resolved is whether the Claimant's failure to perform a heat inspection resulted in the derailment of a train at MP 299.5 on July 31, 2010. The testimony of Roadmaster Nilsen reveals that he was asked if MP 299.5 was a "known trouble area." Roadmaster Nilsen answered "No." He was subsequently questioned and further testified as follows:

"David H. Nilsen: They, it would vary actually. If they're making a heat run and the track time is there then of course they're going to get across their entire territory during the hottest part of the day.

> **Being on a specific territory such as Dave had learned where trouble areas might be. So if there are areas that you're concerned with then you may target those first through the hottest period of the day. But you still are required to get across your, your territory . . . .” (Emphasis added.)**

The Organization argued that because the derailment site was not a “trouble area,” it is likely that the Claimant would have been 80 miles away inspecting a known “trouble area.” Additionally, it argued that the Carrier did not prove that the Claimant's alleged failure to inspect the track at MP 299.5 resulted in the derailment. Roadmaster Nilsen was additionally questioned as follows:

> **“Debra J. Smith: Do you feel like this type of a derailment, this type of situation could have been prevented and how?**
>
> **David H. Nilsen: It's a possibility.”**

Roadmaster Nilsen went on to testify that a hot weather inspection had a 50% chance of discovering a fault in the track alignment. He subsequently re-confirmed that there was a 50% probability that the derailment might have been prevented by a heat inspection. The burden of proof requires, at the very least, that the Carrier show by substantial evidence that the Claimant's actions resulted in the train derailment. The Board is not persuaded that if the Claimant had performed a heat inspection at MP 299.5 – and there was no showing that he would have found it necessary to perform a heat inspection at that site because it had not been a “trouble spot” – that a 50/50 percent chance of discovery proves that the Claimant's actions contributed to the derailment. Thus, the Board concludes that the Carrier failed to substantiate that the Claimant's lack of a heat inspection was instrumental to the derailment.

In summary, the Board finds that substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Claimant failed to properly test the HLCS unit in his Carrier vehicle and he failed to perform heat inspections after the ambient temperature rose above 90 degrees on July 31, 2010. However, there was no showing that the Carrier met its burden to prove that the Claimant's actions resulted in the derailment at approximately 3:20 P.M. on July 31 at MP 299.5.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, Claimant had 30 plus years of unblemished service. The Board finds and holds that the discipline assessed was excessive, and as a consequence, it is reduced to a Level S 30-Day Record Suspension. The Claimant shall be made whole in accordance with Rule 40(G).

During the Referee Hearing, it was brought to the Board's attention that the Claimant unfortunately passed away on October 20, 2012. Therefore, the Board directs the parties to substantiate the aforementioned date of death. After that mutual determination is made, the Board further finds and holds that the Claimant's estate is entitled to compensation from August 3, 2010, until the date of the Claimant's death, at which time the Carrier's continuing liability ends.

AWARD

Claim sustained in accordance with the Findings.

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.