

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41887
Docket No. MW-42114
14-3-NRAB-00003-130066**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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. G. Jordan by letter dated January 18, 2012 on charges of being in violation of MOWOR 6.3.1 Main Track Authorization in connection with allegations of failure to ensure all employees and equipment were clear of limits before releasing Authority 364-59 on M1 between CP 4289 and CP 4255 on August 23, 2011 at approximately 1110 hours at or near Mile Post 428.9 on the Creston Subdivision was arbitrary, unwarranted and in violation of the Agreement (System File C-12-D070-4/10-12-0203 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Jordan shall now receive the remedy prescribed by the parties in Rule 40G.”**

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 August 23, 2011, the Claimant was assigned as a Track Inspector at Creston, Iowa, and on that date the Claimant was inspecting track between CP 4289 and CP 4255 on the Creston Subdivision. It was alleged that the Claimant entered a track that was covered by his own authority that had been released, leaving him unprotected on the main track, and because of that, charges were brought against the Claimant.

On August 24, 2011, the Carrier directed the Claimant to report for a formal Investigation on September 1, 2011, which was mutually postponed until December 21, 2011, 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 ensure that all employees and equipment were clear of limits before releasing authority 364-59 on M1 between CP 4289 and CP 4255, on August 23rd, 2011, at approximately 1110 hours, at or near MP 428.9 on the Creston Subdivision.”

On January 18, 2012, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that this is the second 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 because the Carrier failed to provide the Organization with even a scintilla of the evidence that it possessed prior to the Hearing. It argued that prevented the Organization from properly beginning to prepare the Claimant's minimally-informed defense against the ambushing evidence which had been kept secret by the Carrier. It further argued that the Notice of Investigation lacked clarity. Additionally, it asserted that the Claimant was denied the opportunity to have a meaningful review of his case because a Carrier Officer that did not attend the Hearing and who could not make reasonable credibility decisions issued the

discipline. Lastly, it argued that the Claimant was denied an independent review of his case because the Officer that issued the discipline was the appellant Officer that reviewed his own prior decision. It asks that based upon those procedural errors, the discipline should be set aside without reviewing the merits because the Hearing and review process were unfair.

Turning to the merits, the Organization argued that the Claimant was honest about his error because he explained that he had track authority with another Track Inspector who was inspecting track in the opposite direction. When the Claimant reached the end of the authority, he obtained his own additional authority from the Train Dispatcher using a Smart Mobile Client (SMC) and then mistakenly removed his track protection from underneath himself for but a moment. It argued that the record shows that the Claimant almost instantaneously recognized his error (within 20 seconds) and took immediate steps to rectify it and ensure his own safety. It further argued that even though the Carrier asserted that this was the Claimant's third serious offense within the last 36 months, his record should be considered as being spotless at the time of the incident because the other two cases were still under appeal. The Organization concluded by requesting that the discipline be set aside and the claim sustained as appealed.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case. It argued that the Notice of Investigation was clear and the Claimant and the Organization understood the charges. It further argued that the Claimant's rights were not prejudiced by the lack of early access to the Carrier's evidence because there is no Agreement right that allows for discovery procedures. Additionally, it argued that the Claimant's Agreement due process rights were not inhibited by the fact that the Hearing Officer did not issue the discipline and that numerous on-property Awards have consistently determined that there is nothing in the parties' Agreement that specifies which Carrier Officer is required to render disciplinary decisions. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the record is clear that the Claimant admitted his guilt and that he released his track authority while occupying the track and jeopardized his personal safety. It argued that the offense was serious and could lead to derailments, collisions, injuries and, in some instances, death. It further argued that the Claimant's offense falls within the category of "serious" offenses under Appendix A of the Carrier's Policy for Employee Performance

Accountability (PEPA) and because this was the Claimant's third Level S violation within a 36-month review period, dismissal was appropriate. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The Organization alleged that the charges were vague, but the transcript reveals that the Organization understood the charges as evidenced by its able defense of the Claimant and the fact that there was no showing that the Organization and/or the Claimant were "blindsided" by anything that was presented during the Hearing. The Organization further argued that the Carrier should have allowed it the right of discovery prior to the holding of the Hearing. However, the parties' Agreement has no provision for advance discovery. Additionally, the Organization argued that the Claimant was denied a "fair and impartial" Investigation because the Hearing Officer did not render the discipline. That issue has been dealt with on numerous occasions by various Boards. It has repeatedly been held that there is nothing in the Agreement that specifies which Carrier Officer is required to issue the discipline. Accordingly, we find that the Investigation was "fair and impartial."

The Organization also argued that during the post-Hearing handling of the case, the Claimant was denied an independent review of the record. Our examination of the record evidence shows that G. D. Wright, Director of Administration, issued the Claimant's January 18, 2012 dismissal letter. On January 28, 2012, the Organization appealed Wright's decision to B. D. Andrews, General Manager, Nebraska Division. On March 19, 2012, the Carrier responded to the Organization's appeal with a typewritten signature of B. D. Andrews and a handwritten signature that stated: "B. D. Andrews By G. D. Wright." On April 3, 2012, the Organization appealed that declination to the Carrier's highest designated Officer and stated, in pertinent part:

"The Carrier has established a procedure for the handling of discipline cases. The Organization is required to appeal the discipline to the Division General Manager and one would expect to receive a response from that designated person. Clearly the individual that issued the discipline, Mr. Greg Wright also answered the appeal of Ms. Gilbert as indicated in letter dated March 19, 2012. I seriously doubt that Mr. Andrew[s] ever saw the transcript."

Before the Board, the Carrier asserted that Wright is an Administrative Assistant for Andrews and often finalizes like and/or similar letters for distribution after Andrews has reviewed the particulars of an Investigation transcript and made his appellant decision. The Carrier's response might be correct, but while the appeal was being handled on the property, it chose to be silent on the issue, thus leaving the impression that the Claimant was denied an "independent review" of his case.

Turning to the merits, the essential facts of the instant case are not in dispute. As previously stated, the Claimant was assigned as a Track Inspector at Creston, Iowa, on August 23, 2011, and on that date the Claimant was inspecting track between CP 4289 and CP 4255 on the Creston Subdivision while another Track Inspector inspected track in the opposite direction. When the Claimant reached the end of the authority, he obtained his own additional authority from the Train Dispatcher using Smart Mobile Client - Authority 364-59. During the course of the Investigation, the Claimant was questioned about the incident as follows:

"Eldon Ficke: Mr. Jordan, if you'd please state for the record what you know about this incident and your involvement in it and what brought us here today, please?

Gregory S. Jordan: I, I obtained an authority and [then] mistakenly gave it back out from underneath myself through smart mobile client.

Eldon Ficke: Okay. On exhibit number four what Mr. Palmer read into the investigation transcript, is that pretty much how things happened?

Gregory S. Jordan: Yeah, that's the details, is that what you're referring to?

Eldon Ficke: Yes.

* * *

Gregory S. Jordan: Through SMC, yeah I received 364-59. I was on, in main one, correct.

Eldon Ficke: Okay. And then you released the limits of 364-59 through smart mobile client?

Gregory S. Jordan: That's correct.

Eldon Ficke: While you were occupying it?

Gregory S. Jordan: That's correct.”

Despite all of the Organization's forceful arguments that the Claimant had not been given sufficient training on the SMC and its assertions of technological problems between the Hy-Rail Compliance System (HLCS) and SMC over a lengthy period of time, it is clear that the Claimant understood almost immediately that he had erred. Therefore, we find that substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Carrier met its burden of proof that the Claimant improperly released authority 364-59 as set forth in its charges.

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately six and one-half years of service and the Carrier argued that the instant offense was the Claimant's third Level S violation within a 36-month review period. Therefore, dismissal was appropriate, whereas the Organization argued that the Claimant's record was still essentially clear because it had progressed the other two cases to arbitration for final and binding resolution. The Board is privy to two of the cases – the instant case and Third Division Award 41884. In that Award the Board reduced the Level S Record Suspension to a 10-Day Record Suspension. Therefore, assuming there is no change in the Claimant's other discipline case, the Claimant's disciplinary record contains one Level S Record Suspension. On a non-precedential basis and because of the mitigating circumstances present in the instant case and a possible lack of independent appellant review, the Board finds and holds that the discipline was excessive. Accordingly, it is reduced to a Level S 30-Day Record Suspension. The Claimant is to be reinstated to service with seniority and all other rights unimpaired in accordance with the remedy set forth in Rule 40G.

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.