

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 42372  
Docket No. MW-42551  
16-3-NRAB-00003-140195

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 (dismissal) imposed upon Mr. S. Robles by letter dated March 22, 2013 for alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track in connection with charges of alleged ‘. . . failure to properly protect men and equipment while working in the Cheyenne Yards on the Front Range Subdivision at approximately 1230 hours on June 7, 2012.’ Was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-13-D040-14/10-13-0266 BNR).
- (2) The discipline [Level S thirty (30) day record suspension and a one (1) year review period commencing on March 22, 2013] imposed upon Mr. S. Carabajal by letter dated March 22, 2013 for alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track in connection with charges of alleged ‘. . . failure to properly protect men and equipment while working in the Cheyenne Yards on the Front Range Subdivision at approximately 1230 hours on June 7, 2012.’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement.
- (3) The discipline [Level S thirty (30) day record suspension and a one (1) year review period commencing on March 22, 2013]

imposed upon Mr. D. Gutierrez by letter dated March 22, 2013 for alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track in connection with charges of alleged ‘. . . failure to properly protect men and equipment while working in the Cheyenne Yards on the Front Range Subdivision at approximately 1230 hours on June 7, 2012.’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement.

- (4) As a consequence of the violation referred to in Part (1) above relative to Claimant S. Robles, the Carrier shall take the actions necessary to remove all the discipline from the Claimant’s record and make him whole for all his losses in accordance with Rule 40 of the current Agreement.
- (5) As a consequence of the violation referred to in Part (1) above relative to Claimant S. Carabajal, the Carrier shall take the actions necessary to remove all the discipline from the Claimant’s record and make him whole for all his losses in accordance with Rule 40 of the current Agreement.
- (6) As a consequence of the violation referred to in Part (1) above relative to Claimant D. Gutierrez, the Carrier shall take the actions necessary to remove all the discipline from the Claimant’s record and make him whole for all his losses in accordance with Rule 40 of the current Agreement.”

**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.

On June 7, 2012, Gang TP-44 was putting in ties in the Cheyenne Yard. The gang consisted of Claimant Robles, Foreman; Claimant Carabajal, Machine Operator; J. Hibles, Machine Operator; and T. Hinman, Machine Operator. Claimant Gutierrez was assisting the gang by running the ballast regulator. Roadmaster Neubauer and Manager Meidinger came on site and found the gang had gone for lunch and Gutierrez was the only employee still on site. Neubauer and Meidinger observed two sets of equipment that were not properly protected on Tracks 4110 and 4115. The south switch for Track 4110 was aligned so that traffic could access it. A maintenance of way and an out of service tag were lying on the ground by the switch stand. There were three separate points of unprotected access to Gutierrez and his equipment. Neubauer and Meidinger applied protection and moved to Track 4115, where they discovered the north switch lined for a different track without a maintenance of way lock or out of service tag present.

Management supplied a statement after interviewing Robles and Gutierrez. According to his statement, Robles initially denied that they had left equipment unprotected, but later said he assumed that everything was protected and was unaware of what switches were thrown and when. Gutierrez said he accepted the briefing he was given that indicated he was protected. Robles submitted a statement saying he was briefed and the crew walked the track and locked it out. He said he did not tell anyone to throw a switch, so as far as he knew, he was protected.

Each Claimant also provided a statement of the incident. In his statement, Gutierrez said he witnessed 440 and 4107 being locked out. Carabajal's statement was that everything was locked when he left the switch. Hinson's statement was that the locks were on and he walked the tracks to check the protection. Hibler said he had to move the machines to refuel. Gutierrez told Meidinger he was let in by a machine operator and saw the operator lock the switch back out.

Following the investigation, Robles was dismissed and Carabajal and Gutierrez were issued Level S 30-day Record Suspensions with one-year review periods.

The Carrier maintains it was not unfair for the Conducting Officer to have prepared for the hearing. The procedural objections articulated by the Organization are unfounded.

At the investigation Claimant Robles stated he “assumed that everything was protected,” and admitted he was unaware of the status of the switches. Gutierrez did not see or check all the locks and switches that were supposed to protect him.

When management went out for inspection, they found Claimant Gutierrez and two sets of equipment without proper protection. This was an extremely dangerous situation with three points of access. Claimant Robles admitted he had a job briefing about the protection with Carabajal but did not double check the locks. When pressed, Robles said he was just busy. Robles was cavalier and left someone in harms’ way. Carabajal was in charge of lining the switches, and left Gutierrez there. Robles had multiple Level S violations on his record and was dismissed.

The Organization argues all three employees were charged with MOWOR 6.3.2 on how to obtain authority; they were not charged with fouling the track.

The hearing officer produced every document and provided Carrier witness Meidinger with a statement to refresh his recollection after he had already said he did not know. The Hearing Officer even said he was going to ask Meidinger again. He was trying to get Meidinger to change his statement, which is not fair or impartial. He also refused to let the Organization enter in rules. The rules were not made part of the record until page seven of the Carrier’s submission.

The Notice of Investigation stated as follows:

“An investigation has been scheduled at [date and time] at the Roadmaster's Office, 1201 West 27th Street, Cheyenne, WY, 82001, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly protect men and equipment while working in the Cheyenne Yards on the Front Range Subdivision at approximately 1230 hours on June 7, 2012.”

The Notice of Dismissal states:

“As a result of investigation held on February 22, 2013 at 1000 hours at Conference Room, 1212 West 24th Ave, Cheyenne, WY, 82001 you are hereby [assessed discipline] for failure to properly protect men and equipment while working in the Cheyenne Yards on the

Front Range Subdivision at approximately 1230 hours on June 7, 2012.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWOR 6.3.2 Protection on Other Than Main Track.”

Rule 6.3.2 is titled “Protection on Other Than Main Track.” Given the specificity of the Notice of Investigation, there was little chance of confusion regarding the applicable rule. It follows that there has been no denial of due process in the citation of applicable rules.

MOWOR 6.3.2 states: “When establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established.” This rule clearly and explicitly places responsibility for clearing the tracks on the employee in charge. Claimant Robles was the Foreman on the day in question. Neither Claimant Carabajal nor Claimant Gutierrez was serving in the role of employee in charge at the time. It follows that they cannot be found guilty of violating MOWOR 6.3.2. Neither Carabajal nor Gutierrez has been charged with any other rule violation.

Claimant Robles was the employee in charge responsible for insuring that the tracks were not fouled. He failed to do this in direct violation of MOWOR 6.3.2. At the time, he was under a review period from a prior rules violation. This meant he was subject to dismissal for any subsequent serious rules violation. Leaving equipment and personnel unprotected is, without question, a serious violation.

Although the Hearing Officer in this case provided documents for admission into evidence and questioned witnesses to verify testimony, the Board does not find his actions to constitute denial of a fair and impartial hearing.

The claim is granted in part. The Level S 30-day record suspensions with a 3-year review periods shall be removed from Claimant Carabajal’s and Claimant Gutierrez’s records. They shall be made whole for any lost compensation and benefits.

The claim of Claimant Robles is denied.

**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 30th day of August 2016.**