

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42870
Docket No. MW-43381
18-3-NRAB-00003-160133**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension with a three (3) year review period] imposed upon Track Inspector K. Scott by letter dated October 13, 2014 for alleged violation of Maintenance of Way Operating Rule 6.3.1 Main Track Authorization in connection with his alleged ‘... failure to operate within the limits of your authority on September 3, 2014, at approximately 1818 Hours, at or near MP 126.9 on the Ravenna Subdivision.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-15-D040-1/10-15-0023 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Scott shall have his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”**

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 September 3, 2014, the Claimant was hy-railing with Roadmaster Biro performing inspections. The Claimant believed he had used his Smart Mobil Client to obtain track authority to West Ravenna when, in actuality, his track authority was to East Ravenna. The Claimant proceeded, with his Hy-Rail Limits Compliance System (HLCS) signaling when he exceeded the East Ravenna limits. He halted the hy-rail, backed up and set off at the nearest crossing. After Roadmaster Biro reported the incident, an investigation was conducted that resulted in the above-noted discipline for violation of MWOR 6.3.1. When the ensuing claim was not resolved on the property, the matter was referred to the National Railroad Adjustment Board for arbitration.

The Carrier insists that it has proven the charge with substantial evidence as the Claimant admitted the violation, thus eliminating the need for further proof, as other Boards have stated. This Serious violation brought the appropriate discipline. Leniency would be the Carrier's prerogative, not the Board's. If the claim is sustained, the Claimant is due only the removal of the discipline since he lost no wages. He received a fair and impartial investigation, as the Claimant was not prejudged and the Organization has not shown that alleged procedural errors prejudiced the Claimant.

The Organization asserts that the Claimant did not receive a fair and impartial hearing. The Notice of Investigation (NOI) did not specify all of the intended charges or the rule allegedly violated, nor was the rule referred to during the investigation. The Claimant's and the Organization's ability to prepare a defense was therefore compromised. The Claimant was not found to have violated MWOR 10.3, which was the only rule entered into evidence. Charges were never proved because the Claimant was never accused of violating MWOR 6.3.1. The discipline was arbitrary, capricious and unwarranted because the Claimant was disparately treated. Roadmaster Biro, riding with the Claimant, testified that he

was equally responsible for the breach of track limits, but there is no evidence that the Roadmaster was disciplined. Prior awards frown on disparate treatment.

The Board is compelled to sustain this claim without consideration of the merits because the Claimant did not receive the fair and impartial investigation required by Rule 40A. PLB No. 7564 Award No. 51, a 2015 on-property award in which the claim was sustained, contains the following partial explanation for that Board's action:

“The investigation was not fair and impartial regarding MWOR 8.3 Main Track Switches. The rule was not introduced as an exhibit during the investigation. As a result, the Claimant was not put on notice as to the standard against which his conduct was being measured and the Board cannot say whether the Claimant's behavior on April 8, 2014 met or fell short of the standard. Consequently, the Carrier has not proved with substantial evidence that Rule 8.3 Main Track Switches was violated.”

In the case now under consideration, the Carrier was not obligated to specify the rule(s) violated in the NOI so long as the NOI was clear about the behavior of concern to the Carrier. But during the investigation, the Carrier was obligated to enter a copy of the rule(s) violated into the record so as to allow the Claimant and the Organization a complete defense and, ultimately, to give the Board sufficient information to consider whether the rule had been violated. This was not done, as Rule 6.3.1 Main Track Authorization was first mentioned in the letter imposing discipline. The Board believes the words from the above-noted PLB award are as applicable to Claimant Scott's case as they were to the earlier case and that no more needs to be written. The assessed discipline must be expunged from the Claimant's record.

AWARD

Claim sustained.

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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 10th day of January 2018.