

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44311  
Docket No. MW-45766  
20-3-NRAB-00003-190692**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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. B. Walker, by letter dated June 20, 2018, for violation of MWOR 6.3 Track Occupancy for an alleged failure to stay within track authority on April 24, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-16/10-18-0315 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Walker shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

**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 Claimant established and held seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute, he was assigned as a track inspector on Gang TINS1379 with over 27 years of seniority with the Carrier.

On April 24, 2018, the Claimant was inspecting track on the Butte Subdivision with track and time up to Milepost 408.4. As he reached the end of his track authority, he came upon a Form B protection which was held by a track surfacing gang working in the area. The Claimant stopped at the end of his limits, which happened to be at the beginning of the Form B, and waited for the employee in charge ("EIC") of the Form B to talk him through the protected section of track. While he was waiting, the Claimant failed to obtain proper track and time to operate beyond his authority limits of milepost 408.

Eventually the employee in charge allowed the Claimant to proceed into the Form B protected area, but almost immediately, the Claimant's Hy-Rail Limits Compliance System (HLCS) alarm sounded, notifying him that he had exceeded his authority. The Claimant immediately stopped and called the dispatcher and then notified supervision of what occurred.

On April 27, 2018, the Claimant was given notice of an investigation in connection with the following charge:

**"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stay within track authority 388-75, vehicle 25880 passed EBCS at/or near MP 408.4 on the Butte Subdivision on April 24, 2018, while assigned as a Track Inspector on Headquartered gang TINS1379."**

After a formal investigation on May 23, 2018, the Claimant was found in violation of MWOR 6.3, Track Occupancy, and was dismissed from the Carrier's service. At the time of the investigation, the Claimant's disciplinary record included one 30-day suspension in the review period.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Carrier contends that it has provided substantial evidence in this case. MWOR 6.3, Track Occupancy, subsections B and C make clear that employees must ensure proper authority prior to occupying or fouling the track. The Carrier points out that the Claimant admitted that he failed to comply with the rule. the Claimant had track authority up to Milepost 408.4 and he travelled beyond that location without extending his authority limits. The Carrier contends that the Claimant was not protected by the Form B that was protecting another gang.

The Carrier contends that this was the Claimant's second level S violation in the review period, for the same type of rule violation, and thus, the discipline was neither excessive nor arbitrary. The Carrier points out that dismissal was in accordance with its Policy for Employee Performance Accountability ("PEPA") for a second level S violation in the review period, which provides, in part,

- "2. An employee who commits an initial Serious Violation will receive a 30-day Record Suspension with a Review Period of 36 months...
- b. If an employee commits an additional Serious Violation within the Review Period, he or she may be subject to dismissal."

The Organization contends that the Carrier failed to meet its burden of proving that the Claimant's dismissal was warranted under the circumstances. The Organization concedes that the Claimant failed to extend his own authority limits, but contends that the Claimant was protected at all times, because he was traveling under the Form B which he was given permission to enter. At no time was the Claimant on live tracks.

The Organization contends that the Claimant was a long-term employee who made a technical violation but was not at any time in danger due to his omission. The Organization contends that the penalty of dismissal was excessive where the PEPA policy does not require dismissal under these circumstances.

The Claimant has admitted that while he received permission from the EIC to enter the Form B, he did not receive authority to continue past the end of his own limits prior to proceeding. MWOR 6.3.1 makes clear that employees must receive authority

before fouling or occupying tracks. Where there is an admission of guilt, there is no need for further proof. This Board finds that sufficient evidence exists to support the findings against the Claimant.

The Organization argues that the penalty of dismissal was excessive for an employee with 27 years of seniority, especially when he had only one prior violation in the review period and his violation was a technical one, which did not place anyone in harm's way. However, the Carrier's PEPA provides that when an employee commits a second Serious violation in the review period, he may be subject to dismissal. Less than two years prior to this violation, the Claimant was subject to a 30-day suspension for a Level S violation for "Failure to Stay within Track Authority," the same misconduct for which the Carrier dismissed him. Clearly, the Claimant did not benefit from the Carrier's prior attempts to use progressive discipline, as the lesser penalty did not change his behavior. Thus, the Carrier's decision to discharge him cannot be said to be excessive.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of October 2020.