

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44573  
Docket No. MW-45965  
22-3-NRAB-00003-200518**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. C. Brisbin by letter dated December 17, 2018 for violation of MWOR 6.2.1 Authority Behind Trains was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D040-7/10-19-0119 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Brisbin shall have his record cleared of the charges leveled against him 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.

**Factual Background:**

At the time of this dispute, the Claimant was assigned as a Track Inspector on Mobile Gang TINS2541 and was working under the supervision of Roadmaster S. Farrell. He was issued a 30 day record suspension in addition to 3 years' probation for alleged violation of MWOR 6.2.1 – Authority Behind Trains.

On October 24, 2018, at approximately 0930 hours, BNSF dispatcher Barry Moore issued the Claimant Track Authority 351-10. This authority granted the Claimant permission on the Main Track from the Westbound Control Signal at West Siding Switch Minden to the East Switch at East Holdrege behind Train ID BNSF 2940 West. After a train passed, the Claimant, assuming it was Train BNSF 2940, went back to his vehicle and contacted the passing train on the radio. The Claimant called for Train 2940, but the crew answered as Train 2704.

During this radio contact, the Claimant said nothing about the fact that Train 2704 answered instead of Train 2940. He asked the train crew for their headend location, notified them that he had authority behind them from Minden to Holdrege, that he would be following them, and asked where they would be working for the day. The train crew notified the Claimant—again identifying themselves as Train 2704—that they would be working at WAC, a fertilizer customer, and would notify him prior to making any reverse movements. After this radio conversation, the Claimant, still incorrectly identifying Train 2704 as Train 2940, occupied the main line within the limits of Track Authority 351-10 without permission because his authority was behind Train 2940, not Train 2704. The dispatcher ordered the Claimant to set off the tracks and notified his supervisor. The Carrier deemed this to be a serious safety violation and assessed the Claimant a 30-day Record Suspension with a three-year review period.

**Position of Organization:**

The Organization contends the Carrier failed to hold a fair and impartial investigation. Carrier Witness Justin Cowper stated on page four of the transcript,

*'Uh reason why we're here today is uh the Track Inspector Mr. Chris Brisbin violating rule uh Maintenance of Way Operating Rule 6.2.1 Authority Behind Trains.'* As the Organization sees it, this statement by the Carrier's witness clearly shows the Carrier had already determined that Claimant was guilty -- prior to the investigation.

The Organization also notes that the Carrier has submitted no documents or evidence to confirm the train lineup or locations for the date in question. In its assessment, the Carrier has failed to support its allegations against the Claimant.

As allowed by Rule 6.2.1, the Claimant used the graphical territory display on his Smart Mobile Client to observe that BNSF 2940 West was in the area. Transcript Exhibit 7 shows this. There was no indication from the BNSF dispatcher that BNSF 2704 was anywhere in the area on the date and time as the Carrier alleges. As testimony and evidence revealed, the only train in the area was BNSF 2940 West. As the Organization sees it, the responding train crew either did not know their train number or mistakenly identified themselves as BNSF 2704. In either case, the blame does not fall to the Claimant. In sum, the Organization maintains there is no evidence of another train. Based on that, it argues the Carrier has not shown any rule violation. It contends the Carrier's case is derived from conjecture without proof.

#### Position of Carrier:

In the Carrier's assessment, the Claimant failed to understand that the train on the radio was not Train 2940. Train 2704 identified itself twice and answered all questions. The Claimant failed to properly identify the correct train while obtaining track authority from the dispatcher. He has admitted his guilt. As the Carrier sees it, he put himself in harm's way and the infraction is properly considered serious.

The Carrier reasons that if there was only one train, there would be no need for the dispatcher to immediately request the Claimant to get off the tracks. In its view, this is not a case of a wrong train call back. Rather, the problem was that the Claimant failed to wait for Train 2940 to go by.

#### Analysis:

We do not find that the Claimant was denied a fair and impartial hearing based on the phraseology of the witness' rationale for the investigatory meeting. There was no evident prejudice to the Claimant from this comment.

It is clear from the transcript of the radio communications that the Claimant failed to digest that the responding train was 2704, not 2940. Train 2704 identified itself twice. Rule 6.2.1 addresses Authority Behind Trains and requires that the identity of the train be confirmed. The Claimant did not do this.

The Board has considered the Organization's argument that there was only one train in the area based on the Smart Mobile Client display. This display only shows the 2940 (west) as being in the area. Train 2940 is not shown, indicating that it was not in the immediate vicinity. This is persuasive evidence that the imminent threat perceived by the Carrier was neither imminent nor a threat. However, the transcript of the radio exchange between the Claimant and 2940 clearly establishes that Claimant was not listening to the train's identity, and did not seek confirmation of that identity as required by 6.2.1. As a result, he violated the rule. However, in the assessment of this Board, the Claimant's offense was not as egregious as depicted by the Carrier. As a result, the penalty was harsh and unreasonable under the circumstances.

Claim sustained in accordance with the Findings. The Claimant's penalty shall be reduced to a Formal Reprimand with a one-year review period and his disciplinary record shall be revised accordingly. He shall be compensated for any lost pay or benefits resulting from the discipline imposed by the Carrier. Any compensation not expressly awarded herein 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 29<sup>th</sup> day of October 2021.

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