

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44748  
Docket No. MW-46529  
22-3-NRAB-00003-210303**

**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 (dismissal) imposed upon Mr. R. Taylor, by letter dated November 13, 2019, for violation of MWOR 15.2 Protection by Track Bulletin Form B and MWOR 6.3.1 Track Authorization was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-20-D070-2/10-20-0068 BNR).**

- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Taylor shall be “\*\*\* reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service; 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant**

could have bid on and performed had the Claimant not been removed from (sic) service; 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service. All notations of this dismissal should be removed from all carrier records, due to the Carrier's arbitrary, capricious, and excessive discipline leading to the Claimant being improperly dismissed."

**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:**

The Carrier determined that the Claimant released a train through Form B limits without ensuring all men and equipment were clear of the track on September 12, 2019 at approximately 1640 hours on the Red Rock Sub. MWOR 6.3.1 clearly states that "when part of a work group, the EIC must have at least one other employee in the work group ... read and understand the authority before equipment or employees foul the track." The resulting penalty was dismissal.

**Position of Organization:**

The Organization contends the Claimant was denied a fair and impartial hearing under Rule 40 in that the Hearing Officer's behavior indicated bias against him. Hearing Officer Bunch allowed company witness Brown to change his

testimony to go along with his own line of questioning in order to provide a more damaging case against the Claimant.

The Organization maintains the Carrier further violated Rule 40 when it failed to render a decision within 30 days. The investigation was held on October 29, 2019, hence the Claimant's representative should have been notified in writing no later than November 28, 2019. By letter dated December 5, 2019 (Employees' Exhibit "A-1"), the Vice General Chairman informed that Carrier that its decision had not been received and, as such, the Carrier had violated Rule 40D of the Agreement. Upon learning of the dismissal from the Claimant's family, the Vice General Chairman immediately met with the Claimant's family and obtained the dismissal letter and transcripts, at which point he wrote a last-minute appeal letter on behalf of the Claimant. The Organization relies upon the following provision of Rule 40: "J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed."

The investigation transcript offered by the Carrier in this case was patently marred by significant instances of disarray, which included two missing pages and pages that were not consecutively numbered. In the Organization's assessment, the Carrier failed to satisfy the basic requirements of Rule 40E, which required the Carrier to provide the employee and the duly authorized representative with all of the information adduced at the investigation.

On the merits, the Organization asserts the rule is clear, the Employee in Charge is the responsible person, not the Claimant. If there was a briefing, the Claimant was not included. The Claimant cannot be held responsible for the actions or lack of actions from BNSF Supervisor Brown.

As the Organization sees it, the Rules are clear: only the EIC can release a train through a Form B. The Claimant was not the EIC, he was the Subgroup Coordinator. The Claimant was only doing as instructed by his supervisor.

**Position of Carrier:**

Testimony by Carrier witness EIC Brown confirmed that the track which the Claimant and Foreman Hyde were protecting was occupied by a train while Brown

had men and equipment on that track. Testimony proved that Hyde sent the Claimant instructions via text message stating the Claimant was to instruct the oncoming train to stop at MP 367 prior to arriving at the location of men and equipment. However, when the Claimant relayed the instructions, he failed to tell the train crew to stop at MP 367. This resulted in Brown's 11-man crew having to expeditiously vacate the track.

The address on file for the Organization was 747 N. Burlington Ave, Suite 312, in Hastings, NE, which matches the address of the Organization's System Office on the letterhead of the appeal letter that was sent to the Carrier on December 31, 2019.

Due to the distance between the north and south end of the Form B, the Claimant and Hyde planned how to best run the Form B. Foreman Hyde was going to call trains in from one end and the Claimant was going to call them from the other end, and they would call or text each other to communicate. The Carrier argues that part of the Claimant's assignment was to ensure that everyone foul of the track was in the clear before authorizing trains to pass through on that track.

When train BNSF 3889 called the Claimant to ask if it could pass through, he contacted Foreman Hyde (as he had previously). However, this time Foreman Hyde texted the Claimant that it was okay to allow BNSF 3889 to pass through at 40 mph, but to have it stop at MP 367.5 Instead of opening up and reading the entirety of the text, the Claimant just read the excerpt that flashed on his phone's home page, and did not see that he was to inform the train to stop at MP 367.6 Fortunately, there was a road crossing that the train blew its whistle for, alerting employees to get out of the way as the train approached.

During the investigation, the Claimant admitted that he did not read the entire text message and merely relied upon the excerpt that flashed on his phone, In the Carrier's assessment, there can be no question that the Claimant failed to comply with the applicable rules, as he did not verify that his men and machines were clear before granting authority to a train to proceed.

This was the Claimant's second serious violation during an active review period. On November 29, 2018, the Claimant signed a waiver accepting a Level-S Record Suspension with a 12-month review period for an authority-related violation

- fouling the track while operating a hi-rail vehicle. Insofar as this was a second Level-S Record Suspension, the Carrier concludes the discipline was proper.

**ANALYSIS:**

We do not find Hearing Officer Bunch's demeanor to have negatively affected the fairness of the investigation. We note that the language of Rule 40 places a time limitation on the rendering of a decision after investigation: 30 days. It does not impose such a deadline to the requirement of furnishing the Organization with written notice of that decision. Given the lack of a precise deadline, Rule 40E must be interpreted to require written notice within a reasonable amount of time. The Organization notified the Carrier by way of letter dated December 5, 2019 that it had not received the materials of record. Yet there remained no response or provision of such materials. We find this unreasonable. The Organization was forced to prepare its appeal letter without the required transmission from the Carrier. This nonfeasance flaunts the Rule 40E requirements, and defeats the due process of the handling of the case. As such, there is no need to address the merits of the case.

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier's return to service policies. The Carrier shall remove the discipline from the Claimant's record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

**AWARD**

Claim sustained.

**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 6<sup>th</sup> day of May 2022.