

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44842  
Docket No. MW-47183  
23-3-NRAB-00003-220068**

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. C. Clift, by letter dated July 21, 2020, for alleged violation of MWOR 6.3.1 Track Authorization and MWOR 1.1.2 Alert and Attentive for alleged failure to obtain proper track authority prior to fouling the main track was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File S-P-2359-G/11-20-0490 BNR).**
- (2) The appeal\* as presented by letter dated November 19, 2020 to General Director Labor Relations Joe Heenan shall be allowed as presented because said claim was not disallowed by Mr. Heenan in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant C. Clift shall be reinstated to service, have his record cleared of the charges leveled against him and he shall now:**

**‘... 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 service;
- 4) Health, dental and vision care insurance premiums, deductibles and co-pays than he would not have paid had he not been unjustly removed from service.”

**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 Claimant's Vehicle 28141 was reported to be outside authority limits at or near Mile Post 93.8 on the Yakima Subdivision on July 1, 2020. Following investigation, the Carrier dismissed the Claimant for violation of MWOR 6.3.1 Track Authorization and MWOR 1.1.2 Alert and Attentive. The Organization disputes this dismissal as being outside the Carrier's contractual authority.

**Position of Organization:**

The Organization argues the Claimant has been totally honest about the situation, and has acknowledged that his excuse of being in a hurry is not adequate. His honesty and forthrightness is laudable, and in the Organization's view, he should not be dismissed for a simple mistake. The Organization also maintains the Claimant's ten years of service should be considered as a mitigating circumstance, along with the fact that he has autistic children.

**Position of Carrier:**

As the Carrier sees it, the Claimant Clift lost focus and set outside his limits. He put himself in danger by hurrying and traveling on a portion of track where he had no authority. He even admitted his wrongdoing: "At that point in time uh getting into a hurry um uh I set on at 93.8, which after I got to traveling, my alarm started going off, and then at that time, I realized what I had done uh setting on outside my limits." (TR 17-18)

The Carrier notes that the Claimant has an extensive history of Level S violations, including a Level S just two years prior. In that instance, his failure to be alert and attentive and maintain a safe breaking distance resulted in a machine collision. In the Carrier's view, the violation of MWOR 6.3.1 and MWOR 1.1.2, failing to obtain proper track authority and going outside of authorized limits, is serious. Insofar as this constituted a second Level S violation within a two-year period, the Carrier argues dismissal was appropriate under the PEPA Policy. This was the sixth serious violation in his career, diminishing the value of his ten-year service as a mitigating circumstance. The Carrier maintains that insofar as the Claimant has admitted to being in a hurry, not verifying the MP, and setting outside of his limits, the charges stand proven.

**Analysis:**

We do not find that the Carrier has failed to consider mitigating circumstances. Many employees have problems which could potentially impact performance at work. It is the obligation of the employee to notify the Carrier if (s)he perceives that personal problems are jeopardizing job performance. The Claimant did not advise the Carrier of any difficulty in meeting job expectations, and as a result, the Carrier was within its rights to expect the Claimant to perform his job properly.

The Claimant's history of service does not serve as a mitigating service. Though his service spanned ten years, it was marked with multiple disciplinary actions due to poor performance. Long service can only serve as a mitigating circumstance when it is relatively free of such problems.

The evidence has established that the Claimant lost focus and set outside his limits. This is a serious breach of safety protocol, which puts personnel and equipment at risk. It follows that the Carrier has met its burden.

**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 10<sup>th</sup> day of March 2023.