

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 40, (Case No. 40)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 9, 2009, when Claimant, J. R. Browning (6581615), was issued a 30-day record suspension for failure to properly place yellow flag on July 9, 2009. The Carrier alleged violation of Maintenance of Way Operating Rule 5.4.2; and**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with seniority, vacation, all rights unimpaired and pay for all wage loss commencing October 1, 2009, continuing forward and/or otherwise made whole."**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence; finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On July 17, 2009, Carrier notified Claimant to appear for a formal Investigation on August 6, 2009, which was mutually postponed until September 11, 2009, concerning in pertinent part the following charge:

"...to determine all facts and place responsibility, if any, in your alleged failure of rule 5.4.2 (display of yellow flag) on July 9th, 2009."

On October 26, 2009, Claimant was notified that he had been found guilty as charged and was issued a 30-day record suspension with a one year probation period.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that the record substantiates that the Claimant placed a yellow flag at Milepost 1106.9 on July 9th at approximately 1:30 a.m. which was witnessed to by Signal Maintainer, J. Rocha. It further argued that the record verifies the flag was initially placed at the correct location by the fact that three westbound trains passed the flag without incident and it was not until the fourth through the seventh westbound trains passed the flag that it was found to be in the wrong location.

The Organization also argued that testimony reflected the fact that vandalism had occurred numerous times regarding Carrier signs directing vehicle traffic and train traffic being moved and on that particular night there was reported vandalism (moving) of road signs in the same general area and according to it that is the reasonable explanation as to why the yellow flag was found one mile away. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the Claimant may have thought he placed the yellow flag at 1106.9, but he erred which is documented by the fact that four trains reported the flag in the wrong location and a Supervisor physically moved the flag to the correct location.

The Carrier argued that the Claimant and the Organization submitted a number of pictures to try and prove Claimant's innocence, but they had no value as they were taken without verification as to location on September 11, 2009, some two months after the incident. It also argued that the yellow flag was exactly one mile from the location where it should have been placed for track protection. It closed by stating that there was ample evidence that the Claimant did not follow the Rules and it asked that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11.

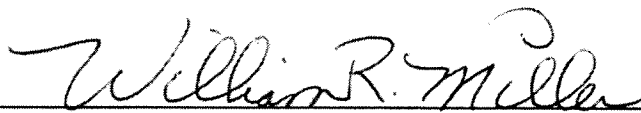
In reviewing the record the Board notes that the Carrier makes a strong argument that the yellow flag was found by a Track Supervisor at Milepost 1107.9, however, that argument does not explain why the first three of seven westbound trains found no misplacement of the yellow flag which adds credence to the Organization's argument that someone else moved the flag after the third train passed by it. Additionally, the Carrier's argument does not refute the testimony of Signal Maintainer Rocha who confirmed that he saw the Claimant place the flag at the proper location. There is nothing to indicate or infer that Rocha's testimony was not credible or that he

had any reason to fabricate a story. Both Rocha and the Claimant testified that they used a storage bungalow at MP1106.66 as a reference point in calculating 3/10 of a mile west for placing the yellow flag on July 9, 2009. The Claimant offered a photograph of the aforementioned building and it was clearly marked on the bottom line of the sign on that building as MP1106.66. The value of that picture is that it clarifies that the Claimant and witness Rocha had a identifiable reference point for calculating the proper placement of the yellow flag 3/10 of a mile to the west. The Transcript further reflects the un-refuted testimony of the Claimant and witness Rocha to the apparent vandalism on the night of July 9th of road signs affecting vehicular traffic over railroad crossings having been moved which was reported to the proper authority. In summation, the Carrier's finding of guilt in this instance was built on inference rather than substantial evidence because it did not explain how or offer any rationale as to why the first three trains traveling westward did not find the yellow flag at the wrong location nor did it refute the credible testimony of Signal Maintainer Rocha. It is clear that in this instance the Carrier did not meet its burden of proof.

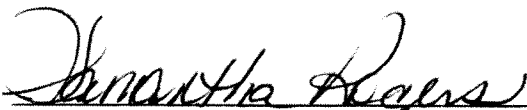
The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and the Claim is sustained as presented. Claimant is returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 12/6/10