

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 52, (Case No. 52)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 January 16, 2009, when Claimant, Salvador Ulibarri (6586135), was issued a Level S 30-day Record Suspension with 3 years probation concerning his failure to properly restore dual control switch at East Fox to its normal while working as Track Supervisor on December 17, 2008. The Carrier alleged violation of MOWOR Rules 8.2 and 8.3.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing January 16, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-0909936) (Organization File No. 150-13N1-0884.CLM)**

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.

The facts indicate that on December 17, 2008, Signal Maintainer G. Burns was hy-railing his vehicle across the territory and at East Fox he derailed his vehicle while traversing over a switch. There is no dispute that Claimant had earlier in the day taken the same switch into hand from the motor position and lined himself into the siding. Carrier Officers investigated the incident and subsequently determined that the Claimant might have some culpability.

On December 18, 2008, Claimant was directed to attend a formal Investigation on December 29, 2008, which was mutually postponed until January 6, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, in connection with possible violation of Rules 8.2 and 8.3 of the Maintenance of Way Operating Rules, effective October 31, 2004, as supplemented or amended, concerning your alleged failure to properly restore dual control switch at East Fox to its normal position with the selector lever in the motor position of Wednesday, December 17, 2008 at approximately 11:04 AM, while working as a Track Supervisor...."

On January 16, 2009, Claimant was notified that he had been found guilty as charged and was issued a Level S record suspension of 30 days and assigned a probation period of three years.

It is the Organization's position that the Carrier erred in its discipline as it did not meet its burden of proof. It argued that the record indicates the Claimant had taken the switch into "hand" from the motor position and lined himself into the siding after which he placed the switch back into its normal position in motor and subsequently the switch went out of synchronize, on its own. Simply stated it asserted that the switch malfunctioned due to no fault of the Claimant. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that substantial evidence was produced that Claimant violated the aforementioned Rules and he admitted during the Hearing he operated the switch and it was in the reverse position, causing the derailment. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

The Organization made a forceful argument in behalf of the Claimant that the switch in dispute may have been improperly lined by the Dispatcher or it may have malfunctioned. However, neither argument is persuasive. On page 10 of the Transcript the Hearing Officer questioned the Supervisor of Signals D Owsley as follows:

"Russell Sweet: Is it possible that the Dispatcher lined the switch in reverse?"

Dan Owsley: Um, no, I don't um; don't see a possibility here, because both the Field Recording Log and the Fort Worth Dispatcher Logs all match up. And there were no controls sent out during this time prior to the incident happening

or at the time the incident happened.

On page 25 of the Transcript the Hearing Officer continued to question Supervisor Owsley about the possibility that the switch may have malfunctioned on its own as follows:

"Russell Sweet: ..., with the Dispatcher never throwing the switch, what's the probability of the switch going just out of correspondence on its own?"

Dan Owsley: Um, I'd say impossible after, especially a properly operating switch that I tested it to verify that it was a properly operating switch. (Underling Board's emphasis)

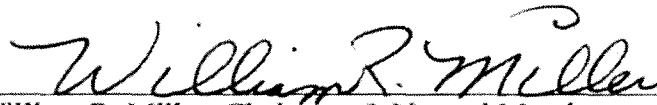
Review of the testimony indicates that Supervisor of Signals D. Owsley's statements that the Dispatcher did not line the switch in reverse and that the subject switch operated properly were not refuted. No rebuttal of those statements and/or plausible alternate theory leads to the inescapable conclusion that the Claimant was the last person who operated the properly functioning switch. On pages 37 and 38 of the Transcript the Claimant stated that the Maintainer G. Burns told him the switch was in the reverse position causing the derailment. He further admitted on page 37 that the person in charge was Maintainer Burns and that he should have advised him when any switch was moved, but he did not do such in this instance.

The record further substantiates that the Claimant admitted on page 39 of the Transcript that he heard the Dispatcher and the Maintainer on the radio state the switch was out of correspondence and he was the only person that had moved the switch. Rule 8.3 states in pertinent part: **"Do not open main track hand-operated switches, except as instructed by employees in charge."** The evidence is clear the Claimant was not the employee in charge and he did not seek authorization to do such in violation of the Rule. Rule 8.2 states in part the following: **"When the position of a derail or main track switch is changed by hand operation, the employee in charge must record the location of the derail and/or main track switch used and the time the derail is secured in derailing position and/or the main track switch is returned to the normal position."** Additionally, Rule 8.3 states in part: **"Lone workers who operate a main track switches must observe the position of the switch and ensure that the switch is line and secured in the normal position before leaving the area."** There is ample testimony and evidence which indicates that the Claimant did not observe the switch in the reverse position and the derailment was caused by the switch being in the reverse position and he was the only person to operate that switch on the date of the incident prior to the derailment. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

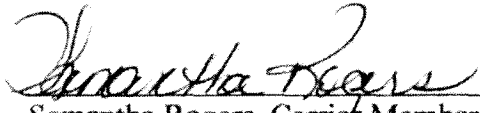
The only issue remaining is whether the discipline was appropriate. At the time of the dispute the Claimant had approximately 32 plus years of service with some prior discipline and a clear record over the last eight years. However, the discipline assessed did not result in any actual time off and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds it will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


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

Award Date: 6/13/11