

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 55, (Case No. 55)**

**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 September 1, 2009, when Claimant, Daniel L. Van Dyne (6582514), was issued a Level S 30-day Record Suspension with 1 year probation concerning his failure to properly use Lookout Protection on September 1, 2009. The Carrier alleged violation of MOWOR 6.3.3 Visual Detection of Trains.**
- 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 September 1, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-09-0198) (Organization File No. 190-13N1-0994.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.

On September 2, 2009, Claimant was directed to attend a formal Investigation on September 29, 2009, which was rescheduled to September 24, 2009, concerning in pertinent part the following charge:

"...to determine all facts and place responsibility if any, in your alleged failure to properly use Lookout Protection on September 1, 2009, at Milepost 974.8 on the Bakersfield Subdivision; you are in possible violation of Maintenance of Way Operating Rule 6.3.3 Visual Detection of Trains, in effect Sunday, October 31, 2004

with revisions up to February 6, 2009."

On October 26, 2009, Claimant was notified that he had been found guilty as charged and was issued a Level S 30-Day Record Suspension and assigned a probation period of one year.

It is the Organization's position that the Carrier erred in disciplining the Claimant. It argued that the Claimant was denied a fair and impartial Hearing because of the multiple roles played by the Manager who was the Charging Officer, key witness against the Claimant and the Officer who found the Claimant guilty and assessed the discipline. Additionally, it argued that on September 1, 2009, the Claimant was assisting another employee in accordance with his duties as a Lookout and did nothing wrong. It contended that the Carrier did not meet its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant and his co-worker were working under "Statement of On-Track Safety". It argued the Claimant and the other employee violated Rule 6.3.3 as they placed themselves in potential danger because they did not have a radio for contact with trains and the form they used was outdated and not filled out correctly.

The Carrier further argued that contrary to the Organization's assertions the multiple roles held by Roadmaster Rubio did not deny the Claimant a fair and impartial Hearing. It suggested that Public Law Board 6457, Award 1 held that it was harmless that Officer who charged the Claimant and decided his guilt was also the first-level appeals Officer, and in Public Law Board 5555, Award 5 it was decided the fact the same Company Officer who initially reviewed this claim was also later a prosecution witness was not prejudicial to Claimant. It concluded the discipline was appropriate and it asked that it not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that we must address the issue of whether or not the Claimant was denied a fair and impartial Hearing because of the multiple roles played by Roadmaster Rubio. The Awards relied upon by the Carrier are not directly on point whereas Award No. 30 of this Board addressed a similar issue in pertinent part as follows"

"The issue of Hearing and Charging Officer's improperly holding multiple roles in formal Investigation process has been the subject of countless Awards and authority can be found on both sides of several issues raised in the instant case. Consistent with the reasoning expressed in Third Division Award No. 31774 we find no language in the parties Agreement which prohibits the officer who initially rendered the discipline prior to the Investigation from issuing the same after the Hearing. However, in this instance there is an additional element, as that same officer was also a witness against the Claimant. In Third Division Award No. 24476 the Board discussed the multiplicity of roles that can be held by a Hearing Officer

and it stated in pertinent part the following:

"...We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system..."

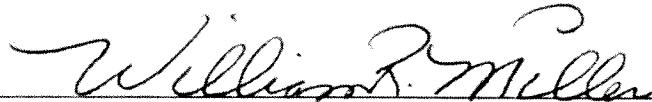
We believe that same reasoning applies in this dispute as well. The Agreement guarantees the employee a right to "due process". That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits." (*Underlining Board's emphasis*)

In the instant dispute the Roadmaster issued the charges, was a prosecution witness and the trier of facts who reviewed his own testimony. That unfair process could have been easily avoided and remedied by having the Hearing Officer render the decision, as many Boards have ruled that the Hearing Officer is in the best position to judge credibility. In an effort to maintain consistency the reasoning of Award No. 30 will be applied in this case as well. The Board finds and holds that the discipline must be set aside without addressing the merits, however, the Claimant is not due any monies as he lost no wages. The Claimant's disciplinary status reverts to that he held prior to October 26, 2009.


The Board also exercises the option to advise the Claimant he should be careful in the future to adhere to all current Carrier Rules because possible violation of some of those Rules can have disastrous consequences.

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: 6/13/11