

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 61, (Case No. 61)**

**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 June 1, 2010, when Claimant, John Liendro Jr. (1573278), was issued a Level S 30-day Record Suspension with 3 years probation concerning his failure of releasing track and time authorization through the Smart Mobile Client program, which eliminated protection for employees and equipment on track on June 1, 2010. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying With Instructions.**
- 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 June 1, 2010, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-10-0143) (Organization File No. 210-13N1-1051.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 June 2, 2010, Claimant was directed to attend a formal Investigation on June 9, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged critical failure by releasing track and time authorization 149-4, through the Smart Mobile Client program, which

eliminated protection for employees and equipment on track between Mykawa Mile Post 14.0 and Hasting Mile Post 4.1 on June 1, 2010, at approximately 1002 hours in violation of Maintenance of Way Operating Rule 6.3.1, Track Occupancy."

On July 14, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a three year probationary period.

It is the Organization's position that the Investigation was unfair as its location was changed two days prior to the Hearing and it was postponed until June 10th because Carrier witnesses were not available. On the merits the Organization stated that the Claimant admitted to the mistake of releasing one of his track protections, of which he had several. It further argued he corrected that in approximately three minutes and was the person who informed Carrier Manager, Roadmaster Barnes of his error. Lastly, it asserted that the discipline imposed was excessive and it concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the Claimant was given a fair and impartial Investigation. It argued there can be no doubt that the Claimant erred when he improperly released track protection for some of his co-workers, which he acknowledged was a violation of MOWOR 6.3.1. Because of the potential for danger of employees and equipment the Carrier stated that the discipline issued was appropriate and corrective in nature. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Organization's procedural arguments do not rise to the level of setting aside the discipline without reviewing the merits of the case, therefore, the Board concludes that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

The record is clear that the Claimant admitted that he prematurely released track time via the Smart Mobile Client program while he still had men and equipment on the track. On page 9 of the Transcript in an opening statement he stated in pertinent part:

"...I just lost focus and, and released the wrong tracking time..."

On pages 17 and 18 of the Transcript in a closing statement the Claimant stated in part the following:

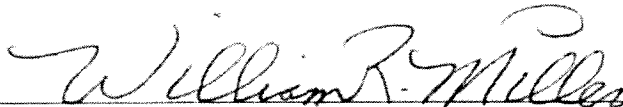
"...I need to reevaluate my, personal life, my professional life, and make the right decision and utilize all the resources that are available to me to, to be able to work safe and, and to work without these distractions. So that's, this loss of focus is something that, that I really do regret..." (Underlining Board's emphasis)

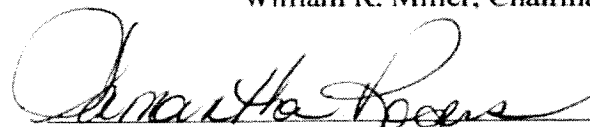
The Carrier's Safety Rules are in place to protect employees and equipment and employees must follow those Rules in order to protect themselves and others. In this instance the Claimant, as he stated, "**lost focus**" and despite the fact that no one was hurt his error had the potential for genuine harm. It is clear that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.


The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had almost three years of service with a prior Level S violation that occurred only four months before the subject case. The discipline exercised by the Carrier was in accordance with its Policy for Employee Performance Accountability (PEPA), thus, the Board finds and holds the discipline 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: 6/29/11