

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 66, (Case No. 66)**

**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 July 2, 2010, when Claimant, Terry D. Rodriguez (6569255), was issued a Level S 30-day Record Suspension with 3 years probation by letter dated September 14, 2010, concerning his failure to properly install replacement rail, leaving behind rail end mismatch defect found on August 2 and 4, 2010. The Carrier alleged violation of Engineering Instruction 6.7.5 Removing Rail Defects, Part D Selecting Replacement Rail and MOWOR 1.13 Reporting and Complying with Instructions.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline, and reinstate with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 2, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0181) (Organization File No. 180-13N1-1073.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 August 9, 2010, Claimant was directed to attend a formal Investigation on August 17, 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 failure to properly install replacement rail,

leaving behind rail end mismatch defects on the Cajon Subdivision. On August 2, 2010 a mismatch was found on a plug rail that you put in on July 2, 2010 at MP 29.935 on Main 2 and on August 4, 2010 a mismatch was found on a plug rail that you put in on July 28, 2010 at MP 23.155 on Main 1.

This investigation will determine possible violation of MOWOR 1.13 Reporting and Complying with Instructions and EI 6.7.5 Removing Rail Defects, Part D Selecting Replacement Rail."

On September 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 Carrier did not meet its burden of proof. It further asserted that the Claimant and the Organization were not furnished a copy of the transcript and because of that it was not allowed to make a thorough review of the transcript before it filed its appeal wherein it could have pointed out and we quote from its appeal letter of October 13, 2010, **"...that the Claimant would have been exonerated of any alleged wrong doing."**, therefore, according to the Organization that was a violation of Rule 13. Based upon that procedural error alone it argued that the discipline should be set aside without even reviewing the merits. Additionally, it argued the Claimant is a 58 year old employee with 35 years of service and a good work record and even if the Carrier could produce evidence to support their charges, which it did not, the discipline was excessive in proportion to the allegations. 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 Investigation was fair and impartial. In its December 9, 2010, letter of denial it addressed the Organization's allegation that it failed to provide a copy of the transcript to the Claimant and Organization as follows:

"It was Carrier's belief that the transcripts were mailed both to Claimant and the Organization. However, the Administrative Associate in the Engineering Department in charge of this task had just retired at that time and Carrier is unable to determine if in fact the transcripts were mailed.

I have been informed by the field that another set of copies of the transcript were mailed to the Claimant and Organization on December 6, 2010. If the Organization desires to present any new argument or offer any new evidence derived from its reading of the transcript, Carrier will not object so long as it is submitted to Carrier within sixty days from the date of this letter, thereby curing the Organization's sole objection in this case."

Turning to the merits the Carrier asserted that the Claimant's Roadmaster, D. Bradford testified that a Track Supervisor found a mismatched rail on August 2, 2010, that the Claimant improperly repaired with a plug rail on July 2nd at MP 29.935 on Main 2 and subsequently two days later the same Track Supervisor found a mismatch on the plug rail the Claimant improperly repaired on July 28, 2010. It argued that Bradford testified that he previously instructed the Claimant on the correct way to measure and repair rail to avoid a mismatched rail from occurring. It further argued that the Claimant admitted he did not understand the math for the 1/32 measuring device he had been using while making the two incorrect repairs at MP 29.935 and MP 23.155, thus, he was guilty as charged. Lastly, it argued that the Claimant lost no compensation and no benefits were impaired. It closed by asking that the discipline not be disturbed.

On December 23, 2010, the Organization responded to the Carrier's offer to provide additional argument and/or evidence. It reiterated that the transcript was not provided in a timely manner pointing out that it was not furnished until 111 days after the conclusion of the Hearing. It also asserted that the Carrier was incorrect when it stated the Claimant lost no monies and had no benefits impaired because the Claimant was actually disqualified from his position as a Foreman, in addition to the record suspension which forced him to work a lower paying job. It argued that because the disqualification was related to the incident in dispute Claimant was entitled to receive the difference in pay until reinstated to his former position and it asked that he be compensated for one days wages for the Hearing and the expenses he incurred for attending the Hearing. It further stated:

"Consequently, the finding of guilt could not have been based on the record developed because the deciding officer for the Carrier did not have the record to base his finding on. The deciding officer was not the officer who held the hearing, however, he is the very same officer who disqualified the Claimant earlier, assessed an additional record suspension and probationary period, therefore, how could he not find him guilty of the alleged charges to justify his previous actions." (Underlining Board's emphasis)

The Organization went on to state the following:

"In NRAB First Division Award No. 25987, the Board held that the Carrier violated the Claimant's due process rights when it refused to show the date that the transcript was prepared. The Board reasoned that by withholding the date the transcript was prepared, the Carrier was withholding evidence crucial to determining the decision was based on the evidence developed at the Investigation."

It concluded that the Carrier failed to comply with Rule 13 and Appendix No. 11 which denied the Claimant "due process". It again asked that the discipline be set aside and the claim sustained.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that we must address the issue of whether or not Rule 13 and Appendix 11 were complied with. It was not refuted that the Organization and Claimant were not provided a copy of the transcript until after it had already made its appeal some 111 days after the Hearing. In Third Division Award No. 31802 involving the same parties to this dispute that Board closed by stating the following:

"...However, we feel compelled to observe that the Organization objected to Carrier's failure to provide Claimant's representative with a copy of the notice of discipline and with a complete copy of the Investigation transcript in a timely manner. We note that this is not the first time that Carrier failed to perform these duties as required by the Agreement. Prior Awards have warned Carrier that if it persists, it risks a sustaining Award on procedural grounds alone. We reiterate that warning."

In the Carrier's letter of December 9, 2010, it made an effort to address the Organization's assertion that it and the Claimant had not been provided a copy of the transcript in a timely manner. In the aforementioned letter the Carrier stated that it would not object to any new argument or evidence presented by the Organization provided it was done within 60 days. Based upon the unique facts presented the Board has determined that the Carrier's offer to allow the Organization an additional opportunity to add new evidence and/or argument absolves the Carrier from its failure to provide the transcript in a timely fashion.

However, the agreement to allow new evidence or argument raises different issues to be addressed. The Organization raised two new arguments, the first was a post-Hearing argument and the second was a pre-Hearing argument.

Turning to the post-Hearing argument the Organization stated in its second letter of December 23, 2010, the following: **"...the finding of guilt could not have been based on the record developed because the deciding officer for the Carrier did not have the record to base his finding on."** That assertion by the Organization is based upon an inference that because it did not receive its copy of the transcript in a timely manner the deciding Officer did not receive his as well which is not consistent with that Officer's letter of September 14, 2010, directed to the Claimant wherein he stated: **"Enclosed are copies of the investigation transcript and exhibits entered during the investigation."** It appears that in this instance the decision maker was sending the Claimant a copy of the Investigation and he had the opportunity to review it which is

consistent with the Carrier's denial letter of December 9, 2010, wherein it stated that it believed the transcripts had been sent out, but because there had been a change in staff due to a retirement it was possible they had not been sent. The Board rejects the Organization's argument because it has no reason to believe that either party intentionally misrepresented the facts.

The Board having rejected the Organization's first argument turns its attention to the second argument regarding the Carrier's conduct prior to the Hearing. The second argument made by the Organization is that the decision maker had predetermined the guilt of the Claimant because he disqualified the Claimant for the same offense prior to the holding of the Hearing and assessed an additional record suspension to justify his prior decision, all of which denied the Claimant "due process" and resulted in a loss of monies. It stated in pertinent part the following:

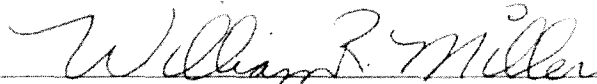
"The Carrier unjustly disqualified and suspended the Claimant from his regularly assigned duties when they removed him from his Foreman's job on August 9, 2010, before a hearing could be conducted and on September 14 they additionally issued a record suspension and probationary period."
(Underlining Board's emphasis)

As previously stated, the Carrier having agreed to the possible addition of new argument and/or evidence had a responsibility to respond to anything that had not been set forth in the original appeal, if it disagreed. In this instance it is clear that the Organization's statements of December 23, 2010, that Claimant was disqualified prior to the Hearing and before a decision was rendered was an assertion of pre-determined guilt. That was a new argument which was not refuted. It is a well settled issue within this industry that if one party sets forth a factual argument and it is not refuted by the other, that contention not challenged must be accepted by the Board as fact (See Third Division Awards 11828, 12251, 12363, 15018 and First Division Awards 16517, 20288 and 20552 which stand for that proposition, to name just a few). If the Carrier had disagreed with the Organization's statement it could have offered an alternative version as rebuttal to the Organization's argument. Absent a different story the Board as the appellate trier of fact is locked to the record that was produced on the property and in this instance the Organization's unchallenged story that Claimant was disqualified as a Foreman for the same incident prior to the Hearing before there was a review of the transcript must be accepted as fact and any subsequent review of that transcript does not negate that un-rebutted statement. The Board finds and holds that the discipline is to be set aside without addressing the merits as the Claimant was denied "due process" and the Claimant's disciplinary status reverts to that he held prior to September 14, 2010, in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Additionally, the Claimant is to be reinstated as a Foreman with seniority intact and made whole at the straight time rate for any loss in difference of pay between the Foreman rate of pay and the positions he has held since being disqualified as that loss of his Foreman rights and compensation was covered by part 2 of the Statement of Claim.

Without making any assessment on the merits of the dispute, 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: 10-12-11