

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 67, (Case No. 67)**

**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 May 20, 2010, when Claimant, Raymond D. Morgan (6461347) was issued a Level S 30-day Record Suspension with 1 year probation by letter dated July 14, 2010, concerning his failure to confirm the milepost location after receiving track authority on May 11, 2010. The Carrier alleged violation of MOWOR 6.2.1 Train Location.**
- 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 May 20, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0145) (Organization File No. 100-13N1-1047.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 May 17, 2010, Claimant was directed to attend a formal Investigation on May 26, 2010, which was mutually postponed until 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 failure to confirm the milepost location of BNSF 8858 West after receiving track authority on Track Warrant #820-60 at

approximately 1523 hours on May 11, 2010 on the Conroe Subdivision in violation of Maintenance of Way Operating Rule 6.2.1, Train Location."

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 one year probationary period.

It is the Organization's position that the Carrier did not meet its burden of proof. It asserted that the Claimant was denied a "fair and impartial" Hearing because the recorder malfunctioned and lost information and questions had to be repeated giving the Carrier witness a second opportunity to readjust his answers. Additionally, it argued that it was unfair that the principal witness against the Claimant testified via telephone rather than facing the accused which denied the Claimant an opportunity to face his accuser. Based upon those procedural errors alone it argued that the discipline should be set aside without even reviewing the merits. Additionally, it argued that the Claimant is a 56 year old employee with 32 years of service and a good work record. Turning to the merits, it asserted the Claimant has shown that he complied with the intent of the Rule as it existed on May 11, 2010, and because of such the Carrier realized that they had an issue with Rule 6.2.1 and revised it on May 21, 2010, with a clear explanation as to why the revision was needed in System General Order No. 15. 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 and there were no procedural errors. It argued that Rule 6.2.1 was explicit that the milepost locations needs to be confirmed after receiving track authority through radio contact and because Claimant failed to secure such on the date in dispute he was in violation of the Rule. Furthermore, it stated that he admitted to that failure on page 17 of the Transcript. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Organization's procedural arguments do not rise to the level to set aside the discipline in this instance without reviewing the merits as it was evident that the Claimant and Organization were not surprised by anything that arose during the Hearing and Claimant was well represented. The Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

MOWOR 6.2.1, Train Location, which has been relied upon by both parties stated in pertinent part:

"Prior to fouling the track at the location where the track will be first occupied, employees who receive authority to occupy the track after the arrival of a train or to follow a train(s) must:

- * After receiving the authority, establish direct radio contact with a crew member of the train (s).
- * Confirm the train's identity by engine initials and number.
- * Ascertain the train(s) MP location, confirming it has passed the location where the track will be fouled or occupied...."

Review of the testimony indicates that the Manager of Operating Practices, R. Vanwye, testified that on May 11, 2010, he was doing a remote audit of employees when he monitored the conversation regarding the incident in dispute. On page 12 of the transcript, he was questioned about the Claimant's actions as follows:

"Gary M. Marquart: Did, did he contact a crew member in the radio conversation that you heard?"

Rick Vanwye: That gentleman, yes, he did contact a train crew member, correct.

Gary M. Marquart: Okay, did he confirm the train's identity?"

Rick Vanwye: That, he did, yes."

Mr. Vanwye went on to state that the third bullet referred "...to the body of the rule." and the Claimant was in violation of Rule 6.2.1.

The Carrier is also correct that the Claimant testified on page 17 of the Transcript that he did not confirm BNSF 8858 West passing of Milepost 40.38 by radio. However, on pages 20 and 21 the questioning of the Claimant continued as follows:

"Gary M. Marquart: Mr. Morgan, in the conversation with the Dispatcher, did he acknowledge that the train was past you?"

Raymond D. Morgan: That is correct.

Gary M. Marquart: Okay. Now then, you stated where or it's been, it's been addressed that you ascertained the mile post location of the train through other means other than verbal communication over the radio, is that correct?"

Raymond D. Morgan: That is correct.

Gary M. Marquart: And, and the train crew, you also stated, I believe, that the train crew acknowledged your presence at that road crossing?

Raymond D. Morgan: That is correct.

Gary M. Marquart: They opened the window, waved at you, hollered, whatever?

Raymond D. Morgan: That is correct.

Gary M. Marquart: Okay. So they knew where you were at?

Raymond D. Morgan: That is correct.

Gary M. Marquart: And you knew where they were at?

Raymond D. Morgan: That is also correct.

Gary M. Marquart: So you, by rule, you ascertained the train's mile post location?

Raymond D. Morgan: That is correct." *(Underlining Board's emphasis)*

The Manager of Operating Practices testimony recognized the crux of the issue when he stated the three bullet points refer to the body of the Rule. The Carrier argued that the three bullet points all require radio confirmation. That argument is based upon an inference and is not without some appeal, but it is not persuasive in this instance because the directive to make radio contact is not within the body of the Rule prior to the three bullets as it was only set forth in the first bullet.

Claimant testified and it was not refuted that he did a roll by of BNSF 8858 West which the train crew acknowledged as they passed him. The record further indicates the Claimant complied with the intent of the Rule as it existed on May 11, 2010. He received authority as required, established direct radio contact with a crew member of the train and confirmed the train's identity by engine initials and numbers. He also ascertained the train's Mile Post location through both visual and verbal communication even though he did not memorialize such on the radio. The Organization was correct that the Rule 6.2.1, Train Location, was subject to multiple interpretations, which may explain why it was subsequently revised on May 21, 2010, wherein it was changed in pertinent part to read as follows:

"...After receiving authority behind a train(s) and before occupying or fouling the track, the employee must establish direct radio contact with a crew member of the train(s) and verbally:

- * Confirm train(s) identity by engine initials and number
 - * Determine train(s) location by MP
- The employee must use this information to verify the train(s) has passed the location prior to occupying or fouling the track."

System General Order No.15 which was an exhibit to the Investigation transcript explained why the Rule was changed as follows:

"MWOR 6.2.1 is amended to clarify that information which must be obtained by the employee through direct radio contact with a train crew member after receiving authority behind a train."

The change and clarification of the Rule emphasizes the fact that the Claimant did not violate the Rule prior to its revision and substantiates that the Carrier did not meet its burden of proof.

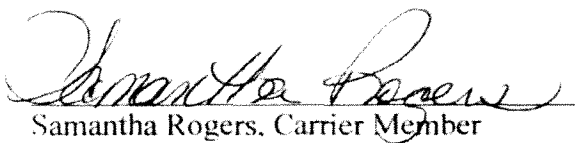
The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and Claimant's disciplinary status reverts to that he held prior to July 14, 2010. The additional requests set forth in part 2 of the claim do not apply as the Claimant lost no compensation nor had any benefits impaired.

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