NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7394
AWARD NO. 9, (Case No. 9)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE

vs

BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on September 25, 2009 when Mr. Daniel J. Brewer was dismissed for his violation of Maintenance of Way Operating Rule 6.3.2 - Protection on other than Main Track, Maintenance of Way Operating Rule 6.3.3 - Visual Detection of Trains, and Engineering Instructions 1.1.4 - On Track Safety Procedures.

2. As a consequence of the Carrier's violation referred to in part (1) above, we request Mr. Brewer be put back to service at once, charges removed from his personal service file and paid for all time lost."
(Carrier File No. 12-10-0030) (Organization File No. B-2083-19)

FINDINGS:

Public Law Board No. 7394, 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 September 25, 2009, Division Engineer, D. F. Befort sent the Claimant a letter which stated in pertinent part the following:

"This is to advise that you are hereby dismissed from employment with BNSF Railway effective immediately for your violation of Maintenance of Way Operating Rule 1.6 - Conduct, MOWOR 6.3.2 - Protection on other than Main Track,

MOWOR 6.3.3 - Visual Detection of Trains, MOWOR 1.10 - Games, Reading or Electronic Devices and Engineering Instructions 1.14 - On Track Safety Procedures for your failure to protect men and equipment fouling the track without proper authority, working as a lookout without proper documentation and failing to devote your full attention to detecting the approach of trains and warning employees while you were using a cell phone approximately 25 feet away from the employee fouling the track operating an MC3 grinder. This occurred while you were working as Lead Welder on Springfield Division, Thayer South Subdivision at or near MP 471.1, Harvard Yard Arkansas on September 24, 2009 at approximately 12:05 P.M."

On September 25, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was set for October 8, 2009, which was mutually postponed until October 22, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, when alleged employee was observed protecting men and equipment fouling track without proper authority, working as a lookout without proper documentation and failing to devote his full attention to detecting the approach of trains and warning employees because he was using a cell phone approximately 25 feet away from the employee fouling the track operating an MC3 grinder."

On October 29, 2009, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It argued that because the Claimant had main line track and time, he had provided sufficient protection for his men and equipment (the equipment was a MC3 grinder - which according to the Organization could be picked up by two men and moved in a matter of seconds) working on the yard track. Additionally, it argued that not all of the Rules Claimant was charged with were applicable and when he was asked whether he was providing protection as a Lookout he meant that he was only being observant and he did not mean that he was protecting his crew as a Look Out since they were already protected by the main line track and time. It further argued he didn't use derails because the truck did not have them, therefore, according to the Organization there was no violation of any Rules. 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 Claimant was working with his crew on September 24th on yard tracks in Harvard, Arkansas, when members Uniform Efficiency Testing Team (UET) stopped to perform an audit of the Claimant's crew, the Claimant informed them

that he was providing protection as a "Lookout". Members of that team testified that the Claimant did not devote his full attention to protecting the crew as he was seen using a cell phone rather than watching for potential train movement and did not have the required completed form in his possession as a "Lookout" necessary before fouling the track. It further argued the assessed discipline was consistent with the Carrier's Policy for Employee Performance Accountability (PEPA) and the Claimant's record which included a third serious violation in a two year period. Lastly, it argued that one of those serious violations had been a dismissal for a similar infraction which was reduced to a lengthy suspension by Award No. 12, of Public Law Board 6986. It reasoned that because the instant violation was of a similar nature to the aforementioned Award, termination was appropriate and it asked that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule and it is clear that the Hearing was conducted in a fair and impartial manner. Claimant was well represented by his Organization and he was not denied his Agreement "due process" rights.

This is the second of two cases involving the same Claimant. In the instant case the record substantiates that on September 24, 2009, the Claimant was observed using a cell phone by members of a UET Team that stopped to perform an audit of his crew. Claimant advised them that he was providing protection as a "Lookout" for his crew as it fouled the track with equipment and he had additional protection with Main Line Track and Time. At the Hearing Claimant testified he got "rattled" when the UET Team arrived and did not mean to tell them that he was providing protection by being a "Lookout", but instead meant that he always tried to keep aware of his surroundings and what was going on. He further testified that when the team saw him using his cell phone it was because he was calling a Welding Supervisor who had left a message on his phone which he thought was work related. There is no dispute that the Track and Time Protection which Claimant obtained denied direct access to the tracks his crew was working on, however, there is evidence that non-running locomotive engines were on the same track his crew was working on. The Carrier argued that the engines could have been started which would have placed the crew in potential harm's way while the Claimant stated he kept a watchful eye on the engines which he thought were being stored. On page 43 of the transcript the Claimant was questioned about the engines as follows:

"Q So if you see an engine in the yard you don't think you ought to protect yourself against it?

A It it's, if it's not running, it, it wouldn't seem that uh, it could make any movement.

Q So your stating that an Engineer can't come and get on the unit and start it?

A Well yes an Engineer could.

Q And within those yard limits, he would have authority to run right up where you were at, would that be correct?

A That would be correct."

Substantial evidence was adduced at the Investigation that the Claimant and his crew were not protected from the engines on the tracks they were working on and the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was appropriate. At the time of the subject incident Claimant had approximately 28 years seniority with three serious violations within the last two years. One of the previous disciplinary actions involving a similar offense was a dismissal that was reduced to a lengthy suspension. That decision, Award No. 12 of PLB No. 6986 addressed a situation where the consequences of Claimant's failure to comply with safety procedures resulted in three employees being slightly injured and the Carrier sustained $141,000.00 damage to its equipment. Fortunately, in this instance no injuries or damage to equipment occurred, but that does not reduce the severity of the offense as there was potential for serious harm or worse. In the aforementioned Award the Board determined the following:

> **"Any <u>future</u> violation of the similar nature shall be deemed grounds to terminate the Claimant from all service, subject to the grievance process and the arbitration process."** *(Underlining Board's emphasis)*

The Board is always reluctant to dismiss a long term employee, but in view of the fact that he was previously dismissed for a similar offense which was reduced to a lengthy suspension with a stern forewarning that any violation of a similar nature would result in termination we are compelled to find and hold that dismissal was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The dismissal will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.

William R. Miller

William R. Miller, Chairman & Neutral Member

Award Date: 12-13-10