

PUBLIC LAW BOARD NO. 5850

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

vs.

**BNSF RAILWAY**

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Case No. 420 – Award No. 420 – Claimant: McKinney  
Carrier File No. 14-10-0214  
Organization File No. 190-13C2-1029.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 25, 2010, when Claimant, Ty. G. McKinney (1756444), was issued a Level S 30-day Record Suspension with a 3 year review period, for his release of track authority while a boom, installed on a section truck, was located on the main track which caused a BNSF locomotive to collide with the boom causing damage to both the locomotive and the boom on June 14, 2010. The Carrier alleged violation of MOWOR 6.3.1 Main Track Authorization, Releasing Authorities.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Ty G. McKinney, has been employed by the Carrier since 2007. On June 15, 2010, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with, on June 14, 2010, his alleged release of track authority while a boom truck was on the main track, which caused a BNSF locomotive to collide with the boom causing damage to both the locomotive and the boom. The notice alleged that Claimant had violated Maintenance of

Way Operating Rule 6.3.1, Main Track Authorization, Releasing Authorities. Following the investigation, the Carrier determined that Claimant had committed the violation alleged and, taking into consideration his personal record, assessed him a Level S 30-day record suspension with a three-year review period.

Carrier Rule 6.3 Track Occupancy provides, in relevant part:

#### **6.3.1 Main Track Authorization**

Use one of the following on main tracks, controlled sidings or any track where CTC is in effect:

- Rule 10.3 (Track and Time)

#### **Releasing Authorities**

Track and Time, Track Permits, Track Warrants, Foul Time and Occupancy Control System limits must be cleared and reported clear to the control operator or train dispatcher before time expires. Before any of these authorities are released, all equipment and employees must be clear of the limits and reported clear to the designate control operator or train dispatcher. The employee must request additional time before authorized time has expired. If the employee cannot clear the track before the expiration time of the authority, authority is extended until the control operator or train dispatcher is contacted.

The transcript of the investigation shows that just after the Hearing Officer opened the record, the Organization representative objected to the introduction of a written statement. The Hearing Officer overruled the objection, and Roadmaster Aaron Whitney read into the record a statement from Robert Polk, indicating that Mr. Polk worked with his Foreman, Claimant, on the day of the incident. The statement recounts some preliminary activities, and then that Mr. Polk told Claimant his stomach hurt and he went to the restroom. The statement concludes that when he returned the train was stopped and that was all he knew.

At the hearing, Mr. Whitney described Claimant's track authority in connection with the incident, and read the track authority form which showed that Claimant cleared his limits at 10:06. He also introduced photographs accompanied by a brief written description of the incident, which indicated that the boom on Claimant's truck was fouling the main line and was struck by a train, causing damage to both pieces of equipment. Mr. Whitney acknowledged that there was no truck driver assigned to Claimant's crew on the day of the incident, and he did not have a full crew. He also acknowledged that Claimant had not attended crane truck school or the Carrier's technical training center.

In Claimant's written statement, which is part of the investigation record, he recounts that at the time of the incident he was working at milepost 144.8, putting in a plug rail after the job. He recites that there was minor work that needed to be completed, and he released his track warrant when the dispatcher called for it because he was out of time. He added that they continued to work using Mr. Polk as a lookout until he needed to use the restroom and then cleaned up. As Mr. Polk left, the statement continues, Claimant started moving away from the truck when he heard the eastbound grain train whistle blowing and the train came around the curve and struck the boom on his truck. The statement concludes that Claimant had been under the impression that the boom was clear of the track when the train struck it.

Claimant acknowledged at the investigation that it was his responsibility as Foreman to ensure that the boom and all men and equipment were in the clear. He stated that the truck driver position usually goes unfilled and he often has to operate the section truck. He added that there had been no truck driver for a month. He stated that he had had no technical training, classes or field training, on the operation of the crane truck, but he acknowledged that he was familiar with the remote operation of the boom and could properly lift and stow it, and he would know if it was out of its cradle or foul of the track. He stated that he had a trackman, Mr. Polk, with him that day and he had been acting as lookout but he had gone to use the restroom. He added that his truck was not set out on the main track at the time of the incident.

Claimant acknowledged that as foreman he supervises the truck driver and the trackman. He explained that if he is operating the boom truck without a driver he takes on the truck driver responsibilities. He further acknowledged that he would be responsible as both truck driver and foreman to ensure that the boom was not fouling the track. He admitted that he released his authority with the boom not stowed and fouling the track. He also acknowledged that at the time of the incident he did not ensure that the boom was properly stowed before releasing his track warrant.

The Carrier's PEPA provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. Claimant's personal record shows a Level S 30-day record suspension, with a three-year review period, for failure to control a Carrier vehicle resulting in a collision on October 2, 2009.

The Carrier first contends that there is no procedural irregularity which denied Claimant his right to a fair and impartial investigation, as, contrary to the Organization's assertion, there is no missing dialogue in the investigation transcript. In any event, the Carrier notes, the record shows that Claimant admitted, in his written statement and hearing testimony, that he released his track authority while the boom was hanging over the line, after which it was hit by a locomotive. It is well established, the Carrier states, that such an admission is sufficient to satisfy its burden of proof, and the record is clear that Claimant violated Carrier rules as alleged.

The Carrier further asserts that the discipline assessed was appropriate, given the seriousness of the violation, which could have had catastrophic results, with consideration given to Claimant's personal record. The Carrier concludes that the penalty complied with its Policy for Employee Performance Accountability (PEPA) and should not be disturbed by this Board.

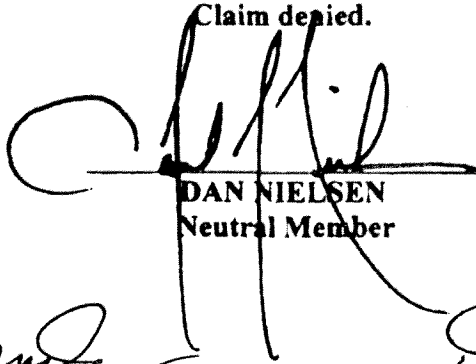
The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization asserts that the Carrier did not comply with Rule 13 and Appendix 11 of the parties' Agreement. In particular, the Organization states, the Carrier failed to provide it the investigation transcript within the required 30 days, as it was received by the Organization on September 28, 2010, 35 days after the investigation, which was held on August 25, 2010. Further, the Organization states, the beginning of the transcript appears to be missing dialogue, as it opens with an objection by the Organization representative to a written statement that is not referenced in the transcript prior to the objection. Further, the Organization contends, the Carrier's refusal to call Mr. Polk led to confusion concerning which employees were on the Section Gang at the time and place referenced in the investigation notice. In addition, the Organization argues that Roadmaster Whitney never produced promised information concerning the employee assigned to the Truck Driver position on the Section Gang to which Claimant was assigned as Foreman. The Organization also asserts that the Hearing Officer prejudged Claimant's guilt, as evidenced by the fact that he read into the record "the rule that has been violated" before all evidence had been heard.

On the merits, the Organization states that the Carrier has continuously understaffed the Truck Driver position, forcing Claimant to simultaneously work that position along with his Foreman position. The Organization notes that the Carrier admitted it had reassigned one-third of the workforce Claimant should have had available, and this incident is a classic example of the result. The Organization urges that one Foreman cannot supervise a work group, drive and operate machinery and vehicles, perform half the labor and provide protection for the work group without some sort of failure. The Organization states that the discipline assessed is extreme, unwarranted and unjustified, and is not supported by the facts of the case. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity in these proceedings which denied Claimant his right to a fair and impartial investigation. On the merits, Claimant admitted that he was familiar with the operation of the equipment. He also admitted that he was responsible for ensuring that the boom did not foul the track and that he released his track authority without doing so. This conduct is a clear violation of Carrier rules, and Claimant's admissions are sufficient to satisfy the Carrier's burden of proving his guilt by substantial evidence. With respect to the penalty, this was a very serious offense and it is fortunate that the only result was property damage. We see no reason to overturn the penalty deemed appropriate by the Carrier.

AWARD

Claim denied.



DAN NIELSEN  
Neutral Member



JOY MENDEZ  
Carrier Member



DAVID TANNER  
Organization Member

Dated this 21<sup>st</sup> day of May, 2013.