

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 33, (Case No. 33)**

**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, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 17, 2009 when Claimant, N. A. Hart (6468847) was dismissed. The Carrier alleged violation of Maintenance of Way Operating Rule 6.3.2 Protection on Other Than Main Track. The incident concerned alleged failure to establish protection on track while loading spikes on August 17, 2009.**
- 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 August 17, 2009, continuing forward and/or otherwise made whole."**

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.

The Board notes that this is the first in a series of two cases involving the same Claimant. The facts indicate that on August 18, 2009, Claimant was directed to attend a formal Investigation which was postponed and subsequently held on September 29, 2009, 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 establish protection on track while loading spikes from 1006 track in Gillette Yard at/or near MP 597.2 on the Black Hills Subdivision on August 17, 2009, while assigned as Grapple Truck Driver on gang TTPX0009, temporarily headquartered at Gillette, Wyoming...."

On October 21, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier's dismissal of Claimant was inappropriate. It argued that the Claimant was charged with failure to protect himself on a "Other Than Main Track" and on the date in question he was working in a yard track using his truck to unload some loose spikes out of a gondola using his boom and magnetic lift and the only time his truck might have fouled the track was when his boom and magnet were inside the open top gondola car. It pointed out that the parties agreed that the west end was protected and the issue was over protection on the east end.

According to the Organization the track Claimant was working on was just off a "Lead Track" that dead ended past his work area. There were no engines or cars beyond his switch so nothing could come back and get into his track. It contended that the switch to the east was already lined against movement into his track and no train could come down into the Claimant's track without aligning the switch for movement into that track. It further argued that on the switch stand 6 nearest Claimant it had a orange tag, stating the switch was hard to throw and should not be used until repaired. The Claimant did not place his lock on that switch, but according to him he moved up the track toward the main line to the next switch 5 and lined, locked and tagged that switch for protection and on that basis no train could come down the lead past that switch to get to his work location.

Lastly, it argued Roadmaster Woodside's erred when he testified that he looked at all the switches because Claimant testified that he had to walk around a building to get to the east end switch that he had locked and tagged. It closed by stating that the Carrier did not meet its burden of persuasion and requested that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record substantiates that the Claimant thought an orange tag (not a lock) on the east switch (6) provided him protection from train movement which was not true. It further argued that Roadmaster Woodside testified that there was no protection or lock on the east end of switch 6 and there was no protection or locks on any other switches east of the Claimant's work site. It contended that the Claimant failed to protect himself and he was in danger and in violation of Rule 6.3.3 which states in pertinent part the following:

"...all switches that provide direct access to the track must be line against movement, properly tagged, effectively spiked, clamped or locked with an effective locking device." *(Underlining Board's emphasis)*

It concluded by asking that the discipline not be disturbed as it was appropriate.

The Board has thoroughly reviewed the record and found that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. The facts indicate we have two contradictory stories as to whether or not the Claimant protected himself on the east end of his work site. Roadmaster Woodside testified on pages 37, 38 and 46 - 48 of the Transcript there was no protection whereas Claimant testified on pages 32 - 34, and 36 there was protection. Claimant suggested on page 36 that Woodside may not have seen the lock and tag on switch 5 because it was partially hidden by a brown building alongside the tracks. When Woodside was questioned about the building on page 43 he testified that the building was not by the east tracks, but on a road that branched off from the road that paralleled the east tracks to the north and that he could see all of the switches from the road. Although the aforementioned testimony of the primary witness against the Claimant and the Claimant was totally contrary, it is the Claimant's additional testimony which makes the difference in this case. On page 31 of the Transcript he testified as follows:

"I pulled my truck alongside of the track to lock the switch. It had a ora-, or it had a tag on it, so I assumed it was already locked...."

Claimant assumed the switch was locked rather than verifying whether it was actually locked. He further testified on page 31 that was what he told Supervisor Woodside. That testimony was consistent with the testimony of Woodside on page 38 wherein he stated in pertinent part the following:

"...I think that he essentially believed, through our conversation that the tag had him protected. You know, he seen the tag, he knew there was a tag there. Um, and he thought he was protected."

On pages 35 and 36 of the Transcript Claimant was asked why he didn't tell Woodside that he had established protection on the east end, if in fact he secured such further east of switch 6 that had the orange tag on it. Claimant was evasive in his response and stated that Woodside just asked him if he knew about protection, and he said yes, and Woodside didn't say much more. If someone was asking you if you had protected your work site, it is not credible to believe that you would not tell them you had locked and tagged another switch further east. It is clear that substantial evidence was adduced at the Investigation that 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 incident Claimant had 29 and 1/2 years of service. His discipline record reflects the fact that prior to the instant discipline he had been disciplined on five occasions, and between the 4th and 5th disciplinary action there was 17 years of unblemished service. Therefore, at the time of the dismissal in this case he had one serious violation, a 30 day record suspension on his discipline record which occurred approximately three months prior to the subject incident, as all others had been worked off several years before. The Carrier argued that under its Policy for Employee Performance Accountability (PEPA) that section titled Serious Rule Violations two serious Rule violations is grounds for dismissal. However, the Board notes that under the Policy's Statement of Principles it states:

"This policy is designed to support BNSF's vision of becoming injury-and accident- free. It is designed, first, to encourage all BNSF employees to be actively engaged in safe work behaviors and in ensuring a safe work environment. Second, when a rule violation occurs, this policy provides a process for arriving at an understanding of improvements needed to prevent similar rule violations. Third, for those rare cases where there is a marked disregard for safety and BNSF rules and procedures, it provides a process to enforce BNSF and federal safety requirements."

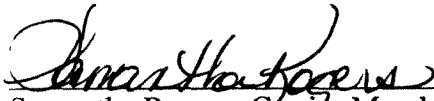
The Board has determined that based upon the peculiarities of this dispute and on a non-precedential basis it was not a case that falls into that third area discussed above wherein an employee showed blatant disregard for Carrier's Safety Rules, but instead is one that should be handled with progressive and corrective discipline as the Claimant was a long-time employee who had a commendable work record including only one minor injury with no loss of days. Therefore, the Board finds and holds that the discipline was excessive and it reduced to a six (6) month suspension from October 21, 2009 through and including April 21, 2010, which is corrective in nature and in accordance with the spirit of PEPA. Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since April 22, 2010, until reinstated in accordance with Rule 13(f) of the Discipline Rule, with two level S Violations on his record. Claimant is forewarned that he needs to be careful to abide by Carrier Rules and Policy as he works to clear off that record over the 12 months following reinstatement.

AWARD

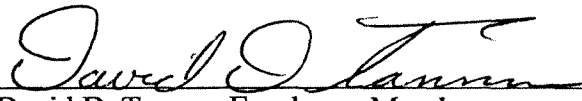
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 8/6/10