

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 80, (Case No. 80)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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, Steve E. Dulmage (6578330), was issued a Level S 30-day Record Suspension with a 3 year review period, for failure to devote his full attention to detecting approaching trains while being the designated lookout on July 2, 2010. The Carrier alleged violation of E.I 1.1.1 Fouling the Track and MOWOR 6.3.3B Lookouts.**
- 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."
(Carrier File No. 14-10-0180) (Organization File No. 180-13N1-1063.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 July 8, 2010, Claimant was directed to attend a formal Investigation on July 29, 2010, which was mutually postponed until August 18, 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 devote your full attention to detecting approaching trains while being the designated lookout on Friday, July 2 on the Seligman Subdivision, MP 571.4 at approximately 1224.

This investigation will determine possible violation of MOWOR 6.3.3B Lookouts and EI 1.1.1 Fouling the Track."

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 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 which 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. It further argued that even if the Carrier could produce evidence to support their charges, which it did not do, the discipline was excessive in proportion to the allegations. It concluded by requesting that the discipline be rescinded and the claim 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 record substantiated that on the date of the incident Claimant failed to devote full attention to detecting approaching trains while being the designated Lookout on Friday, July 2, 2010, on the Seligman Subdivision, Milepost 571.4 at approximately 12:24, thus he was guilty as charged. It closed by asking that the discipline not be disturbed and the claim remain denied.

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 110 days after the conclusion of the Hearing. It also argued that the officer who rendered the discipline was not the Hearing Officer, but he

was the same officer who filed the charges against the Claimant and thus could not make an unbiased decision. 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 will first address the Organization's procedural arguments. As previously stated in Award Nos. 66 and 68 of this tribunal and based upon the unique facts of this case and because it arose during the same timeframe of the aforementioned Awards and under the same conditions the Board has determined that the Carrier's offer to allow the Organization an additional opportunity to add new evidence and/or argument remedies the Carrier's failure to provide the transcript in a timely fashion. Additionally, the Organization argued that the Disciplinary Officer could not make an unbiased decision because he filed the charges, however, a close review of the record does not validate that argument in this instance. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The facts indicate that the Claimant's Roadmaster T. Delk testified at the Hearing he pulled up in his truck to see the Claimant acting as the Lookout for his gang on July 2, 2010, and he observed that the Claimant was looking away from the mainline tracks while talking to another employee and because of that he pulled the entire gang off the track to ensure their safety and proceeded to discuss the matter with the Claimant. After that discussion the Claimant submitted a written statement which reads as follows:

"While working on Seligman Sub MP 57.4 to 571.5 as a lookout I was talking to one of the gang while acting as lookout, which I know is against the rules and I am openly and willing and accepting of repercussions that follow."

At the Investigation the Claimant testified that there is nothing in the Rules which prohibits a Lookout from talking to another employee, but on page 34 of the transcript he stated that he had been taught by various instructors that casual non-work related conversation while fulfilling the duties of Lookout was generally not a safe practice.

Review of Rule 6.6.3B reveals that the Claimant was correct when he testified that it does not state that a Lookout cannot communicate with a co-worker, but it does state in pertinent part the following:

"Lookout must adhere to the following:

*** * ***

*** Devote their full attention to detecting the approach of trains and warning employees."** *(Underlining Board's emphasis)*

On page 24 of the transcript the Roadmaster T. Delk was questioned and testified as did the Claimant that Rule 6.6.3B does not prohibit communication between a Lookout and another employee, however, in this instance he thought the Claimant violated the Rule. The Claimant testified to the contrary that his conversation took a moment to tell an employee where a tool was on his truck while he still kept an eye on the mainline looking both east and west. The Claimant also explained that when he wrote his statement he thought it was against the Rules to talk to anyone while being a Lookout, but later discovered after examination of Rule 6.6.3B that it was still possible to be attentive to your duties while holding a brief work related conversation.

The resolution of this dispute is not whether the Claimant conversed with another employee, but whether he remained attentive to his duties on July 2, 2010. The Carrier is correct that safety is always of paramount importance and that all employees must be attentive to their duties so as to avoid a potential catastrophe. In his defense on page 30 of the transcript the Claimant offered a comparison and/or analogy to the July 2nd incident when he was questioned as follows:

"Justine Devine: The exception that Mr. Delk took while you were performing duties as a lookout he states that you were, you were talking while you were lookout, and looking at the employee, again can you reiterate the, the discussion that you had between yourself and the other employee?"

Steve E. Dulmage: Sure, okay but I was, well just like I'm tying my shoe now, and still being able to talk to you, it was the same, you know while I'm looking out, he asked where the punch was, it's up on top where the spike mauls are, and that was the extent of our conversation." (Underlining Board's emphasis)

The Board recognizes that the duty of being a Lookout is extremely important and carries with it a great deal of responsibility. A Lookout is entrusted with protecting people and valuable equipment and must be attentive at all times. Failure to meet those responsibilities can put fellow employees and the public in "harm's way" and the Board emphasizes that when an employee is working in the capacity of a Lookout they need to keep their primary focus and full attention on "safety". In this instance the record substantiates that the Claimant had a momentary work related conversation with a co-worker. There was no showing that he was distracted or not attentive to his primary duty as a Lookout, therefore, it is determined that the Carrier did not meet its burden of proof. The Board finds and holds that the discipline is set aside and the claim is sustained in accordance with part 2 of the claim 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).

The Board also exercises the option to advise the Claimant he should continue to be careful 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: 9/24/2012