

**P.L.B. No. 7585
Case No. 29
Award No. 29**

PUBLIC LAW BOARD NO. 7585

CARRIER FILE NO. 11-11-0246

ORGANIZATION FILE NO. T-D-3911-W

CLAIMANT: Dale E. Elhard

Parties To Dispute:

**Brotherhood of Maintenance of Way Employees Division – IBT
& BNSF Railway Company**

Statement of Claim: *The Carrier violated the Agreement on April 25, 2011 when it assessed Claimant Dale E Elhard a Level S 30-day record suspension with a 1-year review period, for alleged violation of Maintenance of Way Operating Rule 2.14.2-Before Reporting Clear of Authority Limits, for alleged failure to inform Train Dispatches that all employees and multiple work groups using this authority were clear of the track before reporting clear of the authority limits, while working on the Jamestown Subdivision on March 2, 2011.*

Background Facts:

On March 2, 2011, Claimant Dale Elhard cleared a track warrant, then "immediately remembered that I forgot the switches and the multiple work groups." According to Claimant, when he hit the radio button to transmit, the Dispatcher was already talking. [TR 28]

The Carrier issued a Level S 30-day record suspension with a one-year review period for violation of MOWOR 2.24.2-Before Reporting Clear of Authority Limits. This rule establishes the following requirement:

Before a field employee reports clear or releases a portion of authority limits, and the Train Dispatcher accepts the information, the following must occur: ... The employee will inform the Train Dispatcher/Control Operator that all employees and multiple work groups using the authority are clear of track(s).

Claimant stated "I didn't have the opportunity to complete the whole rule," explaining that "I cleared the track warrant, I immediately remembered that I forgot the switches and the multiple work groups, I hit the button to say it, and the Dispatcher was already talking." [TR 28]

The Notices of Investigation described the conduct in question but did not identify any particular rule as having been violated. On this basis the Organization asserts violation of Rule 40 and advocates dismissal. Otherwise, it argues the audio tape was not audible and there is nothing to substantiate the allegations since Claimant was cut off. In its assessment, the Dispatcher is at least equally at fault.

Opinion of the Board:

The Board is not persuaded that a Rule 40 violation exists on the grounds that the Notices of Investigation failed to identify a particular rule. The alleged violation is very specific, and only one rule governs what must be said to the dispatcher when clearing track. Hence, there was no discernible risk that the Organization or employee would become confused or misled about which rule applied. Further, had there been confusion from this lapse, it could have been cured by a postponement upon request of the Organization. No such postponement request was denied.

The evidence is clear that Claimant forgot to mention switches and multiple work groups when he cleared the track warrant. MOWOR 2.24.2 gives the field employee responsibility for conveying this information before releasing authority. It follows that Claimant technically violated the rule in question.

There are, however, mitigating circumstances in this case which warrant serious consideration. Claimant knew there was no issue regarding switches or multiple work groups, distinguishing the case from one involving potential risk to employees. He immediately sought to rectify his lapse but was precluded. Had the dispatcher filled out the standardized computer form, he or she would likely have inquired before accepting the clearance and there would be no discipline. Most importantly, this employee has worked for 34 years without prior discipline on his record.

Given this lineup of mitigating circumstances, it was not reasonable to treat the incident as a serious offense. The Board is conscious of and in general agreement with the consistency achieved by having rule violations categorized with specified discipline. However, there are times when this approach defeats the reasonableness of the Policy for Employee Performance Accountability by failing to take into consideration the particular facts involved. In such cases, the identified discipline can fail in its proportionality to the offense, and just cause is lost.

Claimant's lapse simply is not comparable to, for example, releasing track authority without verifying that multiple work groups were actually off the tracks, or releasing track authority without knowing the status of switches – circumstances which could create potential danger and are properly considered serious. The mitigating circumstances operative in the instant matter are cumulative and include fully 34 years of discipline free service to the Carrier. Clearly, heavy discipline is not needed to make this employee aware of his performance obligations. It follows that imposition of a Level S 30-day Record Suspension is excessively harsh and falls outside the parameters of just cause.

AWARD:

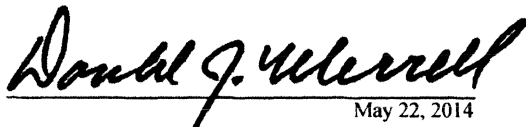
The claim is granted in part. The Carrier shall immediately remove the Level S Record Suspension from Claimant's record with seniority, vacation and all other rights unimpaired, and make him whole for all time lost as a result of this incident. The discipline shall be replaced by a Standard Formal Reprimand with a 12-month review period.

Order:

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.



Patricia Thomas Bittel
Chair and Neutral Member

A handwritten signature in black ink, reading "Donald J. Merrell". The signature is written in a cursive style with a horizontal line underneath it.

May 22, 2014

Donald Merrell,

For the Carrier

A handwritten signature in black ink, reading "Gary Hart". The signature is written in a cursive style with a horizontal line underneath it.

Gary Hart,

For the Organization

Dated: April 23, 2014