

**PUBLIC LAW BOARD NO. 6394**

**AWARD NO. 53**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal, albeit subsequent reinstatement without prejudice to loss of foreman and assistant foreman seniority) imposed upon Mr. A. Livingston by letter dated June 20, 2008 in connection with charges of alleged improper performance of duty on May 15, 2008 while performing Roadway Worker in Charge duties to protect a Pennsylvania Department of Transportation crew inspecting the highway bridge above the tracks at Mile Post HP 108.86, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's file MW-HARR-08-14-BB-292 NWR).
2. As a consequence of the violations referred to in Part (1) above, the aforesaid discipline shall now be removed from Mr. A. Livingston's record and his foreman and assistant foreman seniority shall be restored and he shall be paid for any wage loss related to the loss of his foreman and assistant foreman seniority subsequent to January 5, 2009."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant began service with the Carrier in 1972 as a Trackman. The facts of this case are not in dispute. The incident that led to his discipline and forfeiture of seniority occurred on May 15, 2008, while he was acting as the Roadway Worker in Charge (hereafter, RWIC). The Claimant's job that day was to protect a crew from the

Pennsylvania Department of Transportation that was inspecting a highway bridge above the Carrier's tracks. During the inspection process, the Department of Transportation workers had to lower themselves in a bucket in order to inspect the underside of the bridge. Given the circumstances, for obvious safety reasons the RWIC had to ensure that no train traffic entered the area. The procedure for handling this is the RWIC obtains authority from the Dispatcher for exclusive track occupancy for the area in which work is occurring.

The bridge being inspected by the government crew is located within the limits of the Ruth Interlocking, which also contains the switch to move from the mainline into Rutherford Yard. Mistakenly, the Claimant obtained permission to foul the number one track from Control Point Ruth, which is at the east end of the Ruth Interlocking, but is eastward to Control Point Beaver. Additionally, the Claimant only obtained clearance on the number two track from Control Point Ruth to Control Point Terra, which is also east of the relevant area. Thus, the clearance area did not cover the area westward into the limits of the Ruth Interlocking itself. As a result there was no protection obtained for the state government employees from oncoming trains. As RWIC, the Claimant is the sole person responsible for acquiring permission from the Dispatcher before the state workers can be allowed to enter the track area. The Claimant failed to do this and a train entered the area where the government crew was working.

As a result of this conduct, the Claimant was removed from service for improper performance and there was a formal investigation on May 19, 2008. The Claimant later filed a grievance and the hearing was held on June 4, 2008. Given the Claimant's prior service record, the Hearing Officer originally advised the Claimant by letter dated June 20, 2008, that he was dismissed from service. The parties later revised his dismissal to a suspension, notifying the Claimant on December 10, 2008 and the Claimant was reinstated without foreman and assistant foreman seniority effective December 29, 2008. He returned to service on January 5, 2009. The Claimant retained his right to appeal the forfeiture of his foreman and assistant foreman seniority and properly began the appeals process on June 16, 2009 through the Organization for his restoration of foreman and assistant foreman seniority. That is the case that is before the Board.

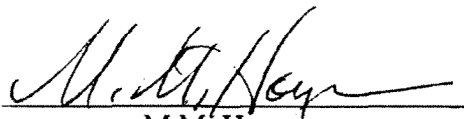
The Carrier maintains that the forfeiture of seniority in this circumstance is well founded, in fact lenient given the seriousness of the Claimant's offense. The Carrier cites PLB 1838 Award 66, BMW v. N & W (Van Wart) and 3 NRAB Award 24971, BMW v. AMTRAK (Suntrup), in which the Board did not find cause to set aside the discipline. The Carrier also cites PLB 3446, Award 70 BMW v. SOU (Zumas); 3 NRAB Award 19411, BRAC v. N & W. (Blackwell); PLB 1760 Award 120, BMW vs. N & W (Van Wart); and PLB 3530 Award 15, BMW vs. N&W (Zumas). The reasoning for this position is that the fact that the Claimant should have known better and therefore the forfeiture of seniority was warranted.

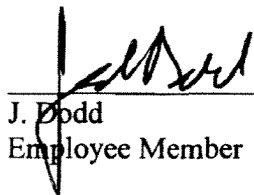
The Organization maintains that the Claimant's seniority should be reinstated. It notes that the tapes are quite clear in showing that the Claimant gave different limits and therefore the Dispatcher should have questioned the new limits. The Organization asserts

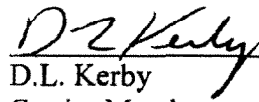
that the dispatcher bears equal responsibility and yet is being treated differently. The union argues that it was a miscommunication between the Dispatcher and the Claimant for which the Claimant was not totally responsible. The Organization also argues that the Carrier did not actually prove the charges against the claimant due to the fact that the record reveals there was a fair amount of confusion between the dispatcher and the Claimant. Contrary to the Carrier's assertion, the Claimant clearly gave his location unequivocally and clearly as HP Mile Post 108.86. This, the union contends means that the Dispatcher should have known that the requested area included the entire CP Ruth Interlocking.

Given the totality of the circumstances, the Board finds it is too severe a penalty to make the Claimant forfeit his seniority. As such, the Claimant's seniority is reinstated as Foreman back to November 28, 2005 and his seniority as Assistant Foreman is reinstated back to December 31, 2006. However, the request for pay for wage loss related to the loss of his foreman and assistant foreman seniority subsequent to January 65, 2009, is denied.

The claim is sustained in part.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
J. Dodd  
Employee Member

  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on January 31, 2012.