

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 39, (Case No. 39)

**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 October 1, 2009, when Claimant, E. Rodriguez (6514129), was issued a Level S 30-day record suspension for failure to provide proper protection for men and equipment on August 26, 2009. The Carrier alleged violation of Maintenance of Way Operating Rule 6.3.1; and**
- 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 October 1, 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.

On August 28, 2009, notified Claimant to appear for a formal Investigation on September 17, 2009, which was mutually postponed until October 1, 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 provide proper protection for men and equipment, at MP 64.4, near Pomona, KS, Emporia Subdivision at

approximately 0747 hours, August 26, 2009

The investigation will determine possible violation of MOWOR 6.3.1 Main Track Authorization."

On October 26, 2009, Claimant was notified that he had been found guilty as charged and assessed a Level S 30 day record suspension and a one year probation period.

There is no dispute between the parties that on August 26, 2009, the Claimant a qualified Trackman/Truck Driver was working with a gang of two men under the direct supervision of Track Supervisor, B. A. Platt, who was the Employee In Charge (EIC). Claimant and the other two employees were working on a road crossing with their truck fouling the track when Platt called the Claimant via radio and discussed the movement of a train through the Claimant's work area and the fact that he needed to have the crew and equipment clear of the track.

It is the Organization's position that when Platt the EIC called the Claimant about the approaching train the Claimant told him that they would be clear in a minute. It argued that instead of waiting and calling back for confirmation that Claimant and the crew were in the clear Platt went ahead and released the train through the limits. It further argued that Platt accepted full responsibility for the error and the events that occurred as a result. Additionally, it pointed out that no equipment was damaged, no one was injured and the track was not damaged and the only thing that happened was a minor train delay. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the transcription of the radio conversation between Supervisor Platt and the Claimant verifies that when Platt told the Claimant he was going to release the train Claimant did not tell him NO even though his truck was not in the clear which placed the crew and equipment in potential danger. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11.

The facts are clear that on the date of the incident Supervisor Platt called the Claimant and told him he was going to release a train for movement and Claimant responded by stating that he would be in the clear in one minute. Unfortunately, Claimant was unable to get his truck in the clear as quickly as anticipated as he experienced trouble moving the boom and because of that he radioed Platt to stop the train's movement. The Organization does an excellent job in behalf of the Claimant arguing that the blame totally belonged to Platt because he was the EIC.

It points out that Platt testified that he should of called the Claimant back to make sure he was in the clear before he released the train to move. Despite that argument, it is equally clear that the Claimant understood the train was moving before he was in the clear which is evident by the fact that he knew he needed to call Platt to stop the train. The Carrier proved that the Claimant had a shared fault in the incident of August 26, 2009, thus 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 was appropriate. Review of the record reveals that the discipline was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds that the discipline will not be disturbed because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 12/6/10