

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 49 (Case No. 49)

**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 24, 2009, when Claimant, R. A. Lopez (6514160), was dismissed for releasing of track authority while men and equipment were still foul of the track on August 24, 2009 causing damage to vehicle and equipment. The Carrier alleged violation of MOWOR Rule 1.1.2 Alert and Attentive and Rule 6.3.1 Main Track Authorization.**
- 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 24, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-09-0211) (Organization File No. 50-13C2-0935.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 August 27, 2009, Claimant was directed to attend a formal Investigation on September 15, 2009, which was mutually postponed until September 30, 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 releasing of track authority while men and equipment were still foul of track, at MP 6.4 on KCT Railway, at approximately 1430 hours, August 24, 2009, causing damage to vehicle and equipment on the track."

On October 25, 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 erred in its dismissal of the Claimant. It argued that the Claimant should have been working under the direct supervision of a Foreman or an Employee In Charge (EIC) as it is the Foreman's duties to see that each Flagman is instructed in the proper procedures and duties that he is assigned to perform. It further argued there was a miscommunication between the Claimant and the Train Dispatcher wherein he gave up the wrong piece of track that his equipment was occupying. It asserted that the error was out of the norm as the Claimant had always been a safe employee who performed his duties to the best of his ability. Lastly, it argued that the discipline issued was excessive in proportion to the allegations, even if the Carrier had proven their charges (which they did not). It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant was dismissed due to violation of Maintenance of Way Operating Rules 1.1.2 - Alert and Attentive and 6.3.1 - Main Track Authorization for an incident of August 24, 2009, while flagging, causing major damage to vehicle and equipment on the track and injury requiring an individual being carried to the hospital for treatment. It argued that on the date of the incident Claimant was working as a Rules Qualified Flagger who was the cause of the accident that was a significant safety violation. Furthermore, it argued that the Claimant admitted his guilt and the discipline was appropriate based upon the seriousness of the charges. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

The facts indicate that the Claimant obtained two track authorities, Track and Time #622 and #626. Authority #622 allowed the Claimant and four contractors to work between Signal 82L and the 683 Switch. Authority #626 overlapped and authorized work between the 687 Switch and Signal 62RA.

On August 24th, around 2:00 p.m., the Claimant and the contractors were working a little west of the 687 Switch. The Dispatcher called the Claimant and requested him to give up the authority granted by Track and Time #622. The record reveals that the Claimant told the

Dispatcher he needed ten minutes to load up and get west of the 683 Switch. At that time Dispatcher advised the Claimant that he still had Authority #626 which authorized him up to clearance point of the 687 Switch. Shortly, thereafter, Claimant advised the Dispatcher the crew was in the clear and he released Authority #622, unfortunately, men and equipment were sitting on the track on the east side of the 687 Switch.

Subsequently, an eastbound train traveling along the Main 3 track crossed over from Main 3 to Main 4 using the 687 Switch. Claimant saw the approaching train and warned the work crew to get out of the vehicles after which there was a collision resulting in substantial damage to the MOW equipment and injury to one of the contractors who jumped from the high rail dump truck that was on the rail prior to actual impact. On page 76 of the Transcript the Claimant was questioned as follows:

"Q ...Whose responsibility is it to make sure that they're giving up the proper track and time limits so that men and equipment are not afoul of the track of the live track?

A It, it's the Flagman's job.

Q And the Flagman that was yourself, correct, sir?

A That's correct."

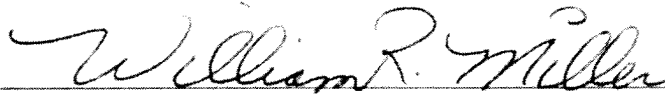
In the aforementioned testimony Claimant agreed that it was his responsibility to make sure that the crew was not afoul of a live track and he further testified and admitted to his guilt on page 83 of the Transcript. It is clear that substantial evidence was adduced at the Investigation that the Carrier 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 instant dispute the Claimant had 30 years of service with a disciplinary record that included a prior dismissal for an altercation on company property and a suspension account of a positive random drug screening test. The Board is always reluctant to dismiss a long term employee, however, the Carrier's Policy for Employee Performance Accountability (PEPA), Appendix C states that a single aggravated offense is grounds for dismissal when there is a **"rule violation that results in serious collision and/or derailment, serious injury, fatality or extensive damage to company or public property."** (*Underlining Board's emphasis*) and to do otherwise in this instance would be an exercise in leniency which is not within our discretion. The Board finds and holds that the dismissal for this very serious offense was consistent and

appropriate with PEPA, therefore, it will not be rescinded 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: 3/18/11