

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 56, (Case No. 56)**

**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, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing October 9, 2009, when Claimant Martin Redenbaugh (1774132), was issued a Level S 30-day Record Suspension with 3 years probation concerning his failure to comply with instructions from Foreman by not being at the designated location to flag for RP15 machines on October 9, 2009. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying with Instructions.**
- 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 9, 2009, continuing forward and/or otherwise made whole.
(Carrier File No. 14-10-0001) (Organization File No. 50-13N1-09100.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 October 12, 2009, Claimant was directed to attend a formal Investigation on October 19, 2009, which was mutually postponed until November 4, 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 comply with instructions from

Foreman Audrey Garcia by not being at the designated location MP 972.09 Fresno Street Crossing to flag for RP15 machines at approximately 1530 hours on Friday, October 9, 2009 while working on the Hi Line Subdivision."

On November 4, 2009, Claimant was notified that he had been found guilty as charged and was issued a Level S 30-Day Record Suspension and assigned a probation period of three years.

It is the Organization's position that the Carrier erred in disciplining the Claimant. It argued that the facts indicate that Foreman Garcia did not instruct the Claimant to protect the Fresno Street Crossing and she failed to provide a proper Job Briefing and she instructed the Claimant to leave that crossing and take crew members to restroom facilities. It further stated that the Gang used the Leap Frogging Method so that there would not be any crossings unprotected. It further argued that if Garcia wanted someone from the bus to stay and protect the crossing while the bus was gone then she should have instructed someone to stay. Lastly it argued that Claimant's decision to take employees on the bus to Havre instead of Gilford was based on the fact it was in closer proximity and one of the crew members was in dire need. It closed by stating that after using restroom facilities at Havre the Claimant and crew members were instructed by Division Roadmaster Nielson to protect the crossings in Havre thus the discipline issued by the Carrier was inappropriate as the Claimant did not violate any instructions and it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant failed to follow instructions from his Gang Foreman on October 9th because he did not take the employees where instructed, nor did he leave the crossing protected with any employee and return to the crossing. It argued that when the Claimant left the crossing there was no protection for movement of the machines and men across Fresno Crossing and he did not return to check on the machines and men at other crossings. It concluded the Claimant's poor decision could have caused a serious accident and the discipline was appropriate and it asked that it 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 Organization is to be complimented for its skillful colorization of the incident of October 9, 2009, which shifts any potential blame for error from the Claimant too others. However, a careful reading of the transcript does not paint the same picture. On page 6 of the Transcript, Assistant Roadmaster, T. Gilson, was asked how he became aware of the incident and he stated that he was monitoring the radio on the date in question and he heard Assistant Foreman S. Carbrin instruct the Claimant to take the crew on his bus to Fresno Street Crossing and flag that crossing which Carbrin confirmed in his testimony on page 17 of the Transcript.

On page 10 of the Transcript Foreman Garcia was questioned about the incident and testified as follows:

"Dale Demaree: And just give us a brief, brief synopsis, synopsis of what you remember about the incident"

Audrey Garcia: We were traveling machines. I was giving authorities like I said. The bus was sent forward to flag crossings a crossing. I asked them to pick out one, and at one point I do not know who called on the radio and said that they needed to use the facilities. And they wanted to go to Havre and I said absolute not to go to Havre. I said there was a bar across the road. At that time I knew where they were, at the Fresno Street Crossing. I said go back to Gilford and use the facilities there. And they replied that they would just hold it in and I said absolutely not. Go use the facilities if you need to go. Again, go to the bar or go to Gilford...." (Underlining Board's emphasis)

On page 16, the questioning of Ms. Garcia continued as follows:

"Randy Lunow: And again you did release him to take some gentlemen to the restroom, is that correct?"

Audrey Garcia: I released him with the provision that he come back to flag the crossing.

Randy Lunow: You specifically stated for him to come back?

Audrey Garcia: Yes, I did specifically ask them to come back." (Underling Board's emphasis)

The testimony of Foreman Garcia was never challenged or rebutted and in fact on page 34 of the Transcript the Claimant was questioned as to whether or not Ms. Garcia released him and the crew from protecting the Fresno Crossing as follows:

"Dale Demaree: And at that time she released you to take somebody to the restroom, is that correct?"

Martin Redenbaugh: Yes.

Dale Demaree: Did she actually say you were relieved of protecting this crossing or that you were just relieved to take someone to the restroom?

Martin Redenbaugh: She said that to take him. I had permission to leave to take him to the bathroom. I mean, yeah." (Underlining Board's emphasis)

Claimant's testimony confirmed Foreman Garcia's testimony that she released the Claimant from the Fresno Crossing to take a co-worker to a restroom facility, however, Claimant did not deny that his Foreman instructed him to return to the same crossing. On page 35 of the Transcript the questioning of the Claimant continued as follows:

"Dale Demaree: So would you say this Fresno Street Crossing was never flagged or protected by your bus or people from the bus physically?"

Martin Redenbaugh: Yes, yes." (Underlining Board's emphasis)

Additionally, on page 30 of the Transcript, the Claimant admitted that Foreman Garcia told him take the employees to bathroom facilities in Gilford and he instead decided that going to Havre was a better choice.

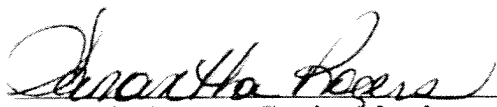
The record substantiates that Claimant did not follow his immediate Supervisor's directives to take his co-workers to Gilford and he never protected the Fresno Crossing nor did he return to that site in violation of direct instructions. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little over one year of service when he committed a serious breach of MOWOR 1.13. The discipline did not result in any actual time off and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds 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: 6/13/11