

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 71, (Case No. 71)**

**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 August 16, 2010, when Claimant David J. Devitt (1343383), was Dismissed for failure to inform the train dispatcher that all multiple work groups were in the clear prior to releasing his track authority on August 16, 2010. The Carrier alleged violation of MOWOR 2.14.2.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing when Claimant withheld from service and continuing forward and/or otherwise made whole.
(Carrier File No. 14-10-0190) (Organization File No. 120-13N1-1082.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 24, 2010, Claimant was directed to attend a formal Investigation on August 31, 2010, 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 report to the dispatcher that all multiple work groups under your authority 801-3 were in the clear, when you

released your authority, on August 16, 2010 at approximately 1629 on the Venus Subdivision."

On September 24, 2010, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Carrier did not meet its burden of proof. It further asserted that the Claimant and the Organization were not furnished a copy of the transcript and because of that it was not allowed to make a thorough review of the transcript before it filed its appeal wherein it could have pointed out and we quote from its appeal letter of November 2, 2010, **"...review of the relevant facts and regulations involved in this case would have exonerated Mr. Devitt of any wrong doing."**, therefore, according to the Organization that was a violation of Rule 13. Based upon that procedural error alone it argued that the discipline should be set aside without even reviewing the merits. Additionally, it argued the Claimant is a 12 year employee with a good work record and even if the Carrier could produce evidence to support their charges, which it did not, the discipline was excessive in proportion to the allegations. 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 Investigation was fair and impartial. In its December 21, 2010, letter of denial it addressed the Organization's allegation that it failed to provide a copy of the transcript to the Claimant and Organization as follows:

"First, I will address the Organization's allegation that no transcript copies were received. I have been informed by the field that copies of the transcript were mailed to the Claimant and Organization on December 6, 2010. If the Organization desires to present any new argument or offer any new evidence derived from its reading of the transcript, Carrier will not object so long as it is submitted to Carrier within sixty days from the date of this letter, thereby curing the Organization's sole objection in this case."

Turning to the merits the Carrier asserted that there is a Remote Audit Team in Fort Worth, Texas, that listens and reviews radio transmissions from the field to the Dispatch Center to ensure that all Rules and proper procedures are followed, and on August 16, 2010, the Team notified Roadmaster, Mark Degano that Claimant was not in compliance with the Rules, required for all employees to remain safe while working on the tracks, when he failed to inform the Train Dispatcher that all multiple work groups under his supervision were in the clear prior to releasing authority. It closed by stating that Claimant was guilty as charged and it asked that the discipline not be disturbed.

On January 19, 2011, the Organization responded to the Carrier's offer to provide additional argument and/or evidence. It reiterated that the transcript was not provided in a timely manner and the Carrier disciplined the Claimant without first reviewing the transcript. It again asked that the discipline be set aside and the claim sustained.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization procedural arguments. This case arose during the same time period as Awards 66 and 68 of this Board wherein the identical argument was addressed and it was determined that based upon unique circumstances and on a non-precedential basis the Carrier's offer to allow the Organization an additional opportunity to add new evidence and/or argument remedied the Carrier's un-timeliness in providing a transcript. Additionally, there was no evidence produced that the disciplinary officer did not have access to the transcripts as he stated in his letter of September 24, 2010, the following: **"Enclosed are copies of the investigation transcript and exhibits entered during the investigation."** The record reveals that the Claimant and Organization were not surprised by anything that arose during the Hearing and the Claimant was well represented and both were given the opportunity to provide additional argument and/or evidence. The Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

Turning to the facts the Carrier alleged that the Claimant violated Rule 2.14.2 Before Reporting Clear of Authority Limits which states in pertinent part:

"Before a field employee reports clear or releases a portion of authority limits, and the Train Dispatcher/Control Operator 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)."**

On pages 27 and 28 of the transcript, the Claimant was questioned as to whether or not on August 16, 2010, he advised the Train Dispatcher that all work groups under his authority were clear of the track. Claimant was questioned as follows:

"Michael Watkins: Mr. Devitt, what, what can you tell us about the incident under investigation?"

David J. Devitt: I had a track warrant that day, uh, is the um, specific thing.

Michael Watkins: This track warrant 901-3?

David J. Devitt: Yeah, 80-, I had track warrant 801-3, and I had a __ (43:09 inaudible) misalignment in the track, repa-repaired it. All men and equipment were clear of my track, so I, at that time and uh, I'd go to release it. I was just __ (43:22 inaudible), I was also making sure she had uh, proper, put the track back into service, the proper slow order in place to protect the track, and all men and equipment were clear of the track and I released the track, or track authority.

Michael Watkins: Mr. Devitt, do you, do you agree that that was, that tape was, that was you on the tape releasing the track warrant?

David J. Devitt: I don't believe I sound like that, but yeah.

Michael Watkins: Do, Mr. Devitt, uh, it's been read several times, but Rule 2.14.2, the third bullet states the employee will inform the Train Dispatcher or Control Operator, that all employees and multiple work groups using the authority are clear of the tracks. Did you do that?

David J. Devitt: I reported limits were clear, yes.

Michael Watkins: You reported your limits of your authority clear, but did you specifically say, all multiple work groups are in the clear?

David J. Devitt: Specifically say, all multiple work groups, no.

Michael Watkins: Can you speak up a little bit?

David J. Devitt: Oh, all multiple work groups clear, I did not specifically say that, according to. (*Underlining Board's emphasis*)

The record is clear that the Claimant admitted he did not follow the specific procedures required when there are more than one work group on the track and working under the same track and time authority. The Carrier Rules were established to protect employees and the employees are obligated follow them to protect themselves and co-workers because failure to do so can result in catastrophic situations. Fortunately, no one was injured in this instance, but it does not lessen the Claimant's responsibility. 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. At the time of the incident Claimant had approximately 12 years of service with a less than stellar work record. Since 2000 Claimant has been disciplined six times before the instant dispute with two Level S Record Suspensions within the prior nine months. The Carrier's Policy for Employee Performance Accountability (PEPA) states that two Level S incidents within a 36 month period can subject an employee to dismissal, therefore, the Board finds and holds the discipline will not be set aside because it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


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

Award Date: 1-10-12