

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY**

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Case No. 419 – Award No. 419 – Claimant: Brown  
Carrier File No. 14-11-0170  
Organization File No. 10-13N1-1144.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 28, 2011, when Claimant, Shannon C. Brown (1108042), was issued a Standard 30-day Record Suspension, concerning his failure to comply with instructions with regards to overstaying main track authority when he released the main track authority late, delaying five premium trains on May 27, 2011. The Carrier alleged violation of MOWOR 1.13 Reporting & Complying With Instructions.
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 compensated for his lost time and expense, and otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Shannon C. Brown, has been employed by the Carrier since 1996. On May 31, 2011, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to comply with instructions with regards to overstaying main track authority, when he released the main track authority late, delaying five premium trains on the Chillicothe Subdivision, MP 173.7, near Yost, on May 27, 2011, while assigned as Foreman. Following the investigation, the Carrier determined that Claimant had committed the

misconduct alleged, in violation of MOWOR 1.13 Reporting & Complying With Instructions, and assessed him a Standard 30 Day Record Suspension.

The applicable Maintenance of Way Rules provides, in relevant part:

**1.13 Reporting and Complying with Instructions.**

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

Roadmaster Daniel Parish testified at the investigation that on the day of the incident Claimant was working for him as Foreman on the Division Surfacing Gang, working with Gang Teague/Gale-7. He explained that the Surfacing Gang was surfacing track behind the Tie Gang after tie replacement was performed. Claimant was the employee in charge of the project.

Mr. Parish explained that they needed Track and Time authority in the Yost plant that day to finish surfacing the crossover on main track #1 and main track #2. He stated that he was granted 30 minutes within the plant and the gang overstayed by 17 minutes; five trains were delayed as a result.

Mr. Parish testified that the Chief Dispatcher made it clear to him that the gang would be granted only 30 minutes and there could be no overstay, and he made that clear to Claimant. Mr. Parish explained that the location of this incident was "double main," an area with two main tracks. Claimant had requested authority on both main tracks, so no trains could pass. Mr. Parish added that this particular line segment was a high volume area, with many of the trains time-sensitive.

Mr. Parish stated that after the incident Claimant informed him there had been numerous issues that led to the delay. First, Claimant told him he attempted to obtain the authority on the Smart Mobile Client, but had difficulties that delayed him about seven minutes, as he had to get the Dispatcher to give him a paper copy of the authority. However, Mr. Parish explained, when Claimant received his authority he was still granted a full 30 minutes inside the plant. Mr. Parish stated that Claimant also informed that him there were some problems with the Chase Tamper Operator, as he was double tamping ties. He stated that Claimant also maintained that it took 10 minutes before he was able to release his authority.

Mr. Parish acknowledged that he did not believe that Claimant deliberately overstayed his authority. Mr. Parish also acknowledged that it was possible that from time to time unexpected issues could delay the employees working on the track. He also acknowledged that he would expect an employee to correct any unsafe condition on the track, rather than just leaving it because his time had expired.

Mr. Parish testified that he had worked for the railroad for approximately three years, and had been a Foreman on a Surfacing Gang, a Track Inspector, and a Machine Operator. He stated that in those capacities he had never been personally involved in an overstay situation, but in the time he had been Assistant Roadmaster he had been involved in a couple of incidents besides this one.

Claimant testified at the investigation that he did not recall receiving the instruction from Mr. Parish that he had to clear the track after 30 minutes, but he acknowledged that he cleared his authority 17 minutes late. He maintained that the delay was caused by several factors beyond his control. First, he stated, he had difficulty using the Smart Mobile Client to obtain his authority, and was delayed for seven or eight minutes as a result. However, he acknowledged that his authority began when the dispatcher granted it, so he did receive a full 30 minutes.

In addition, Claimant explained, he had instructed his lead tamper operator to tamp every other tie, but he was tamping every one and squeezing five or six times on each tie, rather than twice as Claimant had instructed him. He stated that the individual did not follow his instructions, and at some point he contacted the dispatcher and told him he would probably need another five minutes. Claimant acknowledged that he was responsible for that employee's work. He also acknowledged that the dispatcher replied that he needed to be clear, but because of the problems with the tamper operator ties had been left untamped between the lead and second machines and he needed to continue to make the track safe. Claimant also maintained that he was delayed approximately 10 minutes in releasing his authority on the Smart Mobile Client. He had no explanation for attempting to use the same device he had difficulty with earlier, knowing he did not have the PDA file.

Claimant's personal record shows a 20-day Record Suspension issued on June 8, 2011, for failure to report for duty at designated time and place; a 10-day Record Suspension issued on December 2, 2010, for failure to comply with instructions and report for duty at the proper time and place; a Level S 30-day Record Suspension issued on April 30, 2010, for getting outside working limits; a 10-day Record Suspension issued on May 28, 2009, for failure to complete a project in the time limits of track and time authority; a Level S Actual Suspension issued on July 1, 2005, for a workplace violence altercation; and numerous other incidents, including two dismissals.

The Carrier points out the Claimant's Assistant Roadmaster was adamant that he instructed Claimant, as the Foreman in charge, that he would be given only 30 minutes, yet Claimant failed to comply with these instructions. The Carrier states that notwithstanding Claimant's multiple excuses for not clearing the track on time, he was the Foreman, and it was his responsibility to finish the job in the allotted time.

Claimant admitted that he cleared his authority late. The Carrier states that it is well-established that such an admission is sufficient to satisfy the Carrier's burden of proof. The Carrier concludes that Claimant violated Carrier Rules as alleged, and the discipline was appropriate in consideration of Claimant's personal record.

The Organization states that this investigation should never have taken place, as overstay while employees are performing maintenance activities on railroad tracks are a common occurrence. The Carrier, the Organization maintains, appears to be attempting to make an example of Claimant. Further, the Organization states, in his initial testimony Assistant Roadmaster Parish claimed responsibility for this incident. The Hearing Officer, the Organization asserts, questioned Mr. Parish so as to get him to push the blame onto Claimant. Further, the Organization contends, the Carrier ignored the unforeseen problems that Claimant described, problems of which Mr. Parish was well aware.

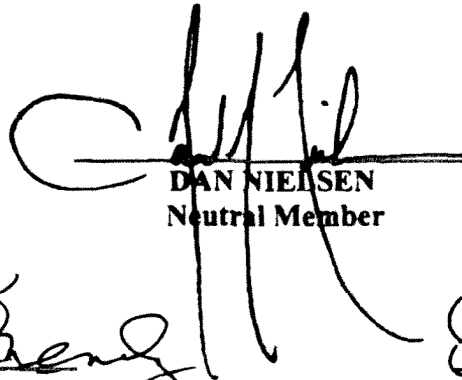
The Organization asserts that the 17 minute overstay in this case was a very minor issue. The Organization also notes Mr. Parish's testimony that in his 2½ years' experience as a track employee he had been involved in overstay situations multiple times. Claimant, the Organization concludes, was simply attempting to finish his tasks and leave the track in a safe condition. The Organization urges that the Carrier has failed to prove, by substantial evidence, that Claimant committed any Rules violations. Even if it had, the Organization states, the discipline is extreme, unwarranted, unjustified and disproportionate to the purported offense. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety, and find that the Carrier has met its burden of proving the charges against Claimant by substantial evidence. The record clearly supports the Carrier's conclusion that Claimant's supervisor instructed him that he would have only 30 minutes to complete his work and there could be no overstay. There is no dispute as the fact that Claimant overstayed by 17 minutes. While Claimant had numerous excuses for his action, he was the employee in charge and all of the supposedly unforeseen and irremediable events were under his control. He may have had difficulty getting his track and time authority on the Smart Mobile Client, but once he had it, it was for the full 30 minutes. He blamed his lead tamper operator for taking too long, but the man was part of his crew, performing work under his supervision. He claimed he was delayed for ten minutes by problems releasing his authority with the Smart Mobile Client, but he also claimed to know that he was having trouble with the device and that he did not have the necessary PDA file.

Contrary to the Organization's argument, an overstay like this one was not a commonplace event that merited little attention from the Carrier. Claimant's guilt has been proven by substantial evidence. Given Claimant's disciplinary history, we cannot say that the penalty assessed represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN  
Neutral Member



JOY MENDEZ  
Carrier Member



DAVID TANNER  
Organization Member

Dated this 21<sup>st</sup> day of May, 2013.