

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 487 – Award No. 487 – Perot  
Carrier File No. 14-15-0308  
Organization File No. 70-SF13N1-1583

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 16, 2015 when Claimant, John M. Perot (1620384), was dismissed for occupying main track without proper authority at E. Noel, Milepost 325.7 on the Panhandle Subdivision on May 24, 2015 while working as a Track Supervisor. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 6.3 Track Occupancy.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, commencing June 16, 2015, continuing forward and/or 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, John M. Perot, had been employed by the Carrier since 2004. On May 27, 2015, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged occupancy of main track without proper authority, at East Noel, MP 325.7 on the Panhandle Subdivision, at approximately 1500 hours on May 24, 2015 while working as Track Supervisor.

Following the investigation, the Carrier found Claimant guilty of the misconduct alleged, in violation Maintenance of Way Operating Rule (MOWOR) 6.3 Track Occupancy, and dismissed him from service.

The facts of this case are not in dispute. Roadmaster John Thomas testified at the investigation that at the time of the incident Claimant called to tell him he had exceeded his limits. He stated that Claimant relayed that he was hy-railing to East Noel from Avarad and had the appropriate track authority, which he had obtained via the Smart Mobile Client. Claimant told Mr. Thomas he requested another authority, but his computer screen went blank, so, when it came back up, he assumed the authority was for that request. However, it was for the same territory he had already occupied, so when he went forward the exceeds alarm on his Hi-Rail Compliance System (HLCS) verified that he was out of his limits. Claimant, he stated, exceeded his limits by about 1500 feet, at East Noel, Milepost 325.7.

Mr. Thomas acknowledged that the area in which Claimant was working frequently experienced communication problems with the Smart Mobile Client. He added that an employee may receive authority by communicating directly with the dispatcher.

Claimant explained at the investigation that he received two authorities for the same limits, which he did not realize until the red "exceeds" light showed on his HLCS. Claimant also stated that it is common for employees who work in this area to lose the signal on the Smart Mobile client. He added that employees in other areas use a different wireless carrier and do not have problems, and this issue had been brought to management's attention but nothing had been done.

Claimant testified that he had to request authority from Alva to East Noel twice because the computer went "brown," but he did receive that authority. He then requested authority from East Noel to West Noel and an authority came back, with a different number than the one Claimant had previously received from Alva to East Noel. However, this was in fact a duplicate authority from Alva to East Noel; Claimant had received the same authority, although with different authority numbers, twice. Claimant acknowledged that he had requested that authority twice, because of the computer brownout. He testified that he had never before received two authorities, with different numbers, for the same track.

Claimant assumed the new authority was for East Noel to West Noel, so he proceeded into that area, triggering the out of limits alarm. He stated that he did not open the second PDF file.

Claimant's personal record shows a Level S record suspension, with a three-year review period, issued on May 6, 2015 for improper use of an electronic device, a formal reprimand issued on March 2, 2015 for failure to get permission from the control operator to operate a dual control switch by hand, a Level S record suspension, with a three-year

review period, issued on September 26, 2012 for failure to properly lock out equipment, and an earlier operating violation.

The Carrier notes that the applicable Rule provides that for a maintenance of way employee to occupy track, he must first receive proper authority from the dispatcher. The requirement, the Carrier stresses, is in place to ensure employees are protected while occupying track, that is, there is no danger of a train approaching. The Carrier explains that an employee can receive authority electronically, by using a Smart Mobile Client, or by radio. If an employee exceeds his limits the HLCS unit will record that information and issue an alarm to the employee.

The Carrier asserts that Claimant admitted that he occupied the main track without proper authority at East Noel, Milepost 325.7, and that the HLCS alerted him to that fact. His explanation, that he assumed he had authority between East Noel and West Noel because he received a PDF with a different number than was on his earlier authorities, does not excuse him, the Carrier states. Claimant did not verify that he had the proper authority before proceeding; he just assumed it. Indeed, the Carrier stresses, Claimant admitted that he did not even open the file. It is well established, the Carrier notes, that admissions such as these are sufficient to satisfy the Carrier's burden of proof.

As for the penalty, the Carrier notes that Claimant had a Level S violation, with a three-year review period, on September 26, 2012, and another Level S, with another three-year review period, on May 6, 2015. According to the Carrier's Policy for Performance Accountability (PEPA), the Carrier states, Claimant was subject to dismissal for the second Level S offense within three years, but the Carrier showed leniency. This is, the Carrier adds, Claimant's third Level S offense within three years, and all involved safety violations. The decision to dismiss Claimant was not arbitrary or capricious, the Carrier concludes.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. In particular, the Organization argues, this case is really about a breakdown in technology, not any misconduct by Claimant. As Claimant testified, the electronic system is subject to "brownouts" which cause an employee to lose contact with the Carrier's dispatch system. That happened here, the Organization explains when Claimant was attempting to obtain the authority at issue. When the system came back up, it sent him an authority with a number different than the one he had for his then-current location. However, it was in fact for that same location, and not the additional authority he requested. The Organization notes Claimant's testimony that this had never happened before, which it was unable to corroborate because the Carrier did not produce the additional witnesses it requested.


This incident, the Organization argues, was not Claimant's fault. Even if it were, the penalty of dismissal is arbitrary, excessive and unwarranted.

We have carefully reviewed the record in its entirety. First, we find no procedural error which deprived Claimant of his right to a fair and impartial investigation, especially

as the facts are not in dispute. The Carrier acknowledges that there are signal problems in the area where Claimant was operating, and it may well be that Claimant had never before received two authorities, with different numbers, for the same section of track. However, these factors cut both ways. They may explain some measure of confusion, but the fact that he knew his electronics might be unreliable, and the fact that he had made multiple requests for the same authority, would have suggested some additional prudence. Instead, in the face of an inherently dangerous situation, Claimant chose to proceed without even opening and reading his authority. His assumption that it was for East Noel to West Noel caused him to take a very large risk which could have had serious consequences. It is fair to characterize this as extremely negligent. Given the nature of the offense and Claimant's personal record, we cannot say that the Carrier's decision that dismissal was warranted represents an unfair, arbitrary or discriminatory exercise of its right to determine penalties.

**AWARD**

**Claim denied.**

  
DAN NIELSEN  
Neutral Member  
MICHELLE McBRIDE  
Carrier Member  
DAVID SCOVILLE  
Organization Member

**Dated this 21 day of August, 2017.**