

**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. 501 – Award No. 501 – Hernandez  
Carrier File No. 14-18-0523  
Organization File No. 2418-SL13N1-1844

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of . . . Jose Hernandez (0286609) for the removal of discipline from the Carrier. Mr. Hernandez was DISMISSED . . . Mr. Hernandez is 30 years old with a Seniority date of July 29, 2004 (sic). We ask that the Dismissal of Mr. Hernandez be removed and be returned to service immediately, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 24, 2018, 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, Jose Hernandez, had been employed by the Carrier since 2014. On May 18, 2018, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged main track authorization violation on May 13, 2018 at approximately 2259 CST while working on the BNSF Brandt RoadRailer 98027 near milepost 36.4 on the San Bernardino Subdivision. Following the investigation, the Carrier found Claimant guilty of the charges, in violation of Maintenance of Way Operating Rule (MWOR) 6.3.1 Track Authorization and MWOR 1.6 Conduct. The Carrier dismissed Claimant 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 he was hy-railing to East Noel from Alva and had the appropriate track authority, which he had obtained via Smart Mobile Client. Claimant told Mr. Thomas he requested a new authority, for East Noel to West Noel, but his computer screen went blank, so, when it came back up, he assumed the authority was for that request. However, it was a duplicate for the same territory he already occupied. Therefore, when he proceeded, the exceeds alarm on his Hy-Rail Compliance System (HLCS) verified that he was out of his limits. Claimant, Mr. Thomas stated, exceeded his limits by about 1501 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 also 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. 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 acknowledged that he did not open the second PDF file.

Claimant's personal record shows a formal reprimand issued on May 17, 2017 for a vehicle incident and a Level S record suspension issued on May 1, 2018 for using a handheld device in a Carrier vehicle.

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 points out that Claimant admitted 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 previous 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 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 formal reprimand for an incident involving vehicle damage on May 4, 2017, and a Level S violation, with a three-year review period, for, on April 16, 2018, using a handheld device while driving a Carrier vehicle. 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 at that time. This is, the Carrier adds, Claimant's third Level S offense within three years, and all involved safety violations. Moreover, Claimant was still within the review period for the earlier Level S violation at the time of this incident and subject to dismissal. The decision to therefore dismiss Claimant was not arbitrary or capricious, the Carrier concludes.

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. Nevertheless, the safety concerns at issue are so significant that no matter the circumstances, it was exceedingly negligent for Claimant 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 serious risk which could have had devastating consequences. Claimant was a fairly short-term employee, and, 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



SAMANTHA DAIGLE  
Carrier Member

  
LOUIS R. BELOW  
Organization Member

**Dated this 9th day of June, 2021.**