

## Public Law Board No. 6204

### Parties to Dispute

Brotherhood of Maintenance of Way  
Employees

vs

Burlington Northern Santa Fe

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**Case 24/Award 24**

### Statement of Claim

1. That the dismissal of machine operator G. Devera for alleged violation of Rule 6.3 was without just and sufficient cause, based on unproven charges, and the discipline was excessive (System file No. B-M-822-F/11-00-0043).
2. The Claimant shall have all mention of the charges leveled against him stricken from his record and he shall be returned to service and made whole for all loss of pay suffered, credited for railroad retirement, vacation and all other loss of benefits suffered by him as a result of the discipline assessed against him.

### Background

The Claimant was advised on September 12, 2000 to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged fouling of a main line track on that date by unlocking the electric lock without track authority while working as a machine operator headquartered at Shelby, Montana. After an investigation was held on September 28, 2000 the Claimant was advised on October 20, 2000 that he had been found guilty of violating Carrier's Rule 6.3 and he was dismissed from service. This discipline was appealed by the Organization, and denied by the Carrier, in the proper manner under Section 3 of the Railway Labor Act and the operant labor Agreement up to and including the highest Carrier officer designated to

hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.

### **Discussion**

The Claimant in this case holds assignment as a group 1 machine operator in the Carrier's Helena, Montana subdivision. According to testimony at the investigation by the road master at Shelby, Montana who was the Claimant's supervisor on the date of September 12, 2000, he held a conference call on that morning and advised those on the call, including the Claimant, that a truck crane which was driven by the Claimant was to "...work between Cut Bank East and Piegan on Main 2..." on that date. Piegan is at approximately mile post 1097, which is also called Henderson Road crossing. The Claimant had been assigned to "...transport a flat car with a panel on it with the truck crane to Henderson Road crossing where he would meet with the loader and they would work together and unload the panel off the flat car, off the south side of main 2...and set the track panel in the ditch for a future installation...". The stretch of track between Cut Bank East and Piegan on main 2 was west of where the Claimant had the truck crane tied up on September 12, 2000. According to the road master witness at about 10:00 AM he asked the Claimant if he was going to get "...track and time..." to move the crane and he told the road master that he was waiting for the group 2 operator, whose name was Bob Yaeger, to call him with information on when the latter would be at the Henderson Road crossing. The road master talked with Yaeger at this time and the latter told the road

master that he was "...headed to Henderson Road to meet..." the Claimant. The Claimant told the road master that he had heard this conversation and he also informed the road master that he did not need any help getting track and time to "...get out to the location...". The road master then heard the Claimant copy track and time and he heard him state his name to the dispatcher. But the Claimant did not "...state the limits he (was) request(ing)...". The Claimant did not state, according to this witness' recollection, where he was or "...where he needed his track and time between..." although this witness intimates in his testimony that he thought the Claimant would obviously have resolved this problem with the dispatcher. The Claimant was granted track and time and it read as follows:

"49612 on main 2 between the East crossovers Cut Bank East and West crossovers at Teton, switch NO at both locations until 11:00 o'clock."

According to the road master, as it turned out, this was not the correct limits required to "...enter the main track from where Mr. Devera's machine was tied up...". But after he received the track and time stated above the Claimant nevertheless then attempted to enter the main track outside of these limits. He tried to enter at a point between Cut Bank Center and Cut Bank East which "...would have put him a mile (or so) outside of his (track and time) limits...". In a tape played of the conversation which the Claimant had with the dispatcher to obtain the track and time the Claimant did not state that he was on the Dupont Spur, but he only gave a track number which, according to the road master, "...would mean nothing to the dispatcher...". At no time did the Claimant give the

dispatcher a mile post number location where he desired to enter the main track. The road master realized that the Claimant had gotten the wrong track and time and he tried to contact the Claimant to that effect but was not successful in doing so. The Claimant proceeded with his truck crane toward the main line and attempted to unlock the electric lock and line the switch to enter the main line. He was not successful in entering the main line but he attempted to do so. Thereafter the road master then had a conversation with him to the effect of whether he understood or not his time and limits, and according to the road master, the Claimant answered that he "...he felt...that he shouldn't of unlocked the electric lock..." and that he "...had a feeling that he didn't have track and time in those limits...". After it was discovered what the Claimant had tried to do supervisory action was taken and the Claimant was restricted to labor work, without the right to copy track and time or to operate any machines, pending an investigation.

In his testimony the Claimant corroborates the testimony cited above by the road master. The Claimant testifies that when he contacted the Havre West dispatcher he did not tell the latter which control points he "...wanted to be between...". He states that he did copy the track and time authority 49612 which is cited earlier in this Award. He states that he was aware "...where these limits were...". He states that he tried to correct the dispatcher and tell him that this was not the limits he wanted. But he did not ultimately do so. Instead he attempted to open the door on the electric lock to enter the main track outside of his track and time authority. The lock did not release, when he opened the door of the electric lock, and the Claimant was not successful in lining up the switch in order

to enter the track. He testified at the investigation that he did "...attempt to enter the main line between cut Bank East and Cut Bank Center...(and that he)...was aware..." that these were not the limits he had been issued. When asked if he complied with the rule which required him to have proper track and time prior to entered a track the Claimant answered that he did not comply with this rule.

### **Findings**

The Rule at bar in this case is the following which are cited here in pertinent part.

#### **BNSF MofW Operating Rule 6.3.1**

##### **Track Occupancy**

Except as provided below in Minor Work and Routine Inspection or in Rule 6.19.7 (Train Coordination) (Maintenance of Way) employees must apply one of the following types of authority or protection when on-track or off-track equipment is used on or foul of the track or when work is performed on or foul of the track.

Use one of the following on Main Tracks, Control Sidings or (any where) any track where a block signal system is in effect:

- Restricted Limits
- Block Registered Territory
- Track Permit
- Rule 10.3 (Track and Time)

A review of the record in this case warrants the following conclusions.

There is some discussion at the investigation whether the dispatcher might not have misunderstood where the Claimant was, or what he was asking for, when he was

requesting track and time on the date of September 12, 2000. At one point in the tape of the conversation between the dispatcher and the Claimant the dispatcher gives the impression, it would appear, that he knew where the Claimant was and what he wanted. If this is true then argument could be made that the fault lay with the dispatcher and not with the Claimant when he received the incorrect track and time to move his equipment. The Board does not find this argument convincing. Dispatchers can only work with information provided to them. If there is a misunderstanding about things as crucial as obtaining track and time it must be traced back to the source which is the employee requesting track and time. The Claimant himself testified to the effect, which is but verified by testimony by the road master at the investigation, that he knew when he attempted to enter the track between Cut Bank East and Cut Bank Center that this point was outside the limits of the track and time he had been issued. Yet he attempted to foul the track anyway. Why he did so is best understood only by himself. But this attempt was such a grievous violation of a basic safety rule of this, or any, railroad that a Board such as this would be remiss in issuing a ruling which would set improper precedent with respect to these serious matters. The Claimant was not successful in gaining access to track which was not protected. Had he been successful the consequences could have been extremely grave. The Claimant states at several points in his testimony that he attempted to correct the dispatcher about the track and time he has received. Perhaps. But the fact remains that he did not do so and that he therefore proceeded to act as if he had received the correct track and time when he himself knew that he had not.

The Organization argues that the Claimant was disciplined for "...guilt by thought...", and not because of any specific action. This is not correct. The Claimant did more than think about fouling a track. He actively engaged in a concerted attempt to enter Carrier's tracks at a point which was not protected and which he knew was not protected. He did not just think about it. He attempted to do so. He was just not successful.

Upon the full record before it the Board has no alternative but to conclude on merits, on basis of substantial evidence of record, that the Claimant is guilty as charged and the claim cannot be sustained.

The Board is further in no position to disturb the propriety of the discipline assessed in view of the Claimant's prior record which includes a thirty (30) day record suspension levied against him, but months prior to the charges filed against him in this case, which was also subject to ruling by this Board in a prior case.<sup>1</sup>

### Award

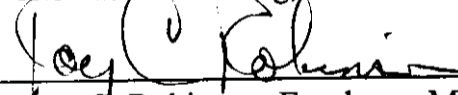
The claim is denied.



Edward L. Suntrup, Neutral Member



Thomas M. Rohling, Carrier Member



Roy C. Robinson, Employee Member

Date: December 22, 2002

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<sup>1</sup>PLB 6204, Award 23.