

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 147, (Case No. 147)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Joy E. Mendez, 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 May 13, 2013, when Claimant, David W. Wilson (6461404), was dismissed for his alleged failure to apply proper remedial action to the frog portion of the switch at the west end of Riverbank, California on the Stockton Sub-division on March 18, 2013 after determining that it did not meet the minimum requirements for tread wear per FRA Track Safety Standard 213.137 Frogs. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.13 Reporting and Complying with Instructions and Engineering Instruction (EI) 11.4.3 Ensuring Safe Train Movement.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 13, 2013, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-13-0254) (Organization File No. 180-SF13S1-1313)

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 March 22, 2013, Claimant was directed to attend a formal Investigation on April 9, 2013, which was mutually postponed until April 17, 2013, 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 apply proper remedial action to the frog portion of the switch at the west end of Riverbank on the Stockton subdivision, Monday, March 18th, 2013 in Riverbank, California after determining that it did not meet the minimum requirements for tread wear per FRA Track Safety Standard 213.137 Frogs.

This investigation will determine possible violation of MOWOR 1.13 Reporting and Complying with Instructions and EI 11.4.3 Ensuring Safe Train Movement."

On May 13, 2013, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation and fair appellant process because of the lack of objective behavior exhibited by the Hearing Officer, the inconsistent testimony of a Carrier witness and the disparate treatment of discipline. It reasoned that because of the various alleged procedural errors the discipline should be set aside without a review of the merits, however, if the Board chose to examine the merits it would discover that the Carrier did not meet its burden of proof and even if it had shown some culpability on the Claimant's part, which it did not, the discipline was excessive when compared to the discipline assessed his co-worker who was found guilty of the same alleged infraction. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the transcript shows that there were no procedural errors in the handling of the Claimant's case and the Claimant received a "fair and impartial" Investigation. It further asserted that the Claimant was not subjected to disparate treatment in the assessment of discipline as this was the Claimant's second Serious Level S discipline event within the 12 month review period whereas the Claimant's co-worker had no active discipline on his personal record.

Turning to the merits, the Carrier argued that the Claimant's Roadmaster, W. Morris, testified that Track Supervisor Finch had told him he was concerned with the poor condition of the main line frog at the west end of Riverbank. The Carrier asserted that at approximately 9:30 a.m. on March 18, 2013, the Roadmaster instructed the Claimant and his co-worker, D. Wullenweber to go inspect the frog and weld it if it was necessary. According to it, Mr. Morris

further testified that he was concerned because that was the worst frog on his territory and he had been short of welders for a week or two. Roadmaster Morris stated that at about 10:15 a.m. on the same day he went to see what the Claimant and his co-worker were doing, but when he arrived he saw that both employees were leaving in the truck. Mr. Morris then decided to inspect the frog himself and he determined the frog needed to be set up with a 10 m.p.h. slow order speed restriction in accordance with the guidelines of FRA Track Safety Standard 213.137. Roadmaster Morris also testified that the Claimant and co-worker did not comply with his instructions to weld the frog if it needed it, and did not take the safe course despite the frog being in poor condition. Morris noted that the frog was in a high traffic area that included six sets of Amtrak trains. The Carrier further argued that the Claimant and his co-worker admitted their guilt, therefore, the assessment of the discipline was appropriate. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board will next address the Organization's allegations that the Carrier committed various procedural errors that are contrary to the intent of fairness for Hearings and the appellant process. The Board has examined the Organization's allegation that the Hearing Officer exhibited unfairness in his holding of the formal Investigation. Our review of the transcript reveals that at times during the Hearing the Hearing Officer was more authoritative than necessary, however, we are not persuaded that his behavior rose to that level that it denied the Claimant a "fair and impartial" Hearing nor are we persuaded that any Carrier witness provided inconsistent and untruthful testimony. Lastly, we will address the Organization's argument that the Claimant was subjected to disparate treatment in the Carrier's assessment of discipline. The record shows that the subject incident was the Claimant's second Serious Level S discipline event within the 12 month review period as he had previously been disciplined on August 6, 2012, whereas his co-worker Mr. Wullenweber did not have any active discipline on his personal record as this was his first Level S discipline and because of that he would not have been eligible for dismissal in accordance with the Carrier's disciplinary policy. It is determined that the Claimant was not subjected to disparate treatment and the Carrier complied with the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

Turning to the merits, the record shows that on March 18, 2013, the Claimant and his co-worker were directed to examine the condition of the main line frog at the west end of Riverbank and to weld it if it was necessary. It was not refuted that the frog was in poor condition and the Claimant and his co-worker did not follow their Supervisor's instructions to repair the frog and because the necessary repairs were not made Roadmaster Morris needed to set up the frog with a 10 m.p.h. slow order speed restriction. On pages 189 and 190 of the transcript the Claimant and his co-worker were questioned about their decision not to weld the frog as follows:

"Frank Barrera III: Do you feel in your professional opinion that you left this properly protected and in the best state for the railroad, and the people that

are going to traverse that location?

David Wullenweber, Jr.: At that time I felt comfortable with my decision, at that time yes, sir.

Frank Barrera III: What about at this time?

David Wullenweber, Jr.: No, I'm sorry to say we messed up, but.

David Wilson: This call lessons learned sir, um.

Frank Barrera III: I'm, I'm not making that call, I'm asking a question.

David Wilson: Right, and it's called lessons learned. I mean, and, uh, we, we've, we've regrouped on, on, on top processes on things, uh, so we, we do the best, we, we are, are doing best that we can do, and we have, like I said, that won't ever be the case again. Uh-"

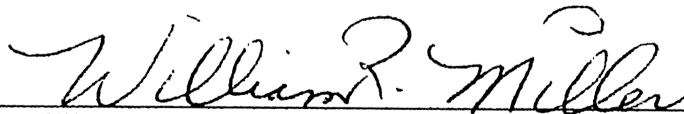
(Underlining Board's emphasis)

It is clear that in the aforementioned testimony the Claimant and his co-worker admitted their failure to abide by MOWOR 1.13 and EI 11.4.3, therefore, substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

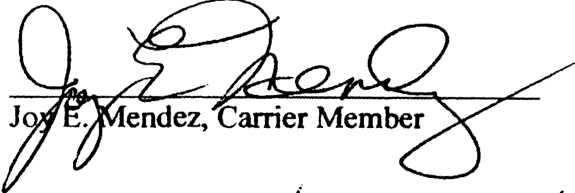
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 20 years of service and this was his second Level S discipline within the 12 month review period from the previous violation. Claimant's violation was serious, however, in this instance based upon a generally good work record over a long period of time the Board finds and holds that the dismissal is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service with seniority intact and all other rights unimpaired with no back-pay. Claimant is also forewarned that upon reinstatement he should be careful to adhere to all directives, instructions and Carrier Rules.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Jos E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014