

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 150, (Case No. 150)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 April 26, 2013, when Claimant, Jolene K. Bitsui (1568815), was dismissed for her alleged carelessness of the safety of herself and others when she failed to have a proper job safety briefing prior to occupying the main track outside of her authorized designated limits with a hyrail welding truck between East and West Crookton on Main 2 at 1015 on February 11, 2013 while working as a Welder and her misconduct when she failed to provide all the facts to her supervisor regarding this rules violation. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.1 Safety, MOWOR 1.2.7 Furnishing Information, MOWOR 1.3.1 Rules, Regulations, and Instructions, MOWOR 1.6 Conduct, and MOWSR 1.1 Job Safety.**
- 2. As 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 April 26, 2013, continuing forward and/or otherwise made whole."**
(Carrier File No. 14013-0210) (Organization File No. 170-13S1-136)

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 February 21, 2013, Claimant was directed to attend a formal Investigation on February 21, 2013, which was mutually postponed until April 2, 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 carelessness of the safety of yourself and others when you allegedly failed to have a proper job safety briefing prior to allegedly occupying the main track outside of your authorized designated limits with a hyrail welding truck between East and West Crookton on Main 2 at 1015 on Monday February 11, 2013 while working as a welder on TRWX0438 and TRWX1583 respectively, and your alleged misconduct when you failed to provide all the facts to your supervisor regarding this alleged rules violation on February 11, 2013.

This investigation will determine possible violation of MOWOR 6.3.1 Main Track Authorization, MOWOR 1.1 Safety, MOWSR 1.1 Job Safety Briefing, MOWOR 1.2.7 Furnishing Information, MOWOR 1.3.1 Rules, Regulations, and Instructions, MOWOR 1.6 Conduct."

On April 26, 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 the Carrier did not meet its burden of proof. It asserted that the Carrier charged that the Claimant failed to have a meaningful job briefing before improperly occupying the main track outside of authorized designated limits and that she was less than forthright about the incident. It argued that the Claimant might have made a error about her authorized limits on the date of the alleged incident, but at no time did she attempt to conceal that event as she reported it in full to her Supervisor on the following day and under no circumstance did she suggest to her co-workers to conceal any information. It further argued that if the Carrier had proven its allegation (which it did not do) the discipline assessed the Claimant was excessive and disparate, especially when compared to that issued to her two co-workers who were both assessed a Level S 30 Day Record Suspension. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Investigation was "fair and impartial" and the Organization has not pointed to any alleged procedural errors. Turning to the merits the Carrier stated the record shows that the Claimant was working with two other Welders, J. S. and R. T. Anderson and on February 11, 2013, at approximately 10:15 a.m. the Claimant was obtaining track authority for all three employees. When the other two employees attempted to put their hyrail on Main 2 they encountered trouble with their hydraulics so the Claimant put her truck on

Main 2 instead. However, according to the Carrier the Claimant did not have track authority to set on at that location so the Dispatcher was alerted when the HLCS alarm system went off. The Carrier explained that when a violation of track authority occurs, the HLCS systems sets off an alarm in the truck and also notifies the Dispatcher in Fort Worth that a violation had occurred. The Carrier argued that the Claimant's co-workers both testified that a job briefing was not done by the Claimant and they were concerned after she allegedly obtained the authority from the Dispatcher that they were being misinformed. It further asserted that both of those employees also testified that the Claimant told her co-workers that after the HLCS alarm went off, that if they were asked by a Supervisor to deny that she was on the tracks. Lastly, it argued that when the Claimant was interviewed by her immediate Supervisor, on the day of the incident, she denied being on the track and instead stated she was parked near the road crossing and accidentally bumped the HLCS unit, causing the alarm to go off, however, a few day later she changed her story and admitted to the violation. In closing it stated the discipline was appropriate and it was not disparate in comparison to the Claimant's co-workers because those employees did not lie about the event and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The Board notes that this is the first in a series of two dismissal cases involving the same Claimant.

Review of the testimony of Claimant's co-workers reveals that both employees testified that they did not have a job briefing with the Claimant after her telephone conversation with the Dispatcher on February 11th. On page 94 of the transcript Mr. R. Anderson was questioned as follows:

"Stephen Hedemann: Okay, uh, prior to, to setting on the uh, Hyrailer, attempting to set it on, uh, what kind of communication or briefing was there?"

Robert T. Anderson: There, uh, we left the office in the morning, we had discussed what we were going to do and how we were going to get the limits and stuff. Once we received our limits, we didn't have a job briefing."
(Underlining Board's emphasis)

On page 77 of the transcript Mr. J. S. Devries testified about whether or not there was an adequate job briefing with the Claimant after she talked to the Dispatcher as follows:

"John S. Devries: Oh, absolutely. There is no doubt in my mind that, we

did not have a thorough briefing that morning and I say that to the extent that, as I listened to her and I know my part and my own action in this event, that I, she didn't catch it, I didn't catch it. I knew something wasn't right, but I couldn't put my finger on it and I, as I said, "Is this right?" And I'm, you're looking at it, you're staring it right in the face, and I said, "I know something's not right." And then I remembered just simply asking at least a second or third time, "Are we okay here? Are we okay to," and I actually remember say, "Are we okay to set on here?"

(Underlining Board's emphasis)

On pages 110 and 111 of the transcript the Claimant was questioned as follows:

"Stephen Hedeman: ...on February 11, uh, he mentioned that, that you had uh, gotten different limits from the un, from the Dispatcher than, that what you had originally requested, was all she was able to, to get you and, and and other testimony said this too. Uh, was, did uh, when you said you handed the track and time down to Devries, did you have any uh, any more discussion or any more briefing where the extent of those limits were?

Jolene K. Bitsui: I told him, I said that uh, when I got the limits, I knew that or I, I called it back and I read the lines and everything and I turned it, and gave it to Steve and I said, "Hey, this, is this right?" You know, I was sick, really sick. And, uh, he said that, you know, "Yeah, it's, it's right." And I said, "The limits are right?" And we both agreed to it...

The Claimant characterized her conversation with her co-workers as a adequate job briefing. The problem with that reasoning is the fact that the Claimant admitted she was not sure that she had recorded the proper work limits that the Dispatcher had given her and because she was unsure she asked Mr. Devries who had been listening to part of her conversation if she had written down the proper limits. Mr. Devries testified and confirmed on pages 83 - 86 of the transcript that he listened in on to part of the conversation the Claimant had with the Dispatcher and he admitted that after that conversation had concluded he thought the Claimant had transcribed the proper limits, but was not positive that he and the Claimant had correctly understood the proper limits. He further testified that he was not sure whether or not the other co-worker Mr. Anderson had heard what the Dispatcher stated as Mr. Anderson was standing somewhere behind him. Nonetheless, the Claimant and her co-workers decided to proceed as though they were certain about their work limits. It is clear that if the Claimant had conducted a thorough job briefing she and her co-workers would have realized they were unsure about their limits and would have then known that they needed to recall the Dispatcher and confirm what their designated authorized limits were. The Board has determined that the Claimant failed to conduct a proper job safety briefing with Messrs. Anderson and Devries after her telephonic conversation with the Dispatcher.

The Carrier also made another serious allegation that the Claimant failed to provide all the facts to her Supervisor regarding the aforementioned Rule violation. Claimant's Roadmaster, Mr. K. Valentine testified that when he interviewed the Claimant at the site of the incident on February 11th she initially denied being on the track when the HLCS alarm went off. The Roadmaster further testified that the Claimant did not provide a written statement and withheld her track and time log, despite him asking her several times to provide those documents. Additionally, he testified that a day or two later, the Claimant altered her rendition of the event and admitted that she had placed her hy-rail vehicle on the tracks with the assistance of her co-workers and the vehicle was outside of its designated and authorized work limits (See pages 23 and 32 of the Transcript). Mr. Valentine's testimony was not effectively refuted and was confirmed by the written statements and testimony of Claimant's co-workers. The Claimant even confirmed on page 108 of the transcript that she did not tell Mr. Valentine everything on the day of the incident and instead told him the full story the following day.

Employees Anderson and Devries also testified that after the HLCS alarm went off, the Claimant encouraged them to deny that she was on the tracks if questioned by a Supervisor. On page 77 of the transcript Mr. Devries was questioned as follows:

"Greg Kreie: At a later date. After uh, after turning in uh, your Statement to uh, to Mr. Valentine, well, let me ask you this. Uh, do you recall in your discussion, uh, do you recall having any discussion with Mr. Valentine as to whether or not uh, Ms. Bitsui had approached you uh, with the idea of covering up the fact-

John S. Devries: Yeah.

Greg Kreie: Did, did you.

John S. Devries: In the initial, in the initial, he asked me what happened and in the course of that conversation, uh, I indicated that Jolene had approached me about if anyone uh, approached us, uh, that was to indicate that she was not on track." (Underlining Board's emphasis)

On page 94 of the transcript Mr. Anderson confirmed Mr. Devries aforementioned testimony as follows:

"Stephen Hedemann: ...at any time, were you approached or asked to uh, make a statement that you were not foul of the track uh, when this happened?

Robert T. Anderson: Yes.

Stephen Hedemann: And, and who made that approach?

Robert T. Anderson: Uh, Jolene Bitsui.

Stephen Hedemann: And what exactly did she tell you or, to the best of your recollection?

Robert T. Anderson: She walked up and said uh, "When they get here to talk to us, tell them we weren't, weren't on the tracks."
(Underlining Board's emphasis)

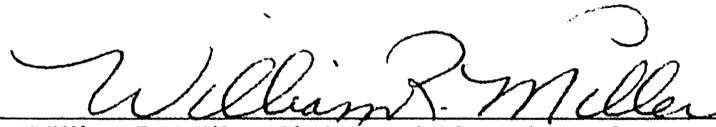
The Claimant testified that her co-workers statements and testimony were not true and she further testified that she never asked anyone to cover up her mistake. The Board has closely examined the testimony of employees Anderson and Devries and has determined that both employees understood they had violated Carrier Safety Rules on February 11, 2013, and neither employee had anything to gain by not being forthright about the incident or lying about the Claimant's actions. It is determined that Messrs. Anderson and Devries testimony was credible whereas review of the Claimant's testimony finds it to be less than candid and self-serving.

Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

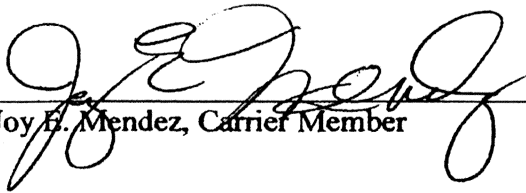
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little less than six years of continuous service with one Level S 30 Day Record Suspension on her disciplinary record and a Level S 58 Days Actual Suspension that had occurred approximately one year earlier wherein she failed to inform a Manager of being absent and then requested compensation for time not worked. The Organization argued that in this instance the Claimant had been subjected to disparate treatment because her co-workers who were guilty of the same offense were only assessed a Level S 30 Day Record Suspension while she was dismissed. That argument is not persuasive because neither of the Claimant's co-workers was not forthright about the February 11th incident nor were they in violation of MOWOR 1.6 whereas the Claimant did violate MOWOR 1.6 - Conduct. The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014