

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 177, (Case No. 177)**

**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 R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 18, 2014, when Claimant, Derrik J. Barnes (1672708) was dismissed for his alleged release of track authority before all equipment and employees were clear of limits on KCT Railway at Kansas City, Missouri on August 18, 2014. The Carrier alleged violation of the BNSF Railway Maintenance of Way Operating Rules (MOWOR) 6.3.1 Main Track Authorization.**
- 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 August 18, 2014, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-14-0361) (Organization File No. 30-SF13N1-14114)

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 all 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.

The facts indicate that on August 18, 2014, at 9:00 a.m. Claimant was working as Foreman near Milepost 6.0, on the KCT Railway in Kansas City, Missouri. It was alleged that the Claimant released track authority before all equipment and employees were clear of the limits and because

of that allegation the Claimant was directed to attend a formal Investigation on August 25, 2014, concerning in pertinent part the following charge:

"...for the purpose of ascertain the facts and determining your responsibility, if any, in connection with your alleged release of track authority before all equipment and employees were clear of limits, MP 6.0. KCT Railway, Kansas City, MO, at approximately 0900 hours on August 18, 2014.

This investigation will determine possible violation of MWOR 6.3.1 Main Track Authorization."

On September 24, 2014, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the position of the Organization that the Carrier altered evidence. It asserted the Carrier entered a tape recording made between the Dispatcher and Claimant that was out of sequence and that all hesitations between the two employees were removed to make it appear that everything happened without pause. The Organization suggested that action on the part of the Carrier makes the recording suspect as to possible erasures that may have proven the Claimant's innocence. The Organization essentially argued that the Claimant was denied a "fair and impartial" Hearing and because of that the discipline should be removed without reviewing the merits.

Turning to the merits, it argued the evidence and testimony presented by the Carrier did not prove its allegations. It further argued that the record shows that two machines were involved in the incident and that only one machine was able to send a track indication, therefore, it would have been impossible for that singular machine to have been in two locations at the same time as shown by a Carrier exhibit. In its appeal letter of October 17, 2014, the Organization explained its argument in pertinent part as follows:

"...Exhibit 16 and 17 explain this very well, 16 shows the circuit they were east of 82L, and 17 shows the circuit they entered, if we notice that in exhibit 17 it has 2 circuits colored in, east of 82L as seen in exhibit 16 and the new circuit that they were traveling to west of 82L, as if the only machine that shunts the track was in two locations at the same time. The Carrier witness even said there is a cycle time (Delay) which would explain why exhibit 17 shows the machine in both sections of track. Mr. Bunch stated he didn't know exactly what the cycle time was he thought it was around 5 seconds but was not sure. Clearly it could be a longer cycle time...."

Simply put the Organization argued that the Dispatcher did not have any firsthand knowledge as where the machines were and only had a track indication. It asserted that Carrier witness Mr. Bunch testified there was an actual delay between real-time and when the Dispatcher would see the change on his track screen which would have explained why exhibit 17 showed the machine in both section of track, therefore, according to the Organization the Carrier had not met its burden of proof. Lastly, it argued that if the Carrier did show the Claimant was guilty, which it did not, the discipline assessed was excessive. It concluded and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that there were no procedural problems during the handling of the Claimant's case. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier argued that the Claimant released his track authority before all equipment and employees were clear and the evidence presented showed that Claimant subjected employees and equipment to potential harm. It further argued that after having proven its allegations, it appropriately disciplined the Claimant. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural argument that the recordings of the conversations between the Dispatcher and the Claimant on the date of the incident entered as evidence at the Investigation were altered which may have eliminated crucial information that would have benefited the Claimant. On page 22 of the transcript Carrier witness Mr. Bunch introduced the audio recordings between the Claimant and the Dispatcher. He specifically testified in pertinent part:

"...The next thing that I have is the audio recording of the conversation between Mr. Barnes and the Dispatcher. And instead of bringing in individual clips, they're available, but we, everything is bundled together, so we will hear a conversation between Mr. Barnes, between the Dispatcher. There are couple of other employees' voices that we hear throughout the thing. Um, it is important that I preface this seven minute 30 second dialog. This didn't happen beginning to end without pause. There were moments where Mr. Barnes copied track and time, the Dispatcher is gone for 10 minutes, come back, they have other dialog. So these are all a continuous conversation on the recording...." (Underlining Board's emphasis)

The Carrier clearly explained before it introduced the taped conversations as evidence that gap periods had been eliminated, however, it stated that the tapes (individual clips) with the gaps were available. Review of the testimony reveals that the Claimant never disputed the

accuracy of the tapes nor was there any request to hear any other clips. The Board is not persuaded that the Claimant was denied his "due process" Agreement rights and it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

The Carrier Rules were established to protect employees and employees are required to comply with the Rules to protect themselves, their co-workers and equipment. The question in this dispute is whether or not the Claimant complied with the Rules. The Carrier asserted that the Claimant held no job briefing with his subordinates prior to releasing the track authority that was protecting them and he allowed men and equipment to be exposed to potential harm on an unprotected track.

On page 57 of the transcript the Claimant testified he had a job briefing in the morning before the crew got out to the track to begin work and another radio job briefing on an unrecorded channel with his subordinates prior to releasing his Track and Time Authority 610.

On page 60 of the transcript it was established that the two machines under the direction of the Claimant could fit between 82L Signal and 687 Switch and that was not refuted. On page 62 of the transcript the Claimant was questioned as follows:

"Randy S. Lunow: Is it possible for your machines to have been between 82L and 687 Switch, uh, when you released your Track Authority 610?"

Derrick J. Barnes: Yes.

Randy S. Lunow: Were your machines between 82L and, uh Switch 687?

Derrick J. Barnes: I believe they were, yes according to the radio communication from the Tamper Operator.

Randy S. Lunow: Okay. So if that was the case, then you wouldn't have had a machine out of its limits?

Derrick J. Barnes: No." (Underlining Board's emphasis)

During the Investigation it was not denied that if the machines under the direction of the Claimant were between 82L Signal and the 687 Switch they would not have been outside of their limits prior to releasing the 610 Authority. Claimants testified without rebuttal that the Tamper Operator confirmed that both machines were between the 82L Signal and Switch 687 prior to Claimant's releasing of the 610 Authority. That testimony was not effectively denied at the Investigation or during the appeal process. It is determined that the Carrier did not meet its

burden of proof, therefore, the Board finds and holds that the discipline is set aside and the Claim is sustained in accordance with Part 2 of the Claim.

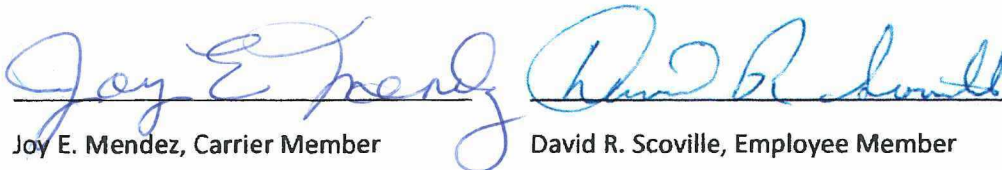
The Board also exercises the option to advise the Claimant that upon his return to service he should continue to be careful to adhere to all current Carrier Rules because possible violation of some of those Rules can have disastrous consequences.

AWARD

Claim 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



Joy E. Mendez, Carrier Member

David R. Scoville, Employee Member

Award Date:

