

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 200, (Case No. 200)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, 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 March 5, 2015, when Claimant, Ronald L. Andrus (1734516) was disciplined with a Level S 30-Day Record Suspension with a 3-year review period for his failure to establish red flag protection in overlapping working limits after receiving joint authority on March 5, 2015 at approximately 10:00 a.m. on the Lafayette Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 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 March 5, 2015, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-15-0255) (Organization File No. 110-SF13N1-1536)

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 the Claimant was assigned as a Surfacing Gang Foreman, on the Lafayette Subdivision. On March 5, 2015, Claimant was overseeing outside contractor’s work and it was alleged that the Claimant failed to establish red flag protection and because of that allegation the Claimant was directed to attend a formal Investigation on March 19, 2015, which was mutually postponed until April 14, 2015, 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 establish red flag protection in overlapping working limits after receiving joint authority on March 5, 2015 at approximately 1000 hours on the Lafayette Sub.

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

On May 13, 2015, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a Three (3) Year Review Period.

The Board notes that the instant case correctly states in the Statement of Claim, Part 1 that Claimant was issued a Record Suspension whereas in Part 2 the Claim requests reinstatement.

It is the Organization’s position that the Claimant was denied a “fair and impartial” Investigation for multiple reasons that included the Carrier not calling the outside contractor’s employee who operated the machine that allegedly fouled the track for the Hearing. Additionally, the Organization suggested that the Carrier had pre-determined the Claimant’s guilt. It asks that based upon those alleged procedural errors the discipline be removed without reviewing the merits.

Turning to the merits, the Organization argued that the record shows that the Claimant did not foul the track with his vehicle and if the outside contractor’s backhoe fouled the track it was contrary to the instructions given by the Claimant. Claimant testified he had joint authority at the subject location with Mr. Journet and that he had a briefing with Journet, and told him he would not occupy the track until Journet passed. Claimant further asserted that he instructed the outside contractor to stay clear of the track until Mr. Journet and the employees with him had passed the work site, therefore, there was no need for red flags because the outside contractor was told not to occupy or be near the track. The Organization concluded that the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant was not denied a “fair and impartial” Investigation. It argued that contrary to the Organization’s assertion there is nothing in the Agreement that required the Carrier to call more witnesses than necessary to satisfy its burden of proof. It further argued there is nothing in the record to substantiate a charge of pre-judgement. It concluded that the Organization did not prove that the Carrier did anything that inhibited the fairness of the Claimant’s Hearing and it requested that the case be resolved on its merits.

Turning to the record, the Carrier argued that the Claimant was the responsible party to set up flag protection for the contractors working at the job site. It further argued that the Claimant was the employee in charge and was responsible for the contractors and Claimant did not take the necessary steps to ensure that the contractors did not foul the track until told it was clear to do so. Additionally, Carrier asserted that Claimant ensured to Mr. Journet that he would not allow the contractor to foul the track until Mr. Journet passed and it is clear that Claimant failed to provide protection by displaying red flags as required under Rule 6.3.1. It concluded that as the supervising party, the Claimant was responsible for contractors in the area and he failed in his duties, therefore, he was guilty as charged and was appropriately disciplined. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and the Organization's procedural arguments which in this instance are not found to be persuasive. It is determined the investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11 and the case will be resolved on its merits.

On page 9 of the transcript, Assistant Roadmaster, R. Woodside, testified in pertinent part:

"All right. Me, the FRA Supervisor, and Richard Journet was Hy-Railing, and, um, I overheard a job briefing between Richard Journet and Mr. Anderson about the limits, overlapping working limits, joint authority. As we was Hy-Railing, we approached Mr. Andrus' lim- limits that he told, uh, Richard Journet that he was going to have. Uh, during the, well, during the job briefing, Mr. Andrus stated that he was not going to occupy the track, so as we approached Mr. Andrus, we had uh, two backhoes occupying the track at the time. And no red flags sighted."

The Claimant and the Organization did not dispute the fact that the contractor had fouled the track and there were no flags displayed, nor was it disputed that the contractor was under the authority of the Claimant. The Claimant testified on pages 31 and 32 of the transcript that contrary to Mr. Woodside's testimony there was not two backhoes on the track because one had broken down the day earlier, however, on page 21 the Claimant was questioned as follows:

"Timothy Wilson: Did the backhoe foul the track?"

Ronald L. Andrus: Yes."

The Board does not question the Claimant's testimony that he instructed the outside contractor to stay clear of the track until Mr. Journet and the other employees with him had passed the work site. On pages 21 and 22 the Claimant further testified that the contractor

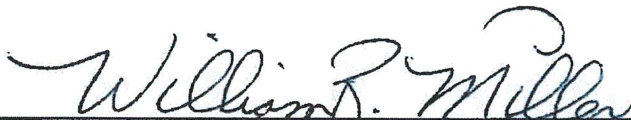
started crimping the ballast on his own and contrary to the Claimant's directives. He also stated that he was on the opposite side of the track from the contractor and approximately 50 feet away and could not tell that the contractor had fouled the track.

The Board does not find the Claimant's testimony convincing that he was unaware of the contractor's actions or that he could not see the contractor less than 20 yards away and whether or not the contractor fouled the track whereas Carrier Officer Woodside testified that two backhoes occupied the track. Assuming for the sake of argument that only one backhoe was working the Carrier has proven a backhoe fouled the track and no red flags had been placed to protect the contractor. Claimant was responsible for the contractors in the area, therefore, it is clear 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 approximately eight years of service. His disciplinary record included a Formal Reprimand, Record Suspension and Actual Suspension none of which were active at the time of instant discipline. The offense was of a serious nature that placed employees and an outside contractor in potential harm and this was the Claimant's second serious Record Suspension. The discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17