

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 202, (Case No. 202)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES 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 April 11, 2015, when Claimant, M. A. Dorrell (6528418), was dismissed for failure to properly protect maintenance of way machines and contract employees while working on Main Track 2 between Lomax and Niota, near MP 223 on the Chillcothe Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rules 6.3.1 – Main Track Authorization, 12.1.2 – Fouling Adjacent Tracks, and 12.3 – Performing Maintenance with Equipment.**
- 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, if applicable, with seniority, health insurance benefits, vacation, all rights unimpaired and pay for all wage loss including overtime commencing April 11, 2015, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 10-16-0164) (Organization File No. 20-BN40N1-1550)**

**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.

The facts indicate that on April 11, 2015, the Claimant was a Foreman responsible for protecting the employees and contractors who were working on Main Track 2 between Lomax and Niota on the Chillicothe Subdivision while contract employees were picking up rail. It was alleged that on that date contractors were picking up and moving rail in between Main Track 2 and Main Track 1 and Claimant failed to provide protection on Main Track 1 and because of that allegation the Claimant was directed to attend a formal Investigation on April 23, 2015, which was mutually postponed until June 16, 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 properly protect maintenance of way machines and Contract employees, on main track, a Critical Decision failure, when Contract employees commenced picking up rail between Main Track 2 and Main Track 1. Boom and Rail repeatedly fouled Main Track 1 in process of picking up rail, as determined by the System Operations Test Team on April 11, 2015 at approximately 1000 hours while working on Main Track 2 between Lomax and Niota, near MP 223 on the Chillicothe subdivision, assigned as foreman, gang ID RP02 TRPX0002. The date BNSF received first knowledge of this alleged violation is April 12, 2015.”**

On July 15, 2015, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the record shows that the Claimant explicitly testified that on April 11, 2015, before he occupied or fouled Main Track 2 he received appropriate authority which was confirmed by the sole Carrier witness. The Organization further asserted that the Claimant testified that he was at a location with a clear view of the Grapple Truck machine that was being operated by an outside contractor as well as the material that was being picked up and at no time did the machine or material foul Main Track 1. In summary the Organization argued that a review of the transcript reveals that while the aforementioned task was being done there were no employees on the ground between Main 1 and 2 and the only person working at the subject location was the Grapple Truck Operator and he was on Main 2 where Claimant had received track authority protection, therefore, it reasoned that the Carrier did not meet its burden of proof. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the Carrier's position that on April 11, 2015, the Claimant failed to properly protect maintenance of way machines and Contract employees when Contract employees picked up rail between Main Track 2 and Main Track 1. It argued that testimony of Michael Babik, Manager of Operating Rules, on pages 22 - 25 of the transcript verified that he and another Carrier

Officer witnessed the boom of the Grapple Truck and the rails being picked up fouling Main Track 1. It further argued the Claimant had not obtained protection on Main Track 1. Lastly, it asserted that the Claimant admitted his guilt to Mr. Babik who testified on page 25 the following:

**“...Mr. Dorrell admitted they were fouling, but that this was how he did his work all the time.”**

Lastly, it reasoned the record is clear that the Claimant was guilty as charged and the discipline was appropriate 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 it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

The Board notes that both parties raised multiple procedural objections during the Investigation and subsequent handling of the dispute. Those objections will not be addressed because the parties agreed on a non-precedential basis that this case should be determined on its merits only.

The Carrier argued that the Claimant admitted his guilt, however, a review of page 36 of the transcript reveals the contrary. Claimant was questioned as follows:

**“Thomas W. Blackwell: Mr., Mr. Babik, uh, made a statement, he said that you admitted to fouling Main 1, did you, did you ever state that you fouled Main 1 to Mr. Babik?**

**M. A. Dorrell: When he walked up to me, he said, you’re fouling it, you’re fouling it, and I said, I don’t think so, not the way it looks from here.**

**Thomas W. Blackwell: Okay, so, my question is, Mr. Dorrell, did you ever admit to fouling Main 1 to Mr. Babik?**

**M. A. Dorrell: No.”**

It is clear that the Claimant’s recollection of the April 11, 2015, incident was totally contrary to Carrier Officer Babik’s recollection. Claimant’s accuser, testified against the Claimant regarding the alleged incident and his accusations of the Claimant’s alleged failures were not corroborated by any other witness. Claimant denied those accusations. The Board has been presented a case wherein two employees have offered distinctly different versions of the same incident with no proof offered by either employee as to why the Board should place greater

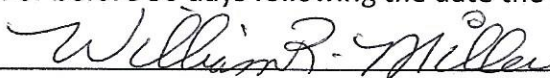
credence in one employee's testimony over the other employee. It could be argued that the Carrier Officer had no reason to distort the facts while the Claimant had a self-interest to color the incident to his advantage. However, to come to that latter conclusion the Board would have to ignore the fact that the Claimant had 35 years of service with a total of 10 demerits in his first 31 years of work, and five other disciplinary incidents since 2011 which included two Formal Reprimands and three Record Suspensions (one of which was for smoking inside a Carrier vehicle). The Claimant's disciplinary record is not perfect, but it indicates that he was a trusted and good employee. It would have been helpful in this instance if the Carrier had arranged for the testimony of the other Carrier Witness who allegedly witnessed the April 11<sup>th</sup> incident. That individual may have corroborated the Claimant's testimony or that of Carrier Witness Babik, but absent that testimony we have a situation of "one against one". In a similar disciplinary dispute, Third Division Award No. 32890, the Board stated in pertinent part:

**"This Board has thoroughly reviewed the record in this case. In sum, the Board finds that the Carrier has not carried its burden of persuasion, which is a particularly heavy one in the case of dismissal. The record contains a direct conflict of testimony between Claimant and Carrier's primary witness against him, with no supporting testimony for either position. In such a situation, where the contradictory evidence can truly be said to result in a "net wash", the party with the burden of persuasion – in this case the Carrier – must lose. Accordingly, the instant claim is sustained."**

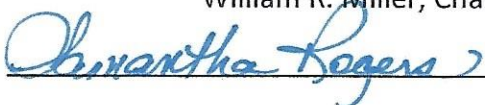
The reasoning set forth in the aforementioned Award is directly on target with the subject dispute and will be followed. The Board has determined that the Carrier did not meet its burden of proof, therefore, the Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from service, until reinstated in accordance with Rule 13(f) of the Discipline Rule.

**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.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: \_\_\_\_\_

1/5/18

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 287, (Case No. 287)**

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

**vs**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Michelle McBride, Carrier Member  
Louis R. Below, Employee Member

**REQUEST FOR INTERPRETATION of P.L.B. No. 7048, Award No. 202:**

On March 3, 2020, the Organization advised the Neutral Member of the Board that a dispute had arisen over the implementation of Award No. 202 because the Carrier had refused to make the Claimant whole for all losses of earnings and benefits suffered during the period he was improperly withheld from service (dismissed) by the Carrier.

Part 2 of the **STATEMENT OF CLAIM** of Award No. 202 requested the following:

**“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, if applicable, with seniority, health insurance benefits, vacation, all rights unimpaired and pay for all wage loss including overtime commencing April 11, 2015, and continuing forward and/or otherwise made whole.”**

Award No. 202 was adopted on January 5, 2018, and it concluded as follows:

**“...the Board finds and holds that Claimant will be returned to service with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from service, until reinstated in accordance with Rule 13(f) of the Discipline Rule.”**

The Question at Issue: **“Did the Carrier fulfill the determination of Award No. 202?”**

**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.

The facts indicate that on July 15, 2015, Claimant was notified that he had been found guilty as charged and was dismissed on that date. Claimant's dismissal was appealed through the normal process and eventually was appealed to this arbitral tribunal where the claim was sustained.

It is the position of the Organization to fully satisfy the requirements of Award No. 202 the Claimant was entitled to the following: 1.) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not to be reduced by earnings from alternate employment obtained by Claimant while wrongfully removed from service); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; 3.) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service; 4.) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service commencing April 11, 2015. The Organization asserts that the Carrier has not fulfilled the requirements of Award No. 202 to reinstate the Claimant in accordance with Rule 13(f) of the Discipline Rule.

The Organization argued that the record shows Claimant was wrongly dismissed by the Carrier and despite his return to service the Claimant has still been penalized for the Carrier's error. It asserted Award No. 202 stated that upon the Claimant's return to service Claimant would be **"...made whole for loss of all monies..."** Therefore, it reasoned the Carrier was obligated to compensate the Claimant for all wage losses and any monies Claimant was required to spend to insure continued health coverage and/or costs related to medical, dental or vision care while in a dismissed status as well as payments that should have been made towards his 401K Plan and any other monies Claimant might have earned if had been employed. The Organization further argued to do less than that was contrary to the Award and was not equitable nor sensible.

Additionally, the Organization argued that to contrary to the Carrier's position the reimbursement of out-of-pocket medical expenses are part of a reinstatement remedy which was resolved between the parties with the Interpretation of Awards 46, 48, 49, 50, 57, 59 and 60 of Public Law Board No. 7590 on June 10, 2019. It asked that those Interpretations be followed

as they specifically addressed Rule 13(f). In closing it requested the Board to order that all of the unpaid monies requested by the Organization be found owed the Claimant.

The Carrier asserted that Rule 13(f) states the following:

**“Employee Unjustly Suspended or Dismissed. If after investigation it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with seniority rights unimpaired and compensated for the net wage loss, if any, resulting from said suspension or dismissal.** (Emphasis added)

It is the Carrier’s position that Rule (13f) does not mention “made whole” or contain any mention of the numerous other items included in the Organization’s demand. It argued that the parties negotiated the aforementioned Rule regarding what an employee is entitled to if it is determined that the discipline was not justified and they are returned to service. It stated Claimant was entitled to “wage loss” only.

The Carrier argued that the wage loss on its property is computed by deducting outside earnings from the base earnings the employee would have made had the Claimant remained employed. Therefore, it determined that the Carrier was only responsible for wage loss from the date of Claimant’s dismissal until Claimant was returned to service. Carrier relied upon Public Law Board 2576, Awards 3 and 4 that addressed the issue of an offset against outside income as well as other Awards.

It further argued that it is a well-established principle that Adjustment Boards do not have authority to award damages not expressly provided for in the Agreement such as premiums for Hospitalization and Life Insurance, as well interest on a grievance (See Second Division Award 6383) or additional compensation for expenses related to Health & Welfare or 401K monies and to award such would be improper and contrary to the Agreement. The Carrier stated that Third Division Awards 20348, 21426, 28440 and 29226 along with many other Awards stand for those propositions and should be followed.

The Carrier further asserted the Organization has only recently decided to pursue 401K benefits for reinstated employees. It argued that such request is completely foreign in railroad discipline cases and is not supported by any provision of the Agreement. It reiterated that Rule 13(f) of the South Agreement is explicit that a reinstated employee may only receive net wage loss, if any, and nothing more. Moreover, Appendix 19 and Appendix 24 of the South Agreement, which are the provisions establishing the 401K plan makes no additional reference to 401K

monies being included in potential discipline reinstatements. It argued an award of any 401K monies would constitute a complete break from railroad arbitral history and should not be considered as a portion of a remedy on any Claimant's behalf.

The Carrier concluded that the Board has no authority to change the express written terms of the nationally-negotiated Health and Welfare Plan or Rule 13(f) and the Organization's proposed remedy is a claim for punitive damages and contrary to the Agreement. It asked that Claimant's and Organization's request be denied.

The Board has been requested to issue an Interpretation of Award No. 202 which is the first of five Interpretation Requests. The five Requests are addressed in Award Nos. 287 – 291. All of the Requests were made on the same date and are the first Interpretation Requests presented to this Board during its ten plus years of existence. The majority of the Requests have a commonality regarding the non-payment of monies other than "wage losses". That issue will be addressed in the instant Award No. 287 (lead case) as well as subsequent Awards where the same issue has arisen. The Interpretation Request in the subject dispute was narrowed down by the Organization to the following statement:

**"...Carrier is required to reimburse the Claimant for out of pocket medical expenses that he incurred during the period of his improper dismissal."**

Therefore, the Award will only address the aforementioned statement as to whether the Carrier is obligated as the Organization asserted to reimburse the Claimant for out-of-pocket medical expenses that Claimant incurred while in a dismissed status.

Turning to the record it is clear that this Board has returned many employees with seniority intact, all benefits unimpaired and made whole for loss of all monies since being removed from service, until reinstated in accordance with Rule 13(f) of the Discipline Rule. Property history has shown that the parties understood and seemingly agreed as to what reinstatement meant under Rule 13(f) and what the Carrier liabilities included.

It was not refuted that the parties have returned employees to service and those Claimants were only paid for net wage loss deducting outside earnings from the base earnings the Claimant would have made if they had remained fully employed.

Both parties make strong arguments for their respective positions. The Carrier's argument is based upon a historical practice wherein it asserted that Rule 13(f) has been in existence for a long period of time and the framers of the Agreement and their successors understood the language of the Rule when they agreed to reinstate employees and afforded those employees "wage loss" only.



The Organization argued that if an employee is dismissed from service and that dismissal is found to be in error the Claimant should not be required to pay a penalty for the Carrier's mistake. It argued that to not make the Claimant whole for health costs, such as reimbursement for insurance premiums to continue insurance coverage allows the Carrier to return employees to service without paying those employees the full amount of monies those employees have lost. It argued that the Claimant should be made whole for all losses.

Contrary to the Carrier's assertion it appears there has not been a true meeting of the minds between the parties over the proper interpretation of Rule 13(f) and a very similar Rule 40G for at least the last nine years as the question of what is owed a fully reinstated employee has been arbitrated on several occasions.

The record indicates that since 2013, the inclusion of out-of-pocket expenses as part of a Rule 40G remedy has been affirmed by no less than eight arbitrators. Additionally, the record indicates Interpretations to Awards 46, 48, 49, 50, 57, 59 and 60 of Public Law Board No. 7590 determined in pertinent part:

**"...a comparison of the Rule 40G to the South Rule 13F shows that comparison of "net wage loss" to "wage loss" to be a distinction without difference. There is not a difference in those two meanings and the remainder of the provisions are nearly identical. The cited Rules have the same meaning."**

Examination of Case No. 65 of Public Law Board No. 7602, between the same parties to this dispute, shows that the Board awarded lost overtime and reimbursement for medical expenditures that would have been covered, but for the lapse in Claimant's Health and Welfare Benefits. It is further noted that in the Carrier's Dissent it took no exception to the awarding of overtime payments or reimbursement of medical expenses.

The Board recognizes the importance of the Carrier's historical argument that the parties have mutually understood that reinstated employees were entitled to only "net wage loss". However, that argument has been rejected by several esteemed arbitrators that have determined that there had not been a meeting of the minds as to the meaning of Rule 40G which has been found to be substantively the same as Rule 13(f). For example in Interpretation No. 1 to Third Division Award No. 41868 the Board stated in pertinent part:

**"...Interpretation No. 1 to Award 41708 (Employees' Exhibit B-3) is lengthy, in large part because it presents a range of quotations from arbitration literature that shows, among other matters:**

**“It is fairly well-settled that benefits are a form of wages and should be included in back pay awards as part of a make-whole remedy.” (Employees’ Exhibit B-3, Sheet 19.)”**

**Interpretations of what has been agreed to by the parties in this industry must be rooted solely in this industry’s history, but consideration of how this matter is addressed elsewhere shows that the reimbursement ordered in Award 41686 is far from rare in this country’s collective bargaining community. The Awards and Interpretations cited by the Organization indicate that, at least in present years, this is also true of this industry.**

**The Awards and Interpretations cited by the Organization and its observation uncontested by the Carrier that the last twenty decisions issued on this matter supported by the Organization’s position undercuts the contention made on page 2 of the Carrier’s Submission that it followed “long established precedent for reinstating employees to service.””**

As stated above, this is not a case of first impression as several arbitrators have previously determined that out-of-pocket insurance premiums and other out-of-pocket medical costs should be covered when employees are reinstated to service. Therefore, it is clear that arbitral precedent on-the-property indicates there was not a meeting of the minds as to the meaning of Rule 13(f) and recent decisions involving the same parties have determined that reinstated employees are entitled to more than “net wage loss”. The Board will not take exception to those Awards.

Furthermore, it is an established principle that provisions of an Agreement or Rule supersedes the practices incompatible therewith (See Third Division Award 26314 and 28034) and deviations of the Agreement or Rule did not change it (See Third Division Award 18967). Lastly, failure to prosecute rightful claims in the past does not estop present action (See Third Division Awards 12941, 14896, 18957 and 20422).

It is determined that the Claimant is entitled to out of pocket medical expenses that would have been covered by Claimant’s medical plan during the period he was held out of service. The Claimant should not be required to pay more in premiums, deductibles and co-pays than he would have paid had Claimant continued to work for the Carrier rather than being in a dismissed status. Additionally, the Claimant should not receive a “windfall” gain. Therefore, the Board requires the Claimant to provide the parties receipts and/or other proof of his medical costs that would have been covered by his medical plan until such time Claimant was returned to active service. The matter is remanded to the parties to determine the monies owed Claimant that would have been covered by Claimant’s insurance had Claimant continued to be employed by the Carrier uninterrupted by Claimant’s dismissal. The Board finds and holds that the

Organization's Interpretation Request for payment of out-of-pocket medical expenses incurred by Claimant during his dismissal period is sustained. The Board further notes that the instant decision is limited to the narrowed issue set forth by the Organization in its Interpretation Request Conclusion of August 13, 2020. However, the limitation of this decision should not be inferred to take exception to the recent Awards between the parties that addressed other issues.

**AWARD**

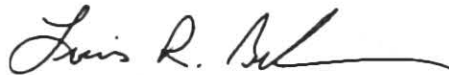
Interpretation Request sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: 10-14-20