

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 204, (Case No. 204)**

**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 February 22, 2016, when Claimant, Paul McCoy (0167783), was dismissed for failure to establish protection for men and equipment prior to fouling track at or near MP 341.8 on the Cherokee Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule 6.3 – Track Occupancy.**
- 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 February 22, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0150) (Organization File No. 518-SL13N1-15196)**

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 November 9, 2015, Claimant was working as a Welder and had track authority on the main track between eastbound control signal Afton “switch yes” and westbound control signal Afton “switch yes”. However, it was alleged the Claimant went to work at an alternative location, West Fairland, rather than where he had track and time and because of that allegation the Claimant was directed to attend a formal Investigation on November 20, 2015, which was mutually postponed several times until January 25, 2016, concerning in pertinent part the following change:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to establish protection for men and equipment prior to fouling track at or near MP 341.8, Cherokee Subdivision, on November 9, 2015 at approximately 1508 hours.

This investigation will determine possible violation of MWOR 6.3 Track Occupancy.”

On February 22, 2016, 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 Claimant was denied a “fair and impartial” Investigation because the Hearing Officer failed to be an impartial “trier of facts” as he continually became involved in conversations during the Hearing as well as offering opinions. Additionally, the Organization asserted that the transcript was unreliable because words were missing, changed or conveniently show inaudible, therefore, based upon the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it argued the Carrier failed to meet its burden of proof that the Claimant worked without protection on November 9, 2015, at or near MP 341.8. The Organization acknowledged that the Claimant mistakenly copied track and time at East Afton and instead was welding on the Frog at West Fairland, however, that did not prove the Claimant was guilty of the charges. It argued that testimony provided by the Claimant and substantiated by the email statement (Exhibit 8) (Attachment 2) provided by Mr. Eric Blackledge shows that Foreman Blackledge did see the Claimant’s Statement of on Track Safety Lookout Form and he did verify it was completed for the proper location West Fairland. It further argued that Roadmaster Bruce testified on page 23 of the transcript that a lookout is adequate protection, therefore, it asserted that because the Claimant had maintained a lookout, the Welder’s Helper, while he was working on the Frog there was no violation MWOR 6.3 – Track Occupancy. It concluded there was no basis for discipline 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 errors on the part of the Hearing Officer during the holding the Claimant's formal Investigation. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted the testimony of Roadmaster Bruce showed that on November 9th the Claimant was working as a Welder, had track authority on the main track between eastbound control signal Afton "switch yes" and westbound control signal Afton "switch yes", but instead worked at a different location, West Fairland, where he did not have track and time authority. The Carrier pointed out that the Roadmaster's testimony was confirmed by the Claimant's testimony on page 41 of the transcript. Roadmaster Bruce further testified that when the Claimant was interviewed shortly after the incident he never mentioned that his Helper was acting as a Lookout while Claimant was welding.

The Carrier argued that at the Investigation the Claimant gave a completely different account of the incident. At the Investigation Claimant insisted he had told the Roadmaster his Helper was acting as Lookout while he worked on the Frog. It pointed out that Claimant testified that he did not have a copy of the Statement of on Track Safety because his unknown Helper had it. It argued that Claimant said he panicked when the Roadmaster questioned him about the incident, but according to the Carrier there would have been no reason to panic if he had been working with protection in accordance to the Rules. The Carrier further argued that upon recall to the Investigation the Roadmaster directly rebutted the Claimant's version of the conversation between the parties. Roadmaster Bruce testified that Claimant had admitted his mistake (see transcript page 15) and the Roadmaster emphasized at no time did the Claimant tell her they were working at West Fairland with lookout protection. Lastly, it argued that the Claimant's story was contradicted by the fact his Helper accepted responsibility for the Rule violation and signed a waiver. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the Organization's procedural arguments and are not persuaded that the Claimant was denied a "fair and impartial" Investigation. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

There is no argument between the parties that the Claimant did not secure track and time authority from the Dispatcher to work on the Frog at or near MP 341.8. Roadmaster Bruce testified on page 15 of the transcript the Claimant had told her **"...that he mistakenly copied track and time at East Afton and was in fact welding on the Frog at West Fairland."**

The question to be resolved is whether or not the Claimant had provided an alternate protection via the use of a Lookout. Claimant contends he had a Lookout, his Helper, while he was welding, which the Organization reaffirmed in its appeal letter when it stated in pertinent part on page 3 “...**Mr. McCoy using his helper as the lookout...**”. Claimant testified that because he was flustered over his error to not secure time and authority from the Dispatcher he failed to initially tell Roadmaster Bruce that he had a Lookout in place while he worked and while they were foul of the track. Claimant contended that he and his Helper did tell Ms. Bruce while riding back in a vehicle that there was Lookout protection while the Claimant was working. Roadmaster Bruce categorically denied on page 46 of the transcript of ever being told that the Claimant had used his Helper for Lookout protection or that she had heard anything about a statement of on track safety.

As proof of his assertions the Claimant offered an email from Foreman Blackledge that stated:

“I did see their lookout form they had filled out for West Fairland.”

If there was a Lookout Form why wasn't it produced? Claimant testified that his Helper filled out the Statement of on Track Safety and/or Lookout Form and had kept the form. Assuming for the sake of argument that testimony is correct then the obvious questions is why did the Helper who was allegedly acting as the Lookout accept responsibility for the Rule violation and sign a Waiver and not produce the Lookout form.

Claimant's credibility is questionable at best, on page 37 of the transcript the Claimant admitted when Roadmaster Bruce called him he first told her he was at East Afton rather than West Fairland. Claimant excused his initial lack of honesty on the basis that he was fearful of being disciplined. Claimant's inability to be forthright does little to bolster his argument that after the first call from his Supervisor he was honest about the incident, especially when the record shows that his Helper took responsibility for the same violation. If proper lookout protection had been provided with the appropriate forms filled out there would have been no reason for the Claimant's Helper to have signed a Waiver accepting responsibility for a Rule violation. Despite a vigorous defense by the Organization the Claimant was his own worse witness as his testimony is best described as being self-serving whereas Roadmaster Bruce's testimony was straight-forward and credible. 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 less than three years of service. The instant discipline was the Claimant's third Serious Level 5 discipline event within his 36 month review period and the second involving Track and Time Authority. The Carrier's Policy for Employee Performance Accountability (PEPA) allows for dismissal after three serious disciplinary events during a 36 month review period. 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 and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18