

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 206, (Case No. 206)**

**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 March 22, 2016, when Claimant, Kenneth Small (1752419), was dismissed for exceeding track authority limits on January 15, 2016, at approximately 0909 hours on the Galveston Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rules 14.2 – Designated Limits and 14.3 – Operating with Track Warrants.**
- 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 January 15, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.
(Carrier File No. 14-16-0239) (Organization File No. 2421-SL13N1-1614)**

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 January 15, 2016, the Claimant was working as a Welder on a mobile gang on the Galveston Subdivision in Texas. A remote audit detected on the

aforementioned date that the Claimant may have exceeded his authority at South Siding Switch Texas City and because of that allegation the Claimant was directed to attend a formal Investigation on January 28, 2016, which was mutually postponed several times until February 23, 2016, 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 exceeding track authority limits on January 15, 2016 at approximately 0909 hours on the Galveston Sub.

This investigation will determine possible violation of MWOR 10.3 Track and Time.”

On March 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 Notice of Charges were changed at the Hearing. It argued that Claimant was charged with violating MOWR 10.3 Track and Time, however, at the Investigation the Carrier added MOWR 14.2 and 14.3. Rules that Claimant was subsequently dismissed for. The Organization argued those Rule changes impaired the Organization’s defense of the Claimant as they were not prepared for those changes thus denying them adequate time to prepare a defense. Additionally, it argued that the Hearing Officer improperly led and directed witnesses in their testimony. Based upon the aforementioned procedural errors the Organization argued that the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier failed to meet its burden of proof that the Claimant exceeded his track authority limits. The Organization argued that the Claimant had a Welder Helper, Terek Hamedi, who was working with him and was a witness as to what transpired on January 15, 2016. According to it, Mr. Hamedi submitted a written statement regarding the incident that substantiated the Claimant’s testimony that the Claimant had not exceeded his track authority limits. It further argued that the record shows that the Claimant testified on page 71 of the transcript that he called the Dispatcher to ask him why his vehicle was alarming and that was when he noticed his thumbwheel was on Main One and he switched it back to Main and the alarm ceased. The Organization also asserted that record verifies that many HLCS units are often defective and was the probable cause the Claimant’s HLCS unit erred. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim 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 of 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 that data showed that the Claimant had exceeded his track authority by occupying the siding at South Siding Switch Texas City. It argued that the audit further indicated that at approximately 9:09 a.m. the Claimant went approximately 288 feet past the South Siding Switch to MP 10.254. The Carrier stated that most important to this case is the Claimant did admit that Vehicle number 23545 was his truck and he did receive a red signal which means the alarm went off. According to it, this occurs when a vehicle is outside of its track limits not by merely moving the thumbwheel as alleged by the Claimant. It suggested that the Claimant had essentially admitted his guilt on page 62 of the transcript when he acknowledged that the alarm went off. 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 arguments. The Organization argued that the Carrier erred when it read additional Rules into the transcript that the Claimant allegedly might have violated and in doing such it denied the Organization and the Claimant the opportunity of fully understanding what the Claimant was being charged thus denying the Claimant a "fair and impartial" Investigation. Rule 13 requires: **"The notice must specify the charges for which investigation is being held."** The Notice of Investigation was clear that Claimant was being investigated for his alleged exceeding track authority on January 15, 2015, and the reading of two additional Rules into the transcript did not change the Organization's understanding of the charges nor was there any showing that somehow the Organization was "blindsided" in their defense of the Claimant. The Organization also argued that the Hearing Officer improperly led and/or directed witnesses during the Hearing. Examination of the transcript does not find that argument to be persuasive. 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.

The record shows that the Claimant testified that he did not exceed his track authority on January 15, 2016, and he submitted a written statement from the Welder Helper that was working with him on the aforementioned date who confirmed the Claimant's testimony. Carrier stated that the data and the expert testimony of Carrier Witnesses entered at the Hearing showed that Claimant's vehicle exceeded his track authority by approximately 288 feet past the South Siding Switch to MP 10.254.

Contrary to the Carrier's assertion the Claimant never admitted or inferred that he was guilty as charged when he stated the alarm went off on his HLCS unit. Instead, the Claimant testified that on January 15th he inadvertently moved the thumbwheel on the HLCS unit from

Main One to Main that caused the inaccurate GPS coordinates and the alarm alert (See page 71 of the transcript). The Manager Operating Practices, Eric Powell, confirmed that the moving of the thumbwheel as explained by the Claimant would turn on the alarm alert. Powell further testified on pages 55 – 57 and 79 that GPS coordinates were used in determining the Claimant's violation and the moving of the thumbwheel does not change the GPS coordinates.

Strong arguments were made by both parties. The Carrier stated in its denial letter of July 6, 2016, the following:

"...It is clearly established that the hearing officer must resolve disputes concerning the credibility of witnesses. The Hearing Officer believed the testimony of the witnesses and discounted the testimony of the Claimant."

The Board does not take exception to those Awards that have determined that the Hearing Officer has the responsibility to measure the credibility of witnesses, however, that responsibility requires the vetting of all witnesses and/or statements. Examination of the record reveals that the Helper working with the Claimant, Mr. Tarek Hamedi offered a written statement that corroborated the Claimant's version of what transpired on January 15, 2016. There was no showing in the record that Mr. Hamedi had any reason not to be forthright or that his written statement was not credible. The record further reveals that the Carrier offered no reasoning as to why the Hearing Officer chose to discount the statement of Mr. Hamedi or any explanation in its denial why that written statement was given no weight. Simply put the statement of a credible individual with nothing to gain was never rebutted. Countless Awards have determined that testimony or statements that are not rebutted are considered to be factually correct.

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 loss for all monies since being removed from service, until reinstated in accordance with Rule 13(f) of the Discipline Rule. After reinstatement the Claimant will still have the responsibility of working off his disciplinary record as it was at the time of his dismissal. The Board take the liberty to forewarn the Claimant that in the future he needs to work safely and abide by all Carrier Rules.

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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. 288, (Case No. 288)**

**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. 206:

On March 3, 2020, the Organization advised the Neutral Member of the Board that a dispute had arisen over the implementation of Award No. 206 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. 206 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 January 15, 2016, continuing forward and/or otherwise made whole.”

Award No. 206 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 to fulfill the determination of Award No. 206?”**

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 March 22, 2016, 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.

The position of the respective parties' and their various arguments are identical to those expressed in Award No. 287 and will not be reiterated for the sake of brevity, but are made a part of this Award by their reference. The Interpretation Request 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, this 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.

The Board has been requested to issue an Interpretation of Award No. 206 which is the second of five Interpretation Requests to this Board during its ten plus years of existence. Each of the Requests has a commonality regarding the non-payment of monies other than "wage losses". The issue addressed in Award No. 287 (lead case) is the same and only issue of the subject dispute. Other issues that arose in the subsequent three cases will be addressed separately.

The reasoning set forth in Award No. 287 will not be repeated for the sake of brevity, but is made a part of this Award by its reference. For the same reasons expressed in Award No. 287 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