

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 213, (Case No. 213)**

**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 July 14, 2016, when Claimant, Nathan Olson (1665843), was dismissed for occupying Main Track without proper authority. The Carrier alleged violation of Maintenance of Way Operating Rule 6.3.1 -Main Track Authorization.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant, remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing July 7, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-16-0352) (Organization File No. 2413-SL13N1-1680)**

**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 May 23, 2016, the Claimant was a Track Supervisor and it was alleged he may have occupied Main Track without proper authority and because of that allegation the Claimant was directed to attend a formal Investigation on June 6, 2017, which was mutually postponed until July 7, 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 occupying Main Track without proper authority, MP 551.6 on the Hereford Subdivision, at approximately 1625 hours on May 23, 2016, while assigned as Track Supervisor.**

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

On July 14, 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 should be considered void account of inaccurate details the Claimant was charged with. It further argued the Claimant had been prejudged which was shown by the fact that when the Claimant requested a Waiver prior to the Investigation it was denied. Lastly, it asserted that because of the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, the Organization argued there were no exhibits showing GPS or Mile Post (MP) locations to prove that the Claimant actually exceeded his Track Authority limit, therefore, it reasoned that the Carrier had not met its burden of proof. The Organization also argued that even if the Carrier could show that the Claimant made a mistake (which it did not do) it should take into consideration that this was a new territory for the Claimant and the Carrier failed to send someone with the Claimant to familiarize him with the new area. It concluded by requesting that the dismissal be rescinded and the claim be sustained as presented.

It is the Carrier’s position that there were no procedural errors during the Claimant’s formal Investigation. It addressed the Organization’s procedural argument regarding the Investigation Notice being defective because the location of the occurrence was at a different location than what was listed in the Notice, was without merit. It argued that Rule 13 requires: **“The notice must specify the charges for which investigation is being held.”** It asserted the specific charges on the Notice were clear that Claimant was being investigated for his **“occupying Main Track without proper authority MP 551.6 on the Hereford Subdivision, at approximately 1625 hours on May 23, 2016 while assigned as Track Supervisor.”** It further argued there was nothing other than Claimant’s testimony to prove he set on at milepost 551.8 versus 551.6 but in either instance both mileposts were a mile outside Claimant’s track authority rendering the Organization’s argument moot. It requested the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the Claimant was working as a Track Supervisor in Amarillo, Texas, on May 23, 2016. On that date Claimant was hy-railing on the Hereford Subdivision; his track authority limits were on Main Track 2 between crossover Eastern and West crossovers Roberts. On May 23<sup>rd</sup> the remote audit team alerted Roadmaster Joseph Diefenback who testified and entered evidence showing that at approximately 4:25 p.m. on the 23<sup>rd</sup> Claimant set on the main track near milepost 551.6 without authority to be on the track, about one mile west of his limits at Eastern. Claimant got an exceed alarm on his HLCS and then after setting the thumbwheel to "NA" to silence the alarm, he reversed course and set off the crossing. Additionally, it pointed out that the Claimant admitted he erred. Lastly, it argued that after having proven its allegations against the Claimant 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 the Organization's procedural argument. That argument is not persuasive as the transcript reveals that the Claimant and his Representative understood the Notice of Investigation and nothing that arose during the Hearing caught them off-guard or "blindsided" them during the defense of the Claimant. It is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

The transcript shows that Claimant testified on page 25 of the transcript as follows:

**"NATHAN OLSON: And, uh, I'll just be honest with you. I, uh, I screwed up. At 551.8 is where I set on. I needed track and time in order to be in compliance from East Tower to Roberts. I requested Eastern to Roberts. That is, Eastern is about, uh, 1.1 mile from where I needed to set on. I looked at it three times and saw East Tower rather than Eastern. I set on. I went about 20 feet. The, uh, alarm went off. I turned it off, I backed up, I set off. Um, I panicked, uh. I lied to the Dispatcher about it. I lied to Joe about it, um. In all honesty, I knew from my previous record that I was going to be fired, and all I thought about was self-preservation. I, uh, I don't have an excuse. I was just scared for my job."**

Claimant's testimony above, clearly shows 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 ten years of service. Review of Claimant's Discipline Record shows the subject incident was the Claimant's third Serious Level S discipline event and fourth total event within his 36 month review period. The discipline assessed was in accordance

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with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, 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