

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 222, (Case No. 222)**

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

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
Louis R. Below, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing November 29, 2016, when Claimant, Mark S. Johnson (1288455) was dismissed for misuse of a hand-held electronic device, failure to approach crossing prepared to stop, and failure to yield to vehicular traffic while operating Company vehicle 24530 on October 4, 2016. The Carrier alleged violation of MWOR 1.10 Games, Reading, or Electronic Devices and MWOR 6.50.2 Movement of On-Track Equipment.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime, as well as all health, dental and vision care premiums, deductibles and co-pays that he would have not paid if he had not been unjustly removed from service, commencing November 29, 2016, continuing forward so as to make Claimant whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-17-0006) (Organization File No. 518-SL13C3-1644)**

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 October 4, 2016, the Claimant, Foreman Patrol Gang, was operating Company vehicle #24530 when it was alleged that Claimant might have violated

MWOR 1.10 and MWOR 6.50.2 and because of that Claimant was directed to attend a formal Investigation on October 18, 2016, which was mutually postponed until November 11, 2016, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of a hand-held electronic device, failure to approach crossing prepared to stop, and failure to yield to vehicular traffic while operating Company vehicle #24530 on October 4, 2016 on Thayer South Subdivision per Drive Cam FGC03820 in accordance with Maintenance of Way Operating Rule 6.50 Movement of On-Track Equipment and Maintenance of Way Operating Rule 1.10 Games, Reading, or Electronic Devices. The date BNSF received first knowledge of this alleged violation is October 6, 2016.”

On November 29, 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 added additional Rules to Charges not set forth in the Notice of Investigation and he submitted an in-accurate transcript in order to divert any reader of the transcript from the true facts. It also argued that the Carrier improperly entered only photographs from the Drive Cam rather than the full video. Additionally, it argued that the Carrier had pre-judged the Claimant as being guilty. Lastly, it asserted the Carrier initially told the Claimant the charge was not serious and would most likely result only in a letter in his file, however, when a Waiver was asked about the only option given Claimant was for him to present his resignation, thus it reasoned the discipline was excessive. The Organization asked that because of the aforementioned errors the discipline should be removed without reviewing the merits.

Turning to the merits, the Organization argued that the record shows that the Claimant was not in violation of any Rules. For example, it argued that the Carrier asserted that Rule 6.50.2 required the Claimant to come to a complete stop, whereas, the Organization asserted that was incorrect. It argued the Rule does not require On-track equipment to stop, but instead it states On-track equipment must approach road crossings “prepared to stop” and must yield to vehicular traffic and it is permissible for On-track equipment to proceed if the vehicular traffic stops and waits for the On-track equipment as happened in this instance. In addition, the crossing is equipped with crossing arms and cross bucks which are installed there to make the public aware to be alert that train and/or On-track equipment may move across the crossing at any time. Regarding the allegation that Claimant misused his electronic device while his vehicle was moving the Organization argued the Claimant was making necessary keystrokes to keep his computer

active to view his track authority as he released a previous track authority in accordance with the past practice and the exception set forth in MWOR 1.10 and attested to by other employees. It concluded there was no basis for discipline and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position there were no procedural errors. It first argued that any incorrect transcript entries were not intentional and the Carrier did not deliberately try to mislead anyone who might read the transcript and the missed transcriptions were extremely minor and did not prejudice the Claimant or affect how the transcript reads or the Hearing Officer's decision. Next it argued that the Notice of Investigation was sufficient and the citation of Rule 6.50 encompassed all of its subparts including subpart Rule 6.50.2, therefore, contrary to the Organization's argument it did not enter any new Rules at the Hearing. It also asserted that the photographs were enough to prove the violations and it further argued that the Hearing Officer subsequently entered the video pursuant to the Organization's request and entered it as an exhibit. It further argued there was no showing that Claimant was prejudged as being guilty nor was there any evidence offered that Claimant's defense was hindered. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier asserted the evidence shows that on October 6, 2016, Division Engineer Stuart and Roadmaster Steel were notified via email of a Drivecam event showing that Claimant was driving near a crossing and noticed a car approaching. According to it the Claimant slammed on his brakes which triggered Drivecam to record. The recording showed Claimant typing on his keyboard while his vehicle was hy-railing, traveling at a speed of 20 to 30 m.p.h. thus he was in violation of Rule 1.10 which Claimant admitted to on page 67 of the Transcript. It further stated that the photographs verified that Claimant was caught off guard when he saw the vehicle approach, and was not prepared to stop and continued through the crossing and never stopped, therefore, he was also in violation of Rule 6.50.2. 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 is correct that a failure to furnish the Organization a correct transcript can be grounds for setting aside discipline without reviewing the merits, however, there must be a showing that the errors hindered the Organization in its appeal. Review of the instant case shows there were a few minor errors in the transcript, but there was no showing that any of those errors were significant or prejudiced/harmed the Claimant's defense. Additionally, the Board is not persuaded by the other Organization's alleged procedural errors. 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.

Review of the record reveals that the Organization stated in its appeal letter of January 6, 2017, the following:

“Mr. Johnson was making necessary keystrokes to keep his computer screen active to be able to view his track authority and was making simple keystrokes pressing enter as he released a previous track authority. Mr. Johnson did not deny it because he understood he was doing it as him and others have routinely done it for years.”

The Organization also attached to its appeal letter statements from two other employees which it stated proved that the Claimant did nothing wrong when he released a previous track authority while his hy-rail vehicle was moving. The Carrier objected to the introduction of the statements on the basis they should have been presented at the Hearing where it would of had the opportunity to rebut them. Without getting into the question of whether the statements were timely entered, examination of the statements reveals that both employees stated they use electronic devices for track inspection purposes – which is allowed, however, neither statement states employees can use their laptops for other than track inspection purposes when in motion.

After the introduction of the two statements by the Organization the Carrier advised the Director of Operating Rules, Mr. D. Adams, whose duties include making sure that the Rules are applied correctly and to interpret them that the Organization was arguing that the Claimant was using his keyboard while in motion in order to keep his computer screen active and able to view his track authority and was making simple keystrokes pressing enter as he released a previous track authority in accordance with the exception set forth in MWOR 1.10. Mr. Adams was asked would Claimant’s conduct fall within that exception and Mr. Adams stated the following:

“The intent of the highlighted portion of the rule Equipment Operators may use necessary keystrokes functions for equipment control and testing/inspection purposes when in motion is to accommodate equipment controlled by a keyboard such as the moveable machine head components or rail grinders or similar on-track machines, and to allow for GPs coordinate marking, etc., during testing and inspections using tools such as EAM.

In addition, a Track & Time is considered a Mandatory Directive as defined by MWOR 6.11. MWOR 2.14 prohibits the release of a mandatory directive by an employee at the controls of moving equipment.” (Underlining Board’s emphasis)

Additionally, Division Engineer Stuart, who was not asked to respond to this line of defense while testifying at the Investigation stated the following:

“The claimants conduct does not fall within the exception due to he is not allowed to type on electronic device while in control of a hyrail in motion. Equipment operators that can use necessary keystroke functions for equipment control and testing/inspection purposes when in motion would be, for example tamper operator making adjustments to line and raise while operating and or similar to Detector car that has an employee in the back testing the rail for defects.”

As stated above, the Carrier argued that Track & Time is considered a Mandatory Directive as defined by MWOR 6.11 and MWOR 2.14 prohibits the release of a mandatory directive by an employee at the controls of moving equipment. Examination of the Carrier’s argument finds it to be on-point with both Rules. MWOR 2.14 specifically states in pertinent part:

“A mandatory directive may not be released by an employee at the controls of moving equipment.”

Mr. Adams and Mr. Stuarts statements compliment the evidence presented during the Hearing which shows that Claimant did not have permission while his hy-rail was in motion to use his keyboard to release authority and was in violation of Rule 1.10.

The Claimant agreed in his testimony that he was required to approach the crossing prepared to stop. Review of the photographs and the testimony of the Division Engineer suggest that Claimant might have been caught off guard when he saw the vehicle approaching the crossing as he hit his brakes hard enough to trigger the Drivecam. The initial photograph of the incident shows Claimant’s speed to be just above 31 mph and the last photograph shows that Claimant had slowed to 21 mph. On page 68 of the transcript Claimant testified he was prepared to stop, but only proceeded forward because the car had stopped. The Organization argued that the Claimant was not required to stop in this instance because the vehicle yielded to the Claimant whereas the Carrier stated the Claimant should have stopped. On page 45 Division Engineer Stuart was questioned regarding Rule 6.50 as follows:

“Brad Hollaway: Is it permissible for the public to yield to us?

Howard L. Stuart: It is permissible, but we are to yield to them, so if they stop, we stop. They go first.

Brad Hollaway: Okay.

Howard L. Stuart: The rule states yield to vehicular traffic.” (Underlining Board’s emphasis)

On page 65 of the transcript Mr. C. Steele, Roadmaster, was also questioned on whether or not the Claimant was permitted to proceed through the crossing in accordance with Rule 6.50 after the car stopped at the crossing. Mr. Steele was questioned as follows:

“Jeffery L. Fry: Mr. Steele, when the, when a car stops at a road crossing to allow you to pass is that a violation of the rule if you continue on?”

Chris Steele: If, if a car stops.

Jeffery L. Fry: If the car stops, sees you and stops, Mr., like it did for Mr. Johnson, and Mr. Johnson proceeded on. Is that a violation of the Rule?

Chris Steele: Um, not stopping, not.” (Underlining Board’s emphasis)

Carrier Officers H. L. Stuart and C. Steele disagreed on whether or not the Claimant was correct to proceed forward after the car stopped at the rail crossing to allow the Claimant’s vehicle pass through the crossing. Roadmaster Steele’s interpretation of the situation was consistent with the Claimant’s understanding of the Rule. The Board makes no decision as to which interpretation was correct, but instead notes that Carrier Supervisors were not in agreement as to whether the Claimant violated Rule 6.50. In view of the fact that there was disagreement between Carrier’s primary witnesses against the Claimant at the Investigation as to whether or not the Claimant violated Rule 6.50 when Claimant proceeded through the crossing after the car stopped at the crossing the Board has determined that the Carrier did not prove Claimant violated Rule 6.50.

In summary the Carrier has proven that Claimant violated Rule 1.10 when he used his keyboard to release authority while passing through a railroad crossing, but it did not prove that Claimant violated Rule 6.50 when he proceeded through the crossing after the car stopped at the crossing.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 18 years of service. In February of 2014, Claimant received a Serious Violation with a three year review period. Additionally, Claimant received a Formal Reprimand in December of 2015 for failure to have his laptop closed while operating a company vehicle. Under the Carrier’s Policy for Employee Performance Accountability (PEPA) the Claimant’s Second Serious discipline made him eligible for possible dismissal. However, in this instance because there was disagreement between Carrier Officers as to whether Claimant

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violated Rule 6.50 and Claimant's forthrightness about the incident in dispute the Board finds and holds that the discipline was excessive and is reduced to a lengthy suspension which is corrective in nature and in accordance with the spirit of PEPA. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy following reinstatement.

AWARD

Claim partially 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 by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



Louis R. Below, Employee Member

Award Date: 3/29/19