

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 383, (Case No. 383)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 21, 2021, when Claimant Robert C. Johnson (1408459) was assessed a Level S 30 Day Record Suspension with a One Year Review Period for failure to ensure that all men and equipment were clear prior to calling a train through the limits of the Form B at approximate MP 300.2 on the Seligman Subdivision on May 26, 2021, at approximately 1150 and your dishonesty in statements surrounding the event.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing July 21, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0263) (Organization File No. 2417-SL13C5-2128)**

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 Claimant was assigned as a Group 3, Class 1 Foreman on May 26, 2021, and on that date at approximately 1150 hours Trackman/Flagman W. Gonzales, Jr., working under the Claimant’s supervision, was providing protection for MOW forces replacing ties on Main 1 near MP 300.2 on the Seligman Subdivision. Mr. Gonzales, Jr., had authorized several trains through the Form B limits on Main 2 after allegedly being notified by the Claimant, who was the

Employee In Charge (EIC), that all men and equipment were clear. At approximately 1150, another train was authorized to pass through the Form B by Mr. Gonzales, Jr, but it was alleged that not all men and equipment were clear. A near miss was reported involving couple of MOW employees who were working between Main 1 and Main 2 shoveling ballast and because of that Claimant was directed to attend a formal Investigation on June 25, 2021, (Second Corrected Notice) concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to ensure that all men and equipment were clear prior to calling a train through the limits of the Form B at approximate MP 300.2 on the Seligman Subdivision on May 26, 2021 at approximately 1150 and your alleged dishonesty in statements surrounding this event. The date BNSF received first knowledge of this alleged violation is June 10, 2021.”

On July 21, 2021, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a One Year Review Period.

It is the Organization’s position that the alleged incident occurred on May 26, 2021, and Claimant and six other employees that were working on that date at the work site were instructed to provide written statements on June 3, 2021, that were given to the Carrier that day. It asserted that Rule 13 of the Agreement states in pertinent part: **“Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company.”** The Organization argued the Carrier had first knowledge of the alleged incident on June 3rd, therefore, the holding of the Investigation on June 25, 2021, was held 22 days after the Carrier’s first knowledge in violation of Rule 13. It further argued that because of that procedural violation it requested the discipline be set aside without reviewing the merits.

Turning to the merits the Organization asserted the Carrier did not meet its burden of proof that Claimant was guilty as charged and it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that its first knowledge of the incident was June 10th. It stated Roadmaster Baiamonte testified, the first date that all of the statements were available for review was June 10th, not June 2nd or 3rd as alleged by the Organization. It asserted Claimant agreed that his individual statement was not provided until June 10th. It argued the combined statement presented on June 2nd was actually a single statement for three different employees - - Claimant, Mr. Montoya, and Mr. Hardy that was not acceptable because the request was for individual statement from all employees so as to review each employee’s recollection of the event.

Additionally, the Carrier asserted first knowledge was not May 26th either. The information provided by Mr. Gonzales, Jr., and Claimant on May 26th to Roadmaster Baiamonte was that no close call occurred. It argued first knowledge was not May 26th. Likewise, it was not May 28th or June 3rd. Simply because a Safety Hot Line Call on May 28th reported a possible miss on May 26th would not trigger time limits for holding an Investigation. In this case, conflicting information concerning the incident resulted in further review being necessary and it wasn't until June 10th the Carrier had sufficient information and all of the individual statements. Therefore, it further argued that was the date of first knowledge triggering time limits for scheduling an Investigation into possible misconduct.

Turning to the facts it argued the record shows Claimant violated MWOR 11.3 - Fouling Track, MWOR 6.3.1 - Track Authorization, and MWOR 1.6 - Conduct when Claimant did not make sure that all men and equipment were clear and was dishonest about the near miss that occurred May 26, 2021. Also, Claimant did not ensure that Mr. Ramirez was clear of the track violating MWOR 11.3 and MWOR 6.3.1. It further argued Claimant was less than truthful when questioned by Roadmaster Baiamonte regarding the near miss as well in his written statement provided on June 10th violating MWOR 1.6 – Conduct. Lastly, it argued that after proving that Claimant was guilty as charged it appropriately disciplined Claimant. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and is not persuaded that the Investigation was held in an untimely manner, therefore, the case will be resolved on its merits.

The record reveals that Claimant was the Employee In Charge (EIC) on May 26, 2021, working near MP 300.2 and Claimant informed Flagman Gonzales at approximately 1150 men and equipment were clear for train movement. The testimony and written statement of the various crew members confirmed that two of the crew members shoveling ballast were not clear and were involved in a near miss situation. For example, Mr. Ramirez, Trackman, wrote in his statement of the incident as follows:

“I, Matt Ramirez, was re-briefing with Bill Gonzales, Jeff Gentry, and Craig Johnson and during that conversation I had told Craig Johnson that he didn’t tell me or the crew that there was a train call through and that he needs to let us know and that wasn’t right, in front of Jeff and Bill as witnesses.

Then I told Jeff if there’s even a train trying to call or some come through, at least honk his horn in the backhoe if Craig Johnson isn’t going to wear a pac-set.

Sometime after this Craig Johnson had asked me if my underwear was okay after the incident as if nothing happened....” (Underlining Board’s emphasis)

The testimony above was not refuted and was substantiated by other witnesses that Claimant as the EIC did not forewarn his crew members that a train was traveling through the

limits of the Form B subjecting those employees to potential danger and harm. Substantial evidence was adduced at the Hearing that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 21 years of service with a clear disciplinary record. Claimant's offense was of a serious nature and had the possibility for dire consequences. The Board finds and holds that the discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

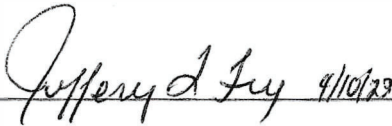
Claim denied.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Jeffery L. Fry, Employee Member

Award Date: April 10, 2023