

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

and

Case No. 17

Claim of R. M. Munguia

Level S 30-Day Record

Suspension - Failure to

Work within Track and

Time Authority

BROTHERHOOD OF MAINTENANCE OF WAY

EMPLOYEES DIVISION - IBT

STATEMENT OF CLAIM: Claim on behalf of Lead Welder R. M. Munguia requesting removal of the Level S 30-day record suspension and one-year suspension of welding seniority rights, with a three-year review period, from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has worked for the Carrier since October 13, 2003. On August 18, 2011, late in the evening, Claimant requested working limits to perform two welds at approximately MP 152.118 and 152.125. At approximately 12:10 a.m., an eastbound train approached the west end of the area where he and a co-worker were working. According to Claimant, he and a helper cleared the main and ensured all working materials were clear of the switch. Claimant admitted, however, that his plastic weld bucket, containing small tools, was not cleared of the switch. The approaching train struck the work bucket and pulled it away. The train crew put the train into emergency and stopped further down the track. Claimant eventually retrieved his bucket and completed his weld assignments.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWOR 6.3.1 (Main Track Authorization) and assessed him a 30-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant failed to work within his track limits and, thereby, violated Rule 6.3.1. BNSF points out that Claimant admitted in writing and at hearing that he did not clear his plastic weld bucket and that a train struck it. It points out, in addition, that Claimant testified that he was outside his track authority and that he made a critical error and mistake when he was working outside his track authority. It argues that various arbitration boards have held that, when there is an admission of guilt, there is no need for further proof and that the only remaining question is the degree of discipline.

BNSF asserts that the gravity of the situation cannot be overstated and that the fact that there were no injuries - to Claimant or his co-worker, and no damage to equipment - does not relieve him of his responsibility. Although it concedes that Claimant's deficiencies in providing protection did not result in a catastrophe, it maintains that the potential was there and its determination that his rule violation was serious is correct.

As to the penalty, BNSF asserts that the discipline imposed is appropriate and that leniency is not in the Board's jurisdiction. It asserts that the record suspension and probationary period assessed to Claimant were appropriate and, in fact, lenient. It points out that this was Claimant's second Level S which, according to PEPA, constitute a dismissible offense.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends, as a threshold matter, that Claimant was coached and counseled on the issue in the days following the incident. It asserts that this represents that "discipline" was assessed prior to one word of testimony being taken at an investigation and/or that the Carrier engaged in an investigation without the employee being offered the benefit of representation. The Organization maintains, therefore, that the Carrier violated its due process

procedure by forcing Claimant to participate in an unfair and biased proceeding.

The Organization contends, in addition, that Claimant testified that he could not remember the last time that he had to obtain Track and Time Protection from the Dispatcher and that his job assignment has him working on an almost daily basis with a Foreman as the Employee in Charge, who directs the work and obtains the protection. It asserts, in addition, that Claimant performed his Welder duties for more than 30 days after the date of his alleged violation and that, during this time, he was given the strict instruction that he was *not* to obtain protection for himself or any other work group.

As to the assessed discipline, the Organization argues that discipline is supposed to correct an employee's unacceptable behavior or performance. It maintains that taking Claimant out of service as a Welder cannot possibly correct either. The Organization contends that Welding gangs are tight-knit groups and that is the best place for Claimant to engage in the process of correcting his lack of understanding. It asserts that, when addressing performance issues, the more appropriate way to correct an employee is through non-disciplinary actions, such as coaching and counseling, training, accommodation and/or reassignment. It maintains that, when addressing behavioral problems, the discipline is supposed to be progressive. It contends that the instant discipline is extreme, unwarranted and unjustified and, even if the Carrier had sustained its charges, the discipline is excessive in proportion to the Carrier's allegations.

The Organization urges that the Claim be sustained, that Claimant's Level S 30-day record suspension and one-year suspension of welding seniority rights, with a three-year review period, be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to establish, by substantial evidence considered on the record as a whole that Claimant violated the Rules and that the penalty assessed was appropriate. The Board concludes that the Carrier met its burdens.

Rule 6.3.1 requires employees to obtain authorization for occupying main tracks and to work within the track limits that are authorized. It is undisputed that Claimant, having requested and received such authority, failed to do so, resulting in a train striking his tool bucket. Indeed, Claimant admitted, both in writing and during the Investigation, that he did not clear his plastic bucket and that a train struck it, and acknowledged that he

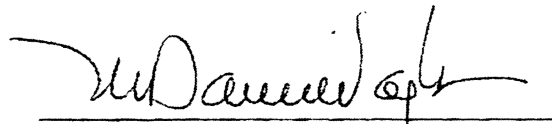
was outside his track authority and made a critical mistake. The Board concludes that Claimant violated the rule and his violation was serious.

The Board has carefully considered, but is not persuaded by, the Organization's other contentions. As an initial matter, the Organization's argument - that Claimant was "coached and counseled" in the days following the incident and that, therefore, he had been assessed "discipline" prior to any testimony at an Investigation - suggests that, when the conduct of an employee - who continues to perform his regular duties - needs to be corrected, Management cannot do so without an Organization representative being offered to him and/or prior to the Investigation. Such a conclusion has the potential to endanger the employee as well as other persons and property. The Board does not understand coaching and counseling to constitute discipline, so subsequent discipline after a formal investigation would not constitute double jeopardy or be otherwise impermissible. The Organization's other contentions are also without merit. The Board concludes that the Carrier did not violate due process procedure by doing so and the Investigation was not otherwise unfair or biased.

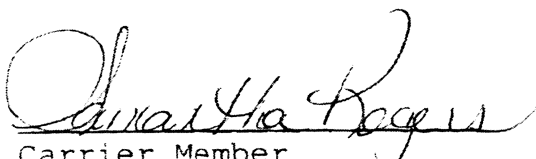
Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a Level S 30-day record suspension and one-year review period was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his suspension to have been an appropriate penalty. The claim is denied.


Dated this 9th day of May, 2014.



M. David Vaughn,
Neutral Member



Carrier Member
Ms. Samantha Rogers



Employee Member
Mr. David Tanner