

BEFORE PUBLIC LAW BOARD NO. 7590
CASE NO. 19

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

V.

BNSF RAILWAY
(Former ATSF Railway)

Carrier File No. 14-12-0068
Organization File. 30-13N1-1199

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on December 29, 2011 when it assessed Claimant, Kevin Michael Reischman (0068395), a Level S 30-day record suspension, with a 3 year review period, for alleged violation of Maintenance of Way Operating Rule 15.2-Protection by Track Bulletin Form B, and Maintenance of Way Operating Rule 5.4.7-Display of Red Flag or Red Light, for alleged passing red flag without permission while moving track machines on the Emporia Subdivision on November 16, 2011.
 2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove the discipline from Claimant's record with seniority, vacation and all other rights unimpaired, and make him whole for all time lost account of this incident.
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The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7590 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter advising him to appear at an investigation on November 29, 2011:

for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged passing red flag without permission, MP 33.9, Emporia Subdivision, at approximately 1030 hours on November 16, 2011 while moving track machines.

This investigation will determine possible violation of MOWOR 5.4.7 Display of Red Flag or Red Light and MOWOR 15.2 Protection by Track Bulletin Form B.

By letter dated December 29, 2011, Claimant was assessed a Level S 30-day Record Suspension with a 3-year review period for "passing red flag without permission. MP 33.9, Emporia Subdivision, at approximately 1030 hours on November 16, 2011 while moving track machines."

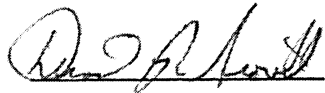
The Organization contends that Claimant did not violate the cited Rule and that there is no proof in the record. Claimant's work group had permission to be within the limits of the Form B and that permission was acknowledged by Employee in Charge Juan Villa. The Foreman had permission for the group to work within the limits of the Form B and Claimant's machine was part of that group.

The Carrier maintains that the evidence established that the Claimant failed to follow the Rule when he approached the Red Board to enter the territory under the Form B. Claimant failed to contact EIC Villa and operated past the Red Board without permission to proceed. The Rule requires employees to contact the EIC when entering a Form B. Claimant did not contact the EIC.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

There is substantial evidence of the Rule violation in the record. Claimant operated his machine past the red board associated with the Form B. He did not contact EIC Villa who was responsible for the Form B. The Organization raises an issue that there was permission given to the group to operate within the Form B earlier in the day. However, whether that permission applied to Claimant as he approached the Form B limits was a question of credibility – with Carrier witnesses testifying that Claimant should have contacted the EIC for permission to enter the Form B limits and operate past the Red Board and Claimant's Foreman testifying that he thought he had permission. This credibility question was determined by the investigating official against the Organization's position.

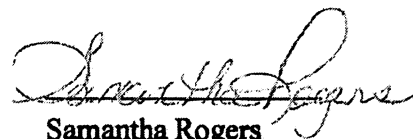
Claim denied.



Dave Scoville
Organization Member



Brian Clauss
Neutral Member



Samantha Rogers
Carrier Member

Signed on SEPTEMBER 22, 2015