

BEFORE PUBLIC LAW BOARD NO. 7590

CASE NO. 59

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

V

BNSF RAILWAY

(Former ATSF Railway)

BNSF FILE NO. 14-16-0330

BMWD FILE NO. 2409-SL13N1-1631

Claimant: J. Schneider

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Southwest District 800 John Christopher Schneider (1779719) Seniority Date August 25, 2008, for reinstatement with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1.) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service; 3.) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service; 4.) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service commencing April 13, 2016, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

Findings:

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. Parties to said dispute were given due notice of hearing thereon.

Claimant received a letter dated February 16, 2016:

An investigation has been scheduled at 0900 hours, Wednesday, February 24, 2016, at the Madill Yard Office, 430 E. Main Street, Madill, OK, 73446, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stay within your authority limits on February 10, 2016. Authority number 799-53 limits were exceeded while operating vehicle number 25612 at approximately milepost 695 on the Madill subdivision, at approximately 1215 hours.

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

Contact R Anderson at 817-352-2907 or Ronnie.Anderson@bnsf.com with any questions regarding this investigation, postponement or waiver.

An investigation was held following a postponement. Claimant was notified in a letter dated June 30, 2016:

As a result of investigation held on Wednesday, June 1, 2016 at 0900 hours at Saginaw, TX Engineering Office, 5800 North Main Street, Saginaw, TX, 76179 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to stay within your authority limits on February 10, 2016. Authority number 799-53 limits were exceeded while operating vehicle number 25612 at approximately milepost 695 on the Madill subdivision, at approximately 1215 hours.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 6.3.1 Main Track Authorization.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

This letter will be placed in your personnel record.

The Carrier argues that Claimant violated Rule 6.3.1 by exceeding the limits of the authority. He was the EIC and had the ultimate responsibility for ensuring that the group in the truck was within the protection of the authority when they set onto the tracks. Organization arguments merely seek to evade and avoid EIC responsibility.

The Organization argues that nothing was proven. Claimant was the EIC on a new territory and had not been familiarized with the area. The truck driver ignored Claimant's admonition to wait for a double check of the authority. Instead of waiting, the driver accelerated in reverse and immediately drove out of the limits. Claimant did what his position required and cannot be held accountable for the driver ignoring him.

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.

A portion of Claimant's testimony regarding the incident:

I started calling the dispatcher. And, uh, to let him know I got a red light because that's what I've always done, even if it's a, you know, it's a thumbwheel error going from main to siding. I always contact the dispatcher immediately just to, to make sure everything is good. And, uh, he said double check, verify your authority. I said yeah, I think we, uh, I think we exceeded our limits. And so I said I will be contacting my supervisor, uh, after I set off the track here, immediately. So we went back up to the crossing and set the vehicle off. And, uh, called the, or texted the Roadmaster.

I believe at some point af- after that I spoke with the Roadmaster. I'm not sure exactly the sequence but my memory serve correct, uh, I think I talked to the DE Ronnie Anderson first and explained everything, who I just said to him, and. You know, he said well are you okay? I said yeah. He said well, you know, you know, it could have been that this happens sometimes and you know we have to. It's happened to the best of us and, uh, you did the right thing. You self-identified and you set off the track and notified your supervisor and, uh, said we'll, uh, you know, we just want to make sure you're okay. So he said it's not the end of the world and life will go on after this and he said we'll probably get you a waiver and, um, you know, it's, it's you're new to the territory and it's, you know, a difficult, difficult area, so. Uh, that's what was spoken with with both the, the DE Ronnie Anderson and with, uh, the Roadmaster Lee Miller

The Organization's examination of Claimant contained the following:

STEVE LINDSEY: So Mr. Schneider, you said that before you were le- you were working on the, uh, territory somewhere around three weeks to a month. Did I understand that correctly?

JON CHRISTOPHER SCHNEIDER: Yes.

STEVE LINDSEY: Okay. Um, and the Roadmaster you had someone ride with you, who was that?

JON CHRISTOPHER SCHNEIDER: Ronnie Jackson.

STEVE LINDSEY: Ronnie Jackson.

JON CHRISTOPHER SCHNEIDER: The former Track Supervisor.

STEVE LINDSEY: Um, did, did Mr. Jackson ride the entire territory with you to ensure that you knew the territory?

JON CHRISTOPHER SCHNEIDER: Uh, no.

STEVE LINDSEY: Okay. Did the Roadmaster ride the entire territory with you to ensure that you knew the territory before you released on your own?

JON CHRISTOPHER SCHNEIDER: No.

STEVE LINDSEY: Were you actually the one driving the truck when the truck exceeded the track and time limits?

JON CHRISTOPHER SCHNEIDER: No, I wasn't.

STEVE LINDSEY: And in the, in the, in the investigation notice it says that you were operating truck 25612. Did you, were you operating truck 25612 that exceeded the limits?

JON CHRISTOPHER SCHNEIDER: No.

STEVE LINDSEY: So at according to the investigation notice at approximately 12:15 at milepost 695 on the Madill Subdivision you did not have truck 25612 on the track?

JON CHRISTOPHER SCHNEIDER: No, I did not. It was off the track.

* * *

STEVE LINDSEY: And so I understand it when I asked the, uh, Carrier witness Mr. Miller, the company standard to if you exceed your limits is to notify the Dispatcher, notify your Roadmaster. Is that what took place on, on this particular day?

JON CHRISTOPHER SCHNEIDER: Yes.

STEVE LINDSEY: And then he and then your Roadmaster Mr. Miller instructed you to call Mr. Anderson, is that correct?

JON CHRISTOPHER SCHNEIDER: Yes.

STEVE LINDSEY: And Mr. Anderson what, what did Mr. Anderson say again?

JON CHRISTOPHER SCHNEIDER: He, I, I explained to him what happened and he told me that, uh, you know, that this isn't the end of the world. It doesn't mean that, uh, you know, it's good that I, I followed the proper procedures and I did what I was supposed to do. And he said it's, you know, it happens sometimes. And, you

know, uh, it's I was new to the territory and he expressed that it was a, uh, you know, that it. I could be given a waiver and that, uh, you know, not beat myself up about it and, um, you know, he says everybody's safe and, um, uh, just basically take it easy.

STEVE LINDSEY: And during this process leading up to this investigation did you not offer to give up your Track Sup rights and your Foreman rights and maintain your Trackman and Welder rights to, uh, get a waiver for this investigation?

JON CHRISTOPHER SCHNEIDER: Uh, yes, I did.

STEVE LINDSEY: And what was relayed to you for the answer for that?

JON CHRISTOPHER SCHNEIDER: Uh, that, that that, it was, there was still be an investigation.

STEVE LINDSEY: So you said that you weren't the ac- the one actually driving the truck when it exceeded the, uh, limits, correct?

JON CHRISTOPHER SCHNEIDER: That is correct.

STEVE LINDSEY: Or actually the person operating the Sperry truck?

STEVE LINDSEY: Now was he following your direction or was he just doing what he wanted to do on the backing up?

JON CHRISTOPHER SCHNEIDER: We set on and he started to, while we were setting on there the very busy crossing. And I, I got out of the vehicle, went over to the signal house. And I, where there's a key to drop the gates. It's the only way to stop the traffic. There's three lanes eastbound, three lanes westbound. So I dropped the gates and let they set the vehicle on. And they backed clear of the crossing and then I released my key from the gates, so the gates would come back up. And I got in the vehicle, was getting my seatbelt on and everything and he started to back up. I said well let's take it easy for just a second. Let's just double check and triple check where we're at.

STEVE LINDSEY: So did he take it easy and stop at that point or did he continue to back up?

JON CHRISTOPHER SCHNEIDER: He continued to back up. And, um.

STEVE LINDSEY: How fast was he backing? I mean, was it faster than normal to get back to get started or was it normal or what was it?

JON CHRISTOPHER SCHNEIDER: It was faster than normal. The, the nature of setting on with the high traffic and the, I'm not sure if he was excited or not.

STEVE LINDSEY: And again, just, just so I'm clear. You did not have truck 25612 on the track?

JON CHRISTOPHER SCHNEIDER: No, I did not have truck 25612 on the track.

The investigating officer followed up with the following:

TYSON PATE: Okay. I've got a few more questions. Uh, Mr. Schneider did, did you have a briefing with the operator of the DRS 024 prior to setting on the track?

JON CHRISTOPHER SCHNEIDER: Yes, we did.

TYSON PATE: What, what how did that briefing go?

JON CHRISTOPHER SCHNEIDER: We discussed the limits and where we were going to set on, uh, the milepost location that identified that the crossing that we were going to sit on was within those limits and, uh, once we. Then I, I put in the electronic request for the track and time and, uh, we looked at it again and discussed it. Even more I asked him, is everybody good with the limits and they. The guy up front said yes. The guy in the back said yes. And then we went to set on the track.

TYSON PATE: Okay. According to exhibit 7A we discussed earlier the, the, uh, crossing you set on was at 694.8. Does that sound correct?

JON CHRISTOPHER SCHNEIDER: I believe that's, that is correct, 694, 694.8.

TYSON PATE: Okay.

JON CHRISTOPHER SCHNEIDER: And we were, we were testing going northbound. That's where, yeah.

TYSON PATE: So you set on at 694.8 and then backed out of your limits to approximately 695.3 going south?

JON CHRISTOPHER SCHNEIDER: Yeah, the D car backed, backed up approximately that far.

TYSON PATE: And you were in there when this happened?

JON CHRISTOPHER SCHNEIDER: I was in the detector car, correct.

TYSON PATE: No more questions. Mr. Lindsey, do you have any further questions?

STEVE LINDSEY: I do. You said that you were in the car but you were not in control of the accelerator and brake, correct? You weren't the one driving the vehicle?

JON CHRISTOPHER SCHNEIDER: I was not the one driving the vehicle. I was not in control of it.

STEVE LINDSEY: And you said that he was backing up at faster than normal, correct?

JON CHRISTOPHER SCHNEIDER: Yes.

STEVE LINDSEY: So would you say he was following your instructions the way, the way that he should have been while you were on the tracks since you were the EIC?

JON CHRISTOPHER SCHNEIDER: Uh, no.

The Board has reviewed the evidence. The Organization raises a number of procedural violations. However, the Board need not reach those procedural issues as there is no substantial evidence in the record to support the discipline.

The evidence establishes that Claimant was the EIC on a territory to which he had recently begun working. His unrefuted testimony is that he was unfamiliar with the territory and had not been familiarized with the entire territory up to the date of the incident.

Claimant also presented unrefuted testimony that he was the passenger in the Detector. They had a proper job briefing in the truck. After Claimant raised and lowered the crossing gates for the Detector to drop on to the rails, he reentered the cab.

It is unrefuted that Claimant told the driver to wait while they “double and triple checked” their authority. Instead, the driver reversed the truck at a high rate of speed and almost immediately drove out of the limits. Claimant then made all the necessary notifications.

This Board notes the unrefuted testimony that Claimant told the driver to wait to double check the track authority and that statement was recklessly ignored by the driver. Claimant was the EIC, but was not the driver of the Detector. Further, being new to the territory and unfamiliar with that authority, it is entirely reasonable that Claimant would take the safe course and double check.

Award:

Claim sustained.



Organization Member



Brian Clauss
Neutral Member



Carrier Member