

**PUBLIC LAW BOARD NO. 7602**

**Parties to the Dispute:**

<b>BROTHERHOOD OF MAINTENANCE OF WAY</b>	)
<b>EMPLOYES DIVISION—IBT</b>	)
	)
<b>v.</b>	)
	)
<b>BNSF RAILWAY COMPANY</b>	)

**Carrier File No. 10-14-0006**  
**Organization File No. C-14-D040-2**

**STATEMENT OF CLAIM:**

**Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier violated the Agreement on November 25, 2013, when it issued a Level S 30 Day Record Suspension to Claimant, Clayton A. Whitbeck for violation of MWOR 6.3.3 Visual Detection of Trains, in connection with Claimant's failure to maintain immediate access to a working radio, while inspecting track at or near MP 54.8 on the Creston Subdivision, at approximately 0930 hours on October 31, 2013, while working as a Track Inspector.**
- 2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.**

**BACKGROUND:**

**The Claimant entered service with the Carrier on March 26, 2007. At the time of the incident that resulted in his suspension, he had been a Track Inspector for about six months.**

**The Carrier regularly performs system operations tests to ensure that employees are complying with the Carrier's safety policies and procedures. On**

October 31, 2013, a test team, led by Joseph Diefenbach, Assistant Director of Maintenance Production on the Nebraska Division, was conducting an audit in the Creston Subdivision. The team (Diefenbach; Wess Gipson, Assistant Roadmaster of Production Gangs; and Ross Springer, Roadmaster Trainee) started at the Havelock Yard. At about MP 54.8, the team noticed the Claimant, who appeared to be inspecting the yard track. Diefenbach instructed Mr. Gipson to go over and make sure Mr. Whitbeck was properly protected; Mr. Springer went with Gipson. When Gipson and Springer approached the Claimant, he showed them the Lone Worker Form that he had filled out, as required by MWOR 6.3.3. From his vantage point across the tracks, Diefenbach observed the interaction and noticed that the Claimant did not have a backpack with him but went to his truck and retrieved a pack set (radio) from it. Diefenbach was listening for radio communications but never heard anything, either on his radio or from Claimant's truck's exterior speaker. As a result, he concluded that the Claimant did not have a radio with him, and notified Gipson, Springer and the Claimant that Claimant's failure to have a radio was a "critical failure." The Claimant was removed from service pending an investigation.

The Maintenance of Way Operating Rules (MOWOR) include a section dedicated to rules for safe Track Occupancy. Under Rule 6.3.1, employees who are going to be occupying, or fouling, track must receive authority or establish protection before doing so. There are several ways of accomplishing that: the employee may obtain authority from dispatch or, if authorization is not forthcoming from dispatch, there are alternate rules for establishing protection, such as use of a flagman, lining and locking switches, and disconnecting the rail. Protection can also be established by Visual Detection of Trains, the procedures for which are set forth in Rule 6.3.3. Subsection A, Lone Workers, which applies to this case, establishes specific rules for individuals working alone. It states, in relevant part:

*Lone workers using individual train detection must complete the form entitled, "Statement of On-Track Safety" prior to fouling a track. The completed form must be in the employee's possession when used to establish on track safety. [Board note: A copy of the form is included in the printed Rule 6.3.3.]*

*Each employee providing protection for a work group, and each lone worker, will maintain immediate access to a working radio, which can be a portable radio capable of monitoring transmissions from train movements in the vicinity. (Emphasis added.)*

Claimant was sent a formal Notice of Investigation by letter dated November 4, 2013, indicating that an investigation would be held "for the purpose of ascertaining

the facts and determining your responsibility, if any, in connection with your alleged failure to maintain immediate access to a working radio, while inspecting track at or near MP 54.8 on the Creston Subdivision, at approximately 0930 hours on October 31, 2013, while working as a Track Inspector.”

The investigation was held November 13, 2013. At the hearing, Mr. Diefenbach testified as set forth above. He stated that when he talked to the Claimant, Mr. Whitbeck told him that he did not think he needed the radio for protection in the Yard, only if he were working on the Main tracks. Diefenbach also testified that a Shoulder Ballast Cleaner, which was working in the area on Main 2, could have presented a hazard to the Claimant without immediate radio contact to alert him to its presence. No one on the audit team asked the Claimant if his truck speaker was on. However, in Diefenbach’s opinion, the Claimant was some 200 feet from his truck, too far for him to have been able to hear any radio transmissions from the exterior speaker. Finally, Diefenbach testified that the basic conditions for using lone worker protection were not present: one of the conditions is “Power-operated tools or roadway maintenance machines are not in use within hearing distance.” The ballast cleaner is considered a roadway maintenance machine. He did not, however, say anything to the Claimant about that on October 31.

The Claimant testified that the radio in his truck was on and he was able to hear the exterior speaker from where he was working. (He estimated his distance from the truck at about 150 feet.) However, it was a quiet day in the Yard and there were no transmissions when the audit team was in the area. The Shoulder Ballast Cleaner traveled through the area at one point, but it was several tracks away from where the Claimant was performing his track inspections and did not interfere with his work or his ability to hear the radio. The Claimant further stated that he thought Diefenbach’s question to him about having a radio referred to the portable pack set radio, not to the radio in his truck, and he answered accordingly: it was not his understanding that he needed to have the pack set physically on him at all times as long as he had access to a working radio, which he did, in his truck. Evidence introduced at the hearing established that different radio channels are assigned to different areas in the Creston Subdivision. Specifically, Channel 87 was in use for the Main track from CP 4664 to Baird, while Channel 17 was dedicated to the north side of the Havelock Yard, where the Claimant was working. Diefenbach acknowledged that he was tuned in to Channel 87 and would not hear any transmissions from Channel 17, and that if there were no communications on Channel 17, nothing would be heard over Claimant’s truck’s exterior loudspeaker.

By letter dated November 25, 2013, the Carrier notified Claimant that he had been found in violation of MWOR 6.3.3 Visual Detection of Trains. The discipline assessed was Level S 30 Day Record Suspension and a one-year review period.

The Organization filed a timely appeal. The parties having been unable to resolve the matter through the grievance process submitted it to the Board for a final and binding decision.

**FINDINGS AND OPINION:**

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Carrier found the Claimant in violation of MWOR 6.3.3, Visual Detection of Trains, specifically the Lone Worker provisions of subsection a. The November 4, 2013, Notice of Investigation informed the Claimant that he was being investigated “for your alleged failure to maintain immediate access to a working radio while inspecting track at MP 58.4...” The Notice said nothing about Claimant’s being in violation of the basic Conditions of Use for establishing lone worker protection, the point raised by Mr. Diefenbach for the first time at the hearing. The November 25, 2013, decision letter indicated that he was being assessed a Level S 30 Day Record Suspension for his “failure to maintain immediate access to a working radio...” Whether the Claimant was in violation of the basic Conditions for Use of lone worker protection was not part of the Notice, nor was it referenced in the decision letter. The issue was not noticed to the Claimant in advance of the hearing, so it could not properly be raised at the investigatory hearing, nor can it form the basis for any disciplinary action based on the November 4, 2013, Notice. Accordingly, the Board is precluded from considering that issue in this case.

This case turns on the parameters of the requirement in Rule 6.3.3.a that “Each ... lone worker will maintain immediate access to a working radio, which can be a portable radio capable of monitoring transmissions from train movements in the vicinity.” The two basic requirements of the Rule are that an employee (1) “maintain immediate access” to (2) “a working radio.” From the record, it appears that the audit team concluded, at least initially, that the Claimant was in violation of the rule because he was not carrying a portable radio on his person when observed by them in the performance of his duties.

The plain language of the Rule is that the “working radio ... can be a portable radio,” and Track Inspectors are issued portable “pack set” radios to carry with them. However, nothing in the Rule requires that the “working radio” be a “portable radio”—it says only that the working radio *can be* a portable radio, which on its face implies that other types of radios may be used. In fact, there was no dispute that it would have been acceptable for the Claimant to have used the exterior speaker on his truck to monitor transmissions regarding train movements in the area where he was working. Unfortunately, the audit team failed to ask the Claimant if his truck radio and speaker were on; he testified that they were. Mr. Diefenbach did not hear any transmissions over the speaker and concluded that the truck radio must not be on. However, the evidence establishes that Diefenbach was tuned in to Channel 87, which was in use by the gang working on Main 2, while Channel 17 was the correct frequency for individuals (like the Claimant) who were working on the north side of the Havelock Yard, not on the main tracks, to tune into. Broadcasts over Channel 87, which Diefenbach was listening for, would not have been transmitted over Claimant’s truck’s loudspeaker, tuned in to Channel 17. There is no evidence in the record establishing that there were any transmissions over Channel 17 during the relatively brief time that the audit team observed the Claimant, and the Claimant testified credibly that it was a quiet day in the Yard with few transmissions. Under the circumstances, the fact that no one on the audit team heard anything over the truck’s loudspeaker is not a sufficient basis for concluding that the truck radio was not on.

In Mr. Diefenbach’s opinion, the Claimant did not have “immediate access to a working radio” because he was too far from his truck to be able to hear any transmissions over the loudspeaker. Rule 6.3.3.a does not specify any distances. The Claimant testified credibly that he was able to hear the speaker; other operations were on the far side of where he was working and the truck was parked. In the absence of any actual transmissions, which would have established how far they could be heard over the truck’s speaker, any conclusion that the Claimant was “too far” is based solely on speculation and does not meet the burden of substantial evidence that the Carrier is required to meet in order to justify disciplining employees.

Finally, it appears that there was a significant miscommunication between the Claimant and Diefenbach regarding Claimant’s understanding of the radio rule. The Claimant understood the audit team to be questioning him about his portable radio, not the lone worker radio access rule in general. Claimant responded that he did not think he needed to use the radio—meaning the *portable* radio—unless he was working on the Main tracks. His response was interpreted by the audit team to mean that he did not need to have immediate access to *any* radio unless he was working on the Main

tracks. While it is easy to see how the misunderstanding arose, the fact is that it *was* a miscommunication.

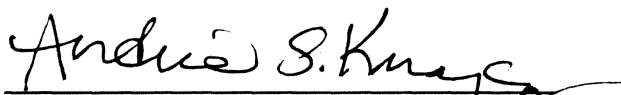
The Carrier's burden of proof in disciplinary hearings is substantial evidence. In reviewing the evidence in the record in this case, the Board concludes that the Carrier failed to meet its burden. Rule 6.3.3.a does not require that Track Inspectors carry a portable radio on them at all times while working. It requires only that lone workers have "immediate access to a working radio." The express language of the Rule includes portable radios as one example, but does not indicate that portable radios are the only acceptable radios that can be used. There is no substantial, objective evidence to support the conclusion that the Claimant's truck radio was not in fact on, or to support the conclusion that he was working too far from the truck to hear any transmissions. In the absence of such evidence, the discipline is not supported, and the claim is sustained. The discipline and all references to it shall be removed from the Claimant's record.

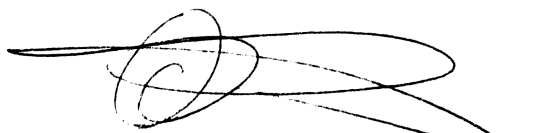
**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

  
Andria S. Knapp, Neutral Member

  
Nathan Moayyad, Carrier Member

  
Zachary Voegel, Organization Member

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**Award No. 35**

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8/17/10

**Date**