

Award No. 51  
Case No. 51  
NMB Case No. PLB-07602-000051

**PUBLIC LAW BOARD NO. 7602**

**Parties to the Dispute:**

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

**Carrier File No. 10-15-0050**  
**Organization File No. C-15-D040-6**

**Claimant — Jesse S. Cardona**

**BACKGROUND:**

This claim challenges the Carrier's imposition of a Level S 30-day record suspension with a 3-year review period for the Claimant's alleged failure to provide proper track protection in October 2014. At the time of the events giving rise to the discipline, he had worked for the Carrier for twenty years and was working as a Foreman on a Mobile Gang based in the Powder River Division.

On October 9, 2014, the Claimant was working with his mobile gang when they discovered two defects on Track 100 in the Alliance Yard, approximately 120' apart. Claimant contacted the Yardmaster and asked if they could have the track for an hour to effect the repairs, which involved cutting out the old track section and replacing it. The Yardmaster granted the request, and when Claimant got back to the work area, one of the gang members had already set out the required red flags and derails that indicate the track is fouled. The derails are a safety device that will derail any oncoming train or other track vehicle that would otherwise strike the individuals working on the track. They lock in place, although the locks do not affect the functionality of the derails; the locks' sole purpose is to discourage theft or unauthorized movement of the derails. Claimant and his crew set to work. The two defects were located in an east-west orientation to one another. The crew parked its

boom truck at the western defect and cut out and replaced it first. Claimant was doing the cutting himself. When they were finished with the first defect, the gang moved east to the second one. At some point, Claimant sought and received additional time on the track from the Yardmaster. While the Claimant was cutting the second defective track section, one of the other gang members moved the derail that had been beyond the first defect closer to where the crew was now working.

The Carrier has a System Engineering Operations Test Team whose purpose is to visit various work sites throughout the system to ensure that employees are complying with the Carrier's work and safety rules. Sometime before 4:00 p.m. on October 9, 2014, Troy Hunter, Manager of Operating Rules for the Team, was driving on an overpass in the Alliance Yard and noticed Claimant's crew at work. He stopped to observe, and concluded that the derails were spaced too closely, in violation of MWOR 6.3.2, but he did not interrupt the crew at work. At some point, one of the gang notice someone standing by and told the Claimant, who was focused on cutting and whose PPE limited his peripheral vision. Claimant went over to Hunter, the two men introduced each other, and Hunter told Claimant that the derails were too closely spaced. In addition, the derails had not been secured with locks are required by the Rule. Claimant told Hunter that they had the locks but had not put them on the derails. Because a violation of MWOR 6.3.2 is considered a "Critical Decision/Deadly/Rule Violation," Hunter arranged for Claimant to be removed from work for the remainder of the shift and sent for drug and alcohol testing. Hunter sent an e-mail to the local Roadmaster, Jeremy Wegner, notifying him of what had happened. The incident description read:

The exception occurred when the employee did not place derails the required distance for the track speed on other than main track, while replacing a rail defect. In addition, he did not place an effective locking device on either derail.

The Carrier sent Claimant a Notice of Investigation dated October 10, 2014, informing them that an investigatory hearing had been scheduled "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to place derails the required distance on other than main track and alleged failure to place an effective locking device on either derail, at approximately 1359 hours, on October 9, 2014."

Following a mutually agreed postponement, the hearing was held November 6, 2014. At the hearing, the Claimant, Mr. Hunter and Mr. Wegner testified to the facts as above. Hunter testified that MWOR 6.3.2 requires that derails be placed at least 150' from where the crew will be working if track speeds are in excess of 5 mph, and 50' if 5 mph or less. The derails he observed were not that far apart. The Claimant testified that he had thought that the gang was in compliance with the track protection rules. He had obtained track authorization from the Yardmaster. When the crew set up at the work site initially, the derails were set up properly, more than 300' apart. When the crew finished with the first defect and started working on the second one, one of the crew members, Mike Long, moved the west derail without being instructed to do so. It appears that the Claimant was focused on cutting out the rail at the second defect and was unaware that the derail had been moved. Claimant stated his belief that Hunter had seen Long move the derail because he (Hunter) approached the crew as Long was putting it down. Claimant testified that they had not locked the derails because the gang was actively working in the immediate area and there was no danger that someone would come and steal them. Claimant said that he typically "eyeballs" the distances for placing derails. When asked if he understood the rule at issue, the Claimant stated:

You know, as many times as you read this rule, I want to say yes, I do and I, in, in working with it, uh, I just know at, at the time you know like I say being nervous and not knowing it would have been, the explanation would have been really nice or some paperwork to see it, because even... looking at it now I mean you're even hearing this kind of talk about—you know even Mr. Hunter—the vagueness of the rule... and it's really up to perception and interpretation but look, I mean do I have it? Do I see it? Yes. Do I fully understand everything that's written here, it's really open to interpretation, to whoever's working or using it, so.

The Claimant did not see Hunter measure any distances. On rebuttal, Hunter testified more specifically that, using the 40-foot length of the boom truck as a measure, the two derails were placed approximately 20' on either side of the defect the crew was working on. He was not asked about and did not testify to whether he saw Long move the west derail or whether the derails were properly placed before it was moved.

The Carrier's Decision Letter, issued November 24, 2014, concluded that the Claimant had failed to place derails the required distance on other than main track

and had failed to place an effective locking device on either derail. These actions put him in violation of MWOR 6.3.2, Protection on Other Than Main Track, and assessed a Level S 30-day Record Suspension with a three-year review period. The Organization filed a timely appeal protesting the Carrier's decision. The parties having been unable to resolve the matter through their grievance process, the matter was submitted to the Board for a final and binding decision.

According to the Carrier, the Claimant acknowledged in his testimony at the hearing that the derails were not set up in compliance with MWOR 6.3.2, which establishes his guilt. Track protection is a critical component of safety, and violations of the track protection rules are considered serious safety violations. The penalty under the Carrier's PEPA Policy for a first serious safety violation is a Level S 30-day record suspension with a three-year review period, which is what was assessed in this case. The conduct having been admitted and the standard penalty having been issued, the claim should be denied.

The Organization contends that the Carrier failed to sustain its burden of proof. In contrast to what Mr. Hunter testified, MWOR 6.3.2 does not actually give any specific distance for placing derails; it only states that the derails should be placed "near" the red flag, without specifying what distance constitutes "near." In addition, the level discipline imposed on the Claimant was excessive and arbitrary. Track protection had been established with the Yardmaster. The problem with piggybacking several working groups on a single track and time authority is that the EIC, who obtained the authority and knows exactly what authority he asked for and was granted, is often working miles away from other working groups. Questions of authority may arise, but employees are under pressure to complete their work within the limited period of the authority granted. When the EIC is remote, employees in other working groups may assume that their authority is broader than it is—which is what happened here. If Claimant's working group had had its own track authority, he would have known exactly what it was. The Carrier has failed to establish that the Claimant intentionally, willfully or maliciously violated the rule in question. He was not deliberately negligent or careless; he was just trying to do a routine task within the time allotted. The discipline assessed was excessive and should not be upheld.

**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.

Claimant was found in violation of MWOR 6.3.2, Protection on Other Than Main Track, which states, in relevant part:

To establish protection on a track other than a main track, controlled siding or any track where CTC is in effect, use one or a combination of the following:

- All switches that provide direct access to the track must be:
  - Lines against movement.
  - Properly tagged.
  - Effectively spiked, clamped or locked with an effective locking device.
- A red flag or light must be placed as outlined in Rule 5.4.7 (Display of Red Flag or Light). A derail capable of restricting access to the track where work will occur must be locked in derailing position near the red flag or light with an effective locking device. The red flag or light must be placed at least 150 feet from the work location when the track speed is greater than 5 MPH or at least 50 feet from the work location when the track speed is 5 MPH or less.
- When remote control switches, including those in a hump yard, are operated by a control operator or other designated employee... [Omitted]
- Place a flagman to hold all trains and on-track equipment clear of the working limits.
- Establish discontinuity in the rail to prevent movement into the working limits. Place red flags 150 feet in advance of the working limits.
- Establish working limits on main track or controlled siding to prevent movement to other than main tracks.

When establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established. The employee assigned the responsibility of yard movements must be notified of the work to be done.

The Board must first address the question of whether the Claimant violated MWOR 6.3.2. The Carrier contends that the Claimant admitted at the hearing that he

violated the Rule, while the Organization contends that the Carrier has failed to sustain its burden of proof to establish that any violation occurred. Claimant was accused of violating the rule in two ways: (1) failing to position the derails sufficiently far apart, and (2) failing to ensure that the derails were locked into position.

Rules have an underlying purpose that is manifested in concrete language designed to effect that purpose. Track protection rules are intended to keep personnel and equipment safe from the deadly and costly consequences of on-track accidents. However, as the Carrier's numerous track protection rules demonstrate, there are many ways to ensure track safety. MWOR 6.3.2 is a good example of this variety of approaches. Aimed at ensuring track safety "on other than main track," MWOR sets forth a several different ways to accomplish that end. The first sentence expressly states: "To establish protection on a track other than a main track ... *use one or a combination of the following...*" (emphasis added). The Rule does not state that any one of the track protection methods that follow is better than another, or that any one of them is preferable to the others, or that they must be followed in any particular order or combination. Under MWOR 6.3.2, track protection on other than main track may be established by (1) lining, tagging and locking all switches that provide direct access to the track; (2) placing red flags or lights and derails; (3) via specific provisions addressed to remote control switches; (4) using a flagman to hold trains and on-track equipment; (5) placing red flags and "establish[ing] discontinuity in the rail to prevent movement into the working limits"; and/or (6) establishing working limits on the main track to prevent movement into the "other than" tracks. In addition, the employee in charge has to keep the Yardmaster (or other employee with the responsibility of yard movements) notified.

Because MWOR 6.3.2 gives employees multiple ways to establish track protection, being in violation of one of the alternative modes of establishing protection does not necessarily mean that the employee is in violation of the Rule altogether. If track protection is established under any of the possible alternatives set forth in MWOR 6.3.2, applying one of the other alternatives incorrectly does not automatically mean that the Rule has been violated. For example, if track protection has been established by lining, tagging and locking all switches that provide access to the working area, derails are actually unnecessary—but someone might choose to use them for extra protection. Placing them too close together would be incorrect under the standards set forth in the bullet point addressing flags and/or lights and derails,

but the employee would not thereby be in violation of MWOR 6.3.2 because protection was established by one of the acceptable other methods set forth in the Rule.

So the Board must look first to see if the Claimant established adequate track protection for his crew under MWOR 6.3.2 overall. After reviewing all of the information in the record, the Board concludes that he had. He did not simply notify the Yardmaster that the crew wanted to work in the Alliance Yard, but conducted two job briefings with him, as a result of which the Yardmaster authorized the crew to occupy the track where the two defects were first for an hour, then the time was subsequently extended for an additional thirty to forty minutes. The record does not indicate what steps, if any, the Yardmaster took to route traffic around the gang (if there was any scheduled in the area in the first place). But the Yardmaster was in control of movement in the Yard, and once Claimant and the Yardmaster concluded their briefing, the crew was assured of adequate track protection while it repaired the two defects. The flags and derails the crew set out were additional insurance. The Claimant's testimony that the flags and the derails were properly set when the gang started its work at that location was un rebutted; Mr. Hunter never mentioned the flags in his testimony, and the Claimant was not charged with improper placement of the flags. From these facts in the record, the Board concludes that the flags were in compliance with MWOR 6.3.2.<sup>1, 2</sup> While the record establishes that Mr. Long moved the west derail closer to the east one when the gang moved to repair the second defect, there is no mention of moving the west flag as well. The red flags are the first line of protection; they are what oncoming trains (or on-track equipment) would see if they ventured close to the work location. The derails are the second line of protection, in that they will literally derail a train that goes past a red flag before it reaches the crew. In addition, the evidence in the record establishes that the locks for the derails have no

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<sup>1</sup> The Board notes that red flags are noted as a form of track protection in two places in MWOR 6.3.2: once in the bullet point with the derails and later in the fifth bullet point: "Establish discontinuity in the rail to prevent movement into the working limits. *Place red flags 150 feet in advance of the working limits.*" (Emphasis added.)

<sup>2</sup> Moreover, the Organization is correct when it points out that MWOR 6.3.2 is not specific about where derails should be placed. The rule sets forth specific limits for flag or light placement—150' from the work location if track speed is greater than 5 miles per hour and 50' if it is 5 miles per hour or less—but about where derails should be placed, the Rule is more ambiguous, stating "A derail capable of restricting access to the track where work will occur must be locked in derailing position *near* the red flag or light..." (Emphasis added.) What constitutes "near" is not defined and thus is a matter of subjective opinion, at least up to some point.

function other than to keep them from being stolen or removed without authorization. Mr. Hunter, whose job is to know and apply the Carrier's safety rules, confirmed this. If the locks do not contribute to the safety of the crew, forgetting to lock the derails cannot be a safety violation. It may be a violation of MWOR 6.3.2, but one that is unrelated to safety and that should not be punished as a safety violation.

The Claimant was charged with violating MWOR 6.3.2 by improperly placing the derails and not locking them. In concluding that he was guilty, the Carrier focused narrowly on the one bullet point related to derails and overlooked the whole scope of MWOR 6.3.2 and the alternative methods of establishing track protection. The derails may have been too close together after Mike Long moved the west derail closer to the second defect, but the Claimant had established track protection for the crew under MWOR 6.3.2 independent of the derails. The Carrier has every right to be concerned when it sees what appears to be an action that is not in compliance with its safety rules. But the appropriate course of action here would have been to recognize that the Claimant has established track protection under MWOR 6.3.2 overall, but to counsel him about placing the derails correctly in the future. The claim is sustained. The discipline shall be removed from the Claimant's personnel file and replaced with a notice of counseling.

### **AWARD**

**Claim sustained in accordance with the Findings.**

### **ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made, in that the Level S suspension and review period shall be removed from his record and replaced with a notice of counseling. The Carrier is ordered to make the Award effective on or before 30 days**

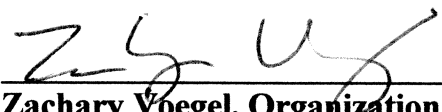
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following the postmark date the Award is transmitted to the parties.

  
Andria S. Knapp, Neutral Member

  
Nathan O. Moayyad, Carrier Member

  
Zachary Voegel, Organization Member

01-13-2017  
Date