

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 74

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0052

BMWE FILE NO. C-18-Do40-4

Claimant: D. Murphy

STATEMENT OF CLAIM

I am appealing to you the decision of Heartland Division General Manager Benjamin Sharpe in his letter dated January 12, 2018, to uphold the discipline assessed to Mr. Daniel Murphy as appealed in letters from Vice General Chairman Randy Anderson dated November 21, 2017 and December 8, 2017, when Mr. Murphy, hereinafter referred to as Claimant, was assessed a Level S, 30-Day Record Suspension, and a three (3) year review period for alleged violation of MWOR 6.3.1, Track Authorization.

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 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter advising him to attend a formal Investigation:

An investigation has been scheduled at 1300 hours, Friday, September 15, 2017, at the BNSF Railway Depot, Conference Room, 201 North 7th Street, Lincoln, NE, 68508, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged conduct in failure to follow requirements of joint track and time on the Omaha Subdivision near MP 34.2 at approximately 0920 hours on September 1, 2017, while assigned as Foreman on Havelock Section 2.

Following postponements, a hearing was held. Following the investigation, Claimant received a letter advising him:

As a result of investigation held on Tuesday, October 3, 2017, at 0900 hours at BNSF Railway Depot, Conference Room, 201 North 7th Street, Lincoln, NE, 68508 you are hereby assessed a Level S 30 Day Record Suspension for your conduct in failure to follow requirements of joint track and time on the Omaha Subdivision near MP 34.2 at approximately 0920 hours on September 1, 2017, while assigned as Foreman on Havelock Section 2.

In addition, you are being assessed a Three (3) Year Review Period that commences on October 12, 2017. Any rules violation during this review period could result in further disciplinary action.

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

The Carrier argues that the rule is clear. Claimant had joint authority with the Surfacing Gang and, as the person obtaining the later authority, Claimant should have contacted the surfacing gang's EIC and held a job briefing. The Carrier argues that "occupying" and "fouling" have different meanings. Even though Claimant did not foul the track, he was still "occupying" it by virtue of having Time and Track authority. He should have contacted Track Inspector Kurzer who was the EIC.

The organization argues that the Rule is clear and Claimant complied with the Rule. He did not occupy the track until after the Surfacing Crew had released the Time and Track Authority. He could not have been in violation of the rule because he attempted to contact the EIC. Not being able to reach the EIC, he spoke with a machine operator. Claimant had been the EIC of that crew on the prior day and knew it was a two machine crew. Both machines were operating on the crossing where his crew was to work.

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.

MOWOR 6.3.1.B provides:

Before Occupying or Fouling Track

When receiving "joint" authority, contact each train and employee listed on the authority and determine the location of any working limits before occupying the overlapping portion of the authority.

The Surfacing Crew EIC testified that he was aware that Claimant had joint authority with him. He heard Claimant on the radio but did not pay attention to the transmission. He released his authority at 10:52. Claimant called Mr. Kurzer at 11:04 and there was a problem with the connection. Mr. Kurzer did not return the call to Claimant. In the interim, Claimant had a job briefing with a machine operator on the two-person crew, Claimant had supervised that crew as the EIC on the prior day and was familiar with the crew members, the territory, and their work.

The Claimant testified that he did not occupy the track until approximately 11:10. His crew waited until the surfacing crew had left the area to enter the crossing and complete their repair. Claimant still held Time and Track authority when he entered the crossing. The Surfacing Crew Time and Track Authority had expired over fifteen minutes earlier. Accordingly, there was no joint authority at issue. The only authority was Claimant's authority. Claimant occupied the track under his own authority and not joint authority.

This Board finds that Claimant's crew did not occupy the track in violation of MOWOR 6.3.1.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made.



Carrier Member



Organization Member

Brian Clauss

Neutral Member

Dated: July 18, 2019