

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 12
Carrier File No. 12-08-0048
Organization File No. B-2083-17
Claimant: Daniel J. Brewer

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 16, 2008, when Claimant D.J. Brewer was dismissed for failing to properly document, provide track authority protection, and release track authority for RW16 Welding Gang on December 13, 2007 violating Maintenance of Way (MOW) Operating Rule 6.3.1 – Main Track Authorization
2. As a consequence of the Carrier's violation referred to in part (1) above, the Claimant should be returned to service, paid for all lost time, and that all references to this incident removed from Claimant's personal record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Daniel J. Brewer, a twenty-seven year employee of the railroad with an unblemished disciplinary record, was dismissed from all service following an incident on December 13, 2007, between the Stations of Olden and Willow on the Springfield Division, Thayer North Sub-Division. The Claimant failed properly to document the multiple work gangs over which he exercised time and track authority, and thereafter neglected to account for all of the work groups before clearing the track and releasing his authority with the Dispatcher. As a consequence of the Claimant's failure to comply with applicable safety procedures, an accident occurred in which three employees were slightly injured and the Carrier sustained \$141,000 damage to its equipment. Fortuitously, neither more damage nor more injury occurred.

The Carrier contends that the Claimant's lapse justifies dismissing him from all service. The Organization contends that the Claimant's otherwise unblemished work record and the decision of the Federal Railroad Administration not to impose a fine on the Claimant mandate that the Claimant be returned to his position with no loss of seniority or time.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted for adjudication by Public Law Board No. 6986.

FINDINGS AND OPINION

Long-standing and well-established safety protocols have been mandated by the Carrier in order to protect bargaining unit employees from injury while working on tracks. The sanctity of these protocols is paramount, requiring that Employees in Charge maintain their concentration and comply meticulously with the rules governing the reservation and release of tracks so that trains will not jeopardize the safety of maintenance of way crews.

Claimant Brewer admitted violating a basic tenet underlying his duties as an Employee in Charge of multiple gangs working under his authority on December 13, 2007. He not only conceded in his testimony at the investigatory hearing that he could not be sure when he logged the second gang on the "Multiple Work Groups Using the Same Authority" form as required under Rule 6.3.1, but also conceded that he cleared the track with the dispatcher at the end of the day without checking that all of the crews on the form had physically left the track section for which he was responsible.

Rule 6.3.1, which incorporates by reference multiple other rules governing work on main track or controlled sidings, requires the Employee in Charge of multiple work groups using the same authority to fill out the authority number, the name of each work group using the authority, the time the acknowledgment was received, and the time the authority limits are cleared. The Claimant could not testify with certainty whether he entered the Bennett and Turney work groups in chronological order. The Claimant inferred that he had entered them both in a timely manner because “the train had to go by me before it got to where he was entering the track and he couldn’t get on the track ahead of the train without acknowledging that train and that was probably 9:45 that the train went by there because Mr. Bennett was there watching that train go by also and wanted to use my time.” This inference is insufficient to establish that the Claimant properly completed the “Multiple Work Groups Using the Same Authority” form as required under Rule 6.3.1.

The Claimant’s failure to clear Mr. Turney’s crew speaks for itself as a violation of Rule 6.3.1, as the Claimant failed to check his own documentation or to contact the other crew before releasing the track authority back to the Dispatcher. Consequently, the Claimant clearly violated applicable rules governing his conduct as Employee in Charge.

The Claimant admitted in his testimony that he was distracted by his obligation to bring his wife to see his mother-in-law in the hospital, and that the cold weather prolonged the process of bringing the rail being installed to the proper temperature, thus extending the time required to complete the work. Nevertheless, it was incumbent upon the Claimant to abide meticulously by the safety rules in order to protect employees under his jurisdiction and to avoid precisely the type of mishap that occurred on December 13, 2007. Thus, the Claimant is culpable.

The Organization contends that the accident could have been avoided if there had been a GPS installed on the truck, or if the welding crew had been listening to the dispatcher's channel, or if the welding crew had called to inquire why they were being held over after their scheduled time. Any of these circumstances might have avoided the accident, but the Claimant's failure to check his own documentation and his carelessness in certifying the track as cleared because he saw all the vehicles that comprised his own work group leaving the track, but forgot that there was another work group operating under his track authority, rendered the Claimant's negligence the proximate cause of this accident. At issue in the instant case is the severity of the penalty that the Carrier may impose for this violation.


The Claimant has worked for BNSF for twenty-seven years, during which time he has compiled an unblemished record of service with no prior discipline. Although the Claimant's mistake is a serious one, there is no rule or regulation mandating that the Claimant forfeit his employment as a result of this single error. He testified credibly at the investigatory hearing that he was disconsolate over his error, and that he understood what he done wrong. Given his extraordinary service to the Carrier over twenty-seven years without any disciplinary action, it is unlikely that he will repeat his inadvertence in the future, with or without retraining, which may be ordered at the Carrier's discretion. Nevertheless, a stringent penalty should be imposed for the grievant's negligence in the instant case as a deterrent warning for other Employees in Charge and to assure meticulous compliance by all such employees with the documentation procedures and track authority clearing procedures mandated by the Carrier in order to protect bargaining unit employees from injury and the Carrier from liability or property damage.

The Board does not exercise leniency in the instant case. Rather, the Board recognizes not only the value of the grievant's contribution to the Carrier by his years of meticulous compliance with the Carrier's procedures in the past, but also the loss of a valuable asset to the Carrier in the future if the Claimant were dismissed for this single, albeit significant, omission. Thus, the penalty is excessively harsh in relation

to the nature of the Claimant's offense, a momentary loss of concentration rather than an intentional circumvention of applicable rules and protocols.

Therefore, based on the evidence submitted, there was not just cause to remove the Claimant, Daniel J. Brewer from all service. The Claimant shall be restored to service with uninterrupted seniority, but without back pay. The prolonged interval from his dismissal to his reinstatement shall be considered a disciplinary suspension. Any future violation of a similar nature shall be deemed grounds to terminate the Claimant from all service, subject to the grievance procedure and the arbitration process.

We so find.


Daniel F. Brent, Impartial Chair

Dated: October 24, 2008

() I concur. () I dissent.


Samantha Rogers
Carrier Member

Dated: November 17, 2008

(☒) I concur. () I dissent.


R. C. Smullen
Organization Member

Dated: October 31, 2008