

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 103, (Case No. 103)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

**vs**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Samantha Rogers, Carrier Member  
David D. Tanner, Employee Member

**STATEMENT OF CLAIM:**

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

- 1. The Carrier violated the Agreement commencing September 28, 2011, when Claimant, Shannon C. Brown (1108042), was Dismissed, for failure to follow the Engineering Instruction with regards to temporary speed restriction before the required number of trains passed over the restricted area on July 11, 2011. The Carrier alleged violation of EI 4.10 Responsibility of Maintenance of Way Department and EI 4.10 Temporary Speed Restrictions Tables.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."**

**(Carrier File No. 14-11-0200) (Organization File No. 10-13N1-1155.CLM)**

**FINDINGS:**

Pubic Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On July 15, 2011, Claimant was directed to attend a formal Investigation on July 21, 2011, which was mutually postponed until August 30, 2011, concerning in pertinent part the following charge:

**"...for the purpose of ascertaining the facts and determining your responsibility,**

**if any, in connection with your alleged failure to follow The Engineering Instructions with regards to temporary speed restrictions when you allegedly removed a temporary speed restriction before the required number of trains passed over the restricted area on July 11, 2011 at 1650 hours on the Chillicothe Subdivision at Ormonde while assigned as a Foreman. Carrier's first knowledge of this alleged rules violation was July 12, 2011."**

On July 15, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because the Conducting Officer and various Carrier Witnesses overlooked evidence and treated the Claimant as if he were guilty from the moment the Hearing was convened and on that basis alone it argued the Claimant should be reinstated and the claim sustained without even reviewing the merits. Turning to the facts it argued that contrary to the Carrier's assertion the Claimant did not improperly remove a speed restriction before the required number of trains passed over the restricted area covered by the Notice of Investigation on July 11, 2011. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors involved in the handling of the Claimant's case and he was not denied a "fair and impartial" Investigation. It further argued the transcript shows that Claimant failed to follow Engineering Instructions when he removed temporary speed restrictions before the required number of trains passed over the restricted area, on July 11th at 1650 hours and coupled with his past disciplinary record dismissal was appropriate. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and are not persuaded by the Organization's procedural arguments that the merits of the case need not be examined. It is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

On July 11, the Claimant and his crew did surfacing and tamping work after which he removed the slow order between M.P. 190.200 and 191.000. The central question at issue in the subject case revolves around what the temperature of the rail was at the time the speed restriction was lifted by the Claimant. The Division Engineer, N. Waller was questioned on pages 11 and 12 of the transcript regarding that issue and his conversation with the Claimant. Waller read from his notes that he transcribed shortly after talking to the Claimant. He read in pertinent part as follows:

**"...Shannon came to my office to talk about these events. He stated to me that rail temperature was 103 degrees, and that he ran 3 trains at 10 mph. We then**

looked up the speed restriction table, 4-1, in the Engineering Instructions. It says that for spot and out-of-face work activities including surfacing, when maximum rail temperature reached or predicted for the duration to operate 21 qualifying trains is between 75 degrees and 104 degrees, we must run 5 trains at 40 mph, and if the track is ok, then the speed restriction can be removed. Shannon then stated to me that he didn't think he had done that right. I asked him if he was familiar with the speed restriction table, 4 - 1, and he replied that he was, and that he had a laminated copy of it that he kept in his truck. That week, I was able to verify with the dispatching office that the speed restriction was voided at 4:50 p.m., July 11. At 6:19 p.m. on July 12, Shannon sent me an email stating that his recorded rail temps that day were 95, 99, 103, & then 84 degrees at the time he removed the slow order, and that he did comply with Engineering Instructions rule 4.10, 4.10 Temporary Speed Restriction Tables...." (*Underlining Board's emphasis*)

Rule 4.10 Temporary Speed Restriction Tables contains an Exception which states:

**"EXCEPTION: If a disturbed track speed restriction is in effect and the rail temperature remains above the threshold temperature adhere to the requirements of Table 4-1. However, if the rail temperature drops below 85 degrees before the required trains pass over the restricted area, you may modify or remove the speed restrictions under the following conditions:**

1. At least 2 trains have passed over the restricted area at 25 MPH.
2. A qualified employee visually inspects the entire segment of restricted track to ensure that the track meets all standards required for higher train speeds."

The Division Engineer testified that on July 12th the Claimant told him the rail temperature was 103 degrees on July 11th when he released the track in question and he thought he had erred. He further testified the Claimant sent him an email the evening of July 12 that modified his original rendition of what transpired on the date of the incident. Claimant testified to the contrary regarding Waller's notes on pages 44 and 45 of the transcript as follows:

"It says the, down there towards the bottom of 3A, um, it states Mr. Waller the, that I did not get a response. But at 8 a.m., on July 12 Shannon came to my office to talk about these events. He stated to me the rail temperature was 103 degrees, and that he ran 3 trains at 10 MPH. It, uh, uh, I did state that it was 103 degrees, but, that I told Mr. Waller that was my hottest temperature of the day. That was not the temperature at the time of the release. I told, he had, he had asked me what the hottest temp- temperature I took was. And that, that was my reply, that, um. And then he also says that, uh, uh, it goes

over, he said 3D, that Shannon then stated to me he didn't think he had done right. I asked him if he was familiar with Speed Restriction Table 4.1, and he replied that he was, and that he had a laminated copy of it that he kept in his truck. I take exception to that also because what I actually told him was that I wasn't exactly sure. I would have to review my records, which I did not have on me at the time, and, um, and double check that I had complied."  
(Underlining Board's emphasis)

On page 49 of the transcript the Claimant reiterated that at 8:00 a.m., July 12, 2011, he told Division Engineer Waller that the hottest rail temperature he recorded the previous day was 103 degrees. The questioning of the Claimant continued on page 52 as follows:

**"Michael Heille: I just have one, a couple of questions, Mr. Brown. What, what kind of day was it that day, July 11, 2011? Was it, was it a warm day?"**

**Shannon C. Brown: Uh, for part of the day it was warm. But, I mean, um, it turned, we ended up getting rain, and overcast, it became cloudy. And, uh with that the temperature had dropped, which is all recorded with my temperatures taken that day."** (Underlining Board's emphasis)

Division Engineer Waller asserted that at the time Claimant released the speed restriction on July 11, 2011, it was 87 degrees at Galesburg. He also submitted a temperature recording from the Galesburg Airport as to what the temperatures were throughout the day. According to that report the temperature at the airport varied between 89.6F and 89.8F between the hours of 3:55 p.m. and 5:55 p.m. The report additionally stated under the Section titled Events that there were thunderstorms in the area. Waller testified that he did not believe that it rained at the Galesburg Airport that day which was approximately ten miles from Claimant's work location, but he did not dispute the Claimant's testimony that it had rained at that site or it was overcast. Waller and the Claimant both testified multiple times that rail temperatures were subject to weather conditions and would be reduced by cloudiness and/or rain. On page 28 of the transcript Division Engineer Waller was questioned as follows:

**"Randy Lunow: Okay. So do you have any idea of positive facts of what the, uh, temperature was at the location at the said time of track was, the slow order was raised?"**

**Nathan Waller: No, I don't.** (Underlining Board's emphasis)

The Board has not been given any reason to question the veracity of either Mr. Waller or the Claimant and in this instance there was a lack of proof offered that the temperature at the

Claimant's work site was not 84F or that the Exception under Rule 4.10 did not apply. However, there is a question that remains and that was whether the Claimant complied with the conditions listed under the Exception, namely, the first which states:

**"1. At least 2 trains have passed over the restricted area at 25 MPH."**

In Waller's statement (See page 11 of the transcript) he stated the Claimant reported to him that he had ran three trains over the restricted area at 10 mph. and on page 18 of the transcript he testified in pertinent part:

**"...In my conversation with Shannon, we ran 3 at 10, 3 trains at 10. I was able to confirm at a later date we ran actually 2 at 10, and 1 at 25. Um, that's still, bullet point number 1 says, 2 trains must pass over to 25 MPH. So I, don't think we even complied with this exception."**

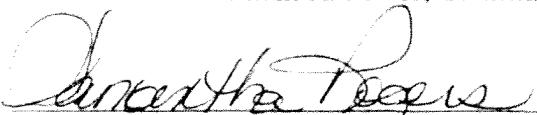
Waller's statement and the aforementioned testimony was not effectively rebutted as to the number of trains that passed over the location in dispute. The Board will not enter into speculation as to whether two trains passing over at 10 mph and 1 at 25 mph equals two trains at 25 mph. The Exception to Rule 4.10 was not explicitly complied with, even though the Claimant did have multiple trains pass over the location before he removed the speed restriction. Therefore, there was substantial evidence adduced at the Investigation that the Claimant did not meet the exact requirements of Engineering Instructions pertaining to the lifting of temporary speed restrictions.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 15 years of service with a less than stellar work record including a Level S Record Suspension some three months prior to this incident. However, because there was no showing that the temperature had not dropped sufficiently for the Claimant to release the speed restriction under the Exception to Rule 4.10 the Board finds and holds that the discipline was excessive and is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service at his former disciplinary status with seniority intact and all other rights unimpaired with no back-pay. The Claimant is also forewarned that upon reinstatement he should be careful to adhere to all Safety and Carrier Rules.

**AWARD**

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.

  
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William R. Miller, Chairman & Neutral Member

  
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Samantha Rogers, Carrier Member

  
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David D. Tanner, Employee Member

Award Date: 10-22-12