

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 116, (Case No. 116)**

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

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Joy E. Mendez, 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 June 1, 2011, when Claimant, W. E. West Jr. (6594378) was issued a Level S 30-day Record Suspension with a 1 year review period, concerning his failure to document the position of switch form after lining the switch on March 28, 2011. The Carrier alleged violation of MOWOR 8.2 Position on Switches.**
- 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 wage loss commencing June 1, 2011, and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0142) (Organization File No. 150-13N1-1128.CLM)**

FINDINGS:

Public 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 April 4, 2011, Claimant was directed to attend a formal Investigation on April 19, 2011, which was mutually postponed until May 13, 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 document the position of switch form after lining the switch at Sabinal at MP 942.5 on the El Paso Subdivision

while working as a Foreman on gang TSCX0735 at approximately 1440 hours on Monday, March 28, 2011.

This investigation will determine possible violation of MOWOR 8.2 Position of Switches."

On June 1, 2011, Claimant was notified that he had been found guilty as charged and was assessed a 30-Day Record Suspension with a one year probationary period.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing because the Notice of Investigation listed the wrong location as there was no switch at the Milepost of the alleged incident. It further argued that the Carrier attempted to add a date to the charges during the Hearing and used witnesses that had no direct knowledge of what occurred March 28, 2011, and on that basis alone it asked that the claim be sustained. Lastly, it asserted that if the Board chose to examine the merits it would discover that the record reveals that the Carrier did not meet its burden of proof. It concluded by again 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 argued that the transcript indicates there was a routine Operations Testing on March 29, 2011, when it was determined that the Claimant had failed to document the Position of Switch Form on the previous day March 28th, while he performed service for the Carrier. It further argued that the violation occurred on March 28, 2011, and was discovered the following day, therefore, the charge was correct. It closed by asserting that the Claimant admitted to his error and it asked that the discipline not be disturbed and the claim remain denied.

The Board will next address the Organization's procedural arguments. The first argument questioned the factual validity of the charges as it suggested there was no switch at MP 942.5. On page 54 of the transcript the Claimant was questioned as follows:

"Sean Sanders: Okay, Mr. West, looking back at Exhibit 5, and you've still got that in front of you. What is the Mile Post location at Sabinal stated on the track chart?"

W. E. West Jr.: Uh, 942.4.

Sean Sanders: I believe that's the position of the switch. What's the Mile Post location for Sabinal, in bold letters underneath?

W. E. West Jr.: 942.5." (Underlining Board's emphasis)

The record shows that the Claimant did not dispute the Carrier's assertion that there was a switch at Mile Post 942.5. The Organization further argued that the Carrier attempted to expand the Notice of Investigation by adding another date (March 29, 2011) during the Hearing. That argument is not persuasive because it is clear that the Claimant was charged with not having filled out the Switch Position Form on March 28, 2011, which was discovered on March 29th, therefore, there was no showing that the Carrier attempted to alter the charges to include March 29, 2011. Additionally, the witnesses called by the Carrier appropriately testified as to what they discovered as Operation Testing Officers on March 29 regarding the prior date covered by the charges. It is also evident from a reading of the transcript that the Claimant and the Organization were not blindsided as they understood the charges and the Organization provided an able defense. The Board has thoroughly reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural arguments and it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

Turning to the merits the Claimant was questioned on page 55 of the transcript as to whether he filled out the form on March 28 when he was actually at the switch or on March 29 after the Ops Team approached him as follows:

"Sean Sanders: Okay. And you're saying that the switch position form was filled out before the Ops Team left?"

W. E. West Jr.: Yes.

Sean Sanders: So you would agree that it hadn't been filled out before the Ops Team approached you?

W. E. West Jr.: Um, no, it, it hadn't.

Sean Sanders: So you, you agree then it hadn't been filled out?

W. E. West Jr.: Yes.

Sean Sanders: Okay, and whose responsibility is it to record switch position/derail on the proper form?

W. E. West Jr.: The employee in charge.

Sean Sanders: And you were the employee in charge for that track warrant, and that work group that day, correct?

W. E. West Jr.: Yes. (Underlining Board's emphasis)

The record is clear that substantial evidence was adduced at the Investigation that the Claimant violated MOWOR 8.2.

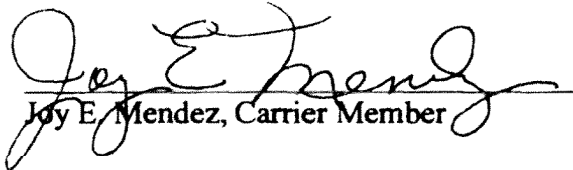
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 37 years of service with no violations in over ten years, however, his violation in this instance was of a serious nature and the discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The discipline was not excessive, arbitrary or capricious, therefore, it will not be set aside and the claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: MAY 24, 2013