

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

Case No. 9
Claim of E. S. Begaye
Level S 30-Day Record
Suspension - Failure
to Allow Proper
Stopping within Half
Range of Vision

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION

STATEMENT OF CLAIM: Claim on behalf of Machine Operator E. S. Begaye requesting removal of the Level S 30-day record suspension and one-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has worked for the Carrier since March 15, 1976. On September 9, 2011, Claimant was assigned to operate Machine #BNX00938803 on Gang TSCX0023 at MP 258.6 on the Fort Worth Subdivision. For 20 miles Claimant operated the machine, slowing it down and stopping at many crossings. However, at approximately 10:45 a.m., during a time when the Carrier was conducting an Operations ("OPS") Test to determine if machines were being stopped safely, Claimant failed to stop his machine short of a crossing and, as a result, he ran over the red flag which had been placed for the test by Assistant Roadmaster David J. Reyes and Roadmaster Mark Degano.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWOR 6.50 (Movement of On-Track Equipment) and assessed him a 30-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked

arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: **The Carrier** argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant did not stop his machine properly during the OPS Test and, as a consequence, ran over a red flag which had been put in place for it. Claimant admitted at hearing that he failed to stop properly during the OPS Test and conceded that the machine's brakes were working properly. BNSF contends that, when an employee admits guilt, there is no need for further proof.

With respect to the penalty, BNSF maintains that it properly considered Claimant's personal record, that the discipline imposed is appropriate, and that leniency is not in the Board's discretion.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to prove a rule violation. As an initial matter, BMWE contends that the Conducting Officer read into the transcript no specific rule or statute violation, forcing it to try to defend Claimant against an unnamed and unnumbered rule violation. It points out that an attempt to add a rule violation by name and number to the Investigation did not occur until pages 57-59 of the 99-page transcript. It asserts that this issue alone is reason to remove any discipline levied against Claimant.

With respect to the merits, BMWE maintains that the Notice of Investigation referred to a machine that Claimant was not operating on the date, time and location that was stated. It contends, therefore, that it presented an affirmative defense which the Carrier never challenged. The Organization asserts, in addition, that the Carrier failed to provide any substantive evidence that Claimant could have done anything different with the circumstances he had with respect to the failure of the travel braking system. It points out, in addition, that Claimant is 56 years old and has 35 years of service and more than 11 years of service as a Machine Operator. It asserts that the discipline is extreme, unwarranted and unjustified and a flagrant abuse of PEPA procedures.

The Organization urges that the Claim be sustained, that the Level S 30-day record suspension and three-year review period be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

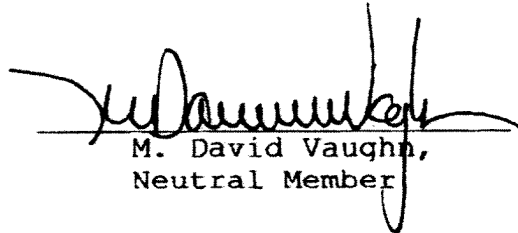
DISCUSSION AND ANALYSIS: MWOR 6.50 requires employees to operate on-track equipment at a speed that will allow stopping within half the range of vision. The evidence is sufficient to persuade the Board that Claimant ran over the red flag that was put on the track. Claimant admitted that the brakes were in working order and that he failed to stop the machine appropriately.

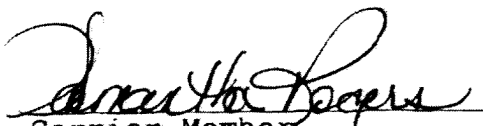
The Board is also not persuaded by the Organization's contentions that the Notice of Investigation referred to a machine that Claimant did not operate on the date, time and location that was stated and that the Investigation was unfair because Claimant was forced to defend himself against an unnamed and unnumbered rule violation. Although the Organization's allegations appear to be correct, the Investigation makes clear that Claimant was fully aware of the incident that resulted in the charges against him. He did not deny his guilt, based either on defects in the specifications or his inability to understand the charges against him. In fact, he readily admitted that he was guilty. During the Investigation, Carrier witnesses identified the rule at issue and, more importantly, Claimant and his representative had a reasonable opportunity to dispute it. Thus, the Organization failed to demonstrate that its ability to defend against the charges was handicapped as a result of the Notice's deficiencies.

Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a Level S 30-day record suspension with a one-year review period was within the range of reasonableness. The Award so reflects.

AWARD: The claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his Level S 30-day record suspension with a one-year review period to have been an appropriate penalty.

Dated this 18 day of March, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner