

**BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 3**

BROTHERHOOD OF RAILROAD SIGNALMEN)	
(Organization File No. 10-034-BNSF-188-SP))	
vs.)	PARTIES TO THE
BNSF RAILWAY COMPANY)	DISPUTE
(BNSF File No. 35-10-0030))	

STATEMENT OF CLAIM: The Organization appeals the Level S 30 day record suspension and one year of probation assessed to Mr. Ronald P. Schmidt, while he was acting as a Relief Maintainer, for allegedly failing to set on within the track warrant limits in violation of MOWOR 6.3.1.

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

1) Facts

On May 12, 2010, the Claimant was assigned as Relief Maintainer at Bend, OR., and responded to a trouble ticket in the vicinity of main track milepost (MP) 145.8, between the North and South siding switches (Deshutes), on the Oregon Trunk Sub-Division. In order to reach the location, the Claimant had to first obtain a Track Warrant that would cover the trouble ticket proximity, as well as an area to set his hy-rail vehicle onto the mainline. When the Claimant contacted the dispatcher for the necessary warrant, he obtained authority between MP 140.0 and MP 147.0. Before granting the Claimant with the required track warrant, the dispatcher had to first clear a train (BNSF 4130 South) from the requested MP locations. Upon clearing the South-bound train, the dispatcher granted the Claimant with the requested track authority. The Claimant set his hy-rail vehicle onto the track at Cooley Road Crossing—MP147.60—six-tenths of a mile South of the requested track warrant authority. Eleven minutes later, the Claimant realized that he was out of his requested track warrant limits (MP 140.0-MP 147.0) and contacted the dispatcher to request an addition to his authority. However, once the track warrant is granted and "okayed," the dispatching computer system will not allow for revisions to existing warrants. Therefore, the Claimant had to first clear from the main track and request a new track warrant. Once the Claimant cleared his vehicle from the mainline and released his initial track warrant, he and the dispatcher discussed his failure to obtain proper authority at Cooley Road Crossing.

At the time of the incident under investigation, the Claimant was a 48 year old employee with approximately 3.5 years of service.

2) Organization Position

In their appeal letter of December 7, 2010, the Organization confirms that it never suggested that Mr. Schmidt failed to comply with MOWOR 6.3.1. (which the Claimant, in the

Investigation, indeed admitted). Therefore, the violation of MOWOR 6.3.1, as charged, is admitted. The Organization, however, takes issue with the conduct of the investigation, says that the Carrier is at fault for not properly training / familiarizing the Claimant, that the dispatcher was, at least partially, to blame and that the discipline is too harsh.

a) Conduct of the Investigation

The Organization argues that the Carrier failed to comply with Rule 54, paragraph C of the BRS/BNSF collective bargaining agreement. That Rule states:

"C. At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire."

b) Training / Familiarization

The Organization contends that Mr. Schmidt did not fail the Carrier but the Carrier failed Mr. Schmidt by not providing the training, tools and familiarization to do his job safely. Rule 56 of the BRS/BNSF Agreement states:

"All employees shall be given any advice, instructions, literature and assistance needed relating to the work of the position or assignment, or the equipment to be installed, repaired, maintained, tested or inspected while qualifying for positions under this agreement. Employees qualifying for positions in Class I shall be given all instructions on keeping time records and books, Carrier forms, ICC forms, instrument reading and any other office or field work necessary to qualify for the position, which the employee had not had an opportunity to learn before being assigned to such position."

The Organization says that the Carrier violated Rule 56 by failing to give Mr. Schmidt the needed assistance to make him familiar with the new territory.

The Organization states that Mr. Schmidt was directed by the Carrier to relieve the Bend Oregon maintainer job and was not provided any material, literature or person to help make him familiar with 80 miles of territory. They say that the Carrier's own directive, which stipulates a person be trained annually on HLCS, was not adhered to as shown in the transcript. Furthermore, they say, Mr. Schmidt did not have any training or experience in track warrant territory.

c) Role of the Dispatcher

The Organization says that Mr. Schmidt complied with MOWOR Rule 14.8 Track Warrant Requests when he gave Cooley Road as his point of entry into his limits. They argue that the Dispatcher failed Mr. Schmidt by not alerting him that Cooley Road was outside his requested limits, due to the obvious distraction of carrying on a radio conversation at the same time he was giving track warrant limits to Mr. Schmidt.

d) Level of Discipline

The Organization contends the discipline issued Mr. Schmidt on June 30, 2010 is harsh and excessive and is a violation of Rule 54 paragraph G which states:

"If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired with pay for time lost, but any earnings in other employment will be used to offset loss of earnings."

3) Carrier Position

a) Conduct of the Investigation

It is the Carrier's position that Rule 54 of the Agreement was not violated. They say that the Notice of Investigation outlined the specific offense for which the hearing was being held.

b) Training / Familiarization

The Carrier says that the record shows that the Claimant admitted being annually tested on the MOWOR book. They state that the Claimant is empowered to recognize safety and implement it into his daily job duties—including the ability to properly gain track authority and recognize if additional assistance is required to perform his duties. They say that the Claimant had been provided with the necessary "training, tools, and familiarization" to perform his job effectively. They say that neither the Claimant, nor the Organization has shown any evidence that he did not have the necessary familiarization with this territory, nor inability to gain track authorization properly. Therefore, they say, the Organization has shown no evidence where BNSF has violated Rule 56—Instruction on Positions. They go on to say that, most importantly, the Claimant has held a Signal Maintainer's position since June 2007. His personal records show that he has been formally trained on multiple rules and policies, including MOWOR-6.3.1, Main Track Authorization and Hy-Rail Limits Compliance System (HLCS), both of which were necessary for obtaining the track warrant in the instant claim. The Organization also relies on MOWOR 14.8, Track Warrant Requests, to establish blame for the dispatcher when the track warrant was granted outside the location of Cooly Road Crossing. However, they say, this Rule does not separate roles and responsibilities as the Organization is purporting. The Rule covers MOW employees, not Dispatching Employees. They say that the Claimant clearly admitted did he not verify that his (set-on) location was within the requested track authority until after the warrant was okayed and he was already on the main tracks.

c) Role of the Dispatcher

The Carrier says that the dispatcher's involvement does not absolve the Claimant of his duty to comply with MOWOR 6.3.1—Main Track Authorization. Therefore, the Carrier says that the Organization has not shown evidence of how MOWOR 14.8 is relevant to the Claimant's culpability in the instant claim.

d) Level of Discipline

The Carrier says that BNSF's Policy for Employee Performance Accountability (PEPA) classifies the Claimant's violation as a serious offense (see Appendix B, Items 4 and 7). They say that contrary to the Organization's contention, the discipline assessed to the Claimant is consistent with the nature of the offense, the rule violation, and their PEPA.

1) Reasons of the Board

a) Conduct of Investigation

The Organization argues that the language of Rule 54 (C) of the Agreement, where it requires that the "specific offense" be outlined, was not complied with.

The charge letter in question states, in relevant part, that the investigation was called "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to set on within the limits of your Track Warrant between MP 140.0 and MP 147.0 on Wednesday May 23, 2010 while working as a Relief Signal Maintainer on the Oregon Trunk Sub in Bend, Oregon."

The Board cannot agree with this position of the Organization. The purpose of a notice of investigation is to allow the organization and the claimant sufficient time and knowledge to know the case to be met. There is no specific language in the Agreement providing that Rules be specifically enumerated to meet this requirement. Parties in the industry in other agreements have bargained for clauses such as that. That is not the case here. The Organization and the Claimant knew the specific offense – the failure to set on within the limits of the Track Warrant, by the Claimant, on the date and at the location specified. The Board finds that the Notice of Investigation held sufficient particulars to allow the parties to prepare, and that, therefore, there was no procedural error.

b) Training / Familiarization

Not only does the record show that Mr. Schmidt was trained annually in the MOWOR, and had worked as a Signal Maintainer for over 3 years, it also shows that only the day before, by his own testimony in the transcript, he had assisted in taking the hy-rail off the track at the very crossing in question (p.42). Mr. Schmidt states, in the transcript, that he had been tested 3 years before on the specific track warrant section of MOWOR 6.3.1, but not in the intervening exams. In the view of the Board, this does not exonerate him. A test is simply an exam on a selection from the Rule book. Each employee covered by these rules is required to know them all, not just those upon which they happen to be tested. Indeed, the Claimant so admits in the transcript (p.47, line 19).

The Board is satisfied, on the basis of the record before it, that Mr. Schmidt had sufficient training and familiarization to be able to ascertain where he was putting on with the hy-rail versus the limits of his track warrant. It appears that he simply made a mistake with respect to the limits he requested from the dispatcher, which led to his violation of MOWOR 6.3.1.

c) Role of the Dispatcher

This Board has jurisdiction over this particular case. It does not have any jurisdiction over any matter involving the dispatcher. While one person's conduct can have an impact on the culpability of another, in this case it is clear that the Claimant admitted to putting the hy-rail on the track outside of the limits he had obtained from the dispatcher. Even if this was an error the dispatcher might have helped him correct, it remains the responsibility of the Claimant to ensure his hy-rail is only put on the track in accordance with the Rules. It does not reduce his culpability to say that someone else might have helped prevent this.

In the final analysis, the Board finds that the Claimant did violate MOWOR 6.3.1.

d) Level of Discipline

The Board agrees with the Organization where, at the end of the transcript, the Local Chairman sums up by saying "...Mr. Schmidt, as the evidence laid out, made a mistake. Nowhere was it intentional. It was an honest mistake." Further, as always, the Carrier has the option to do something other than proceed down the formal investigation and

disciplinary route. It is also clear that Mr. Schmidt, once he realized his mistake, called his supervisor to tell him. This self-reporting is tempered by the fact that the dispatcher had already told Mr. Schmidt that he was going to do the same thing. Mr. Schmidt did have a clear record at the time of this incident, but he is a relatively short-term employee.

Turning to the Carrier's PEPA, it is clear to the Board that the discipline assessed is, as the Carrier claims, consistent with that Policy. Nowhere does the Organization say that it is not, nor that the policy itself should be overturned. They simply argue that, in this circumstance, an alternative path should have been followed, and that the discipline assessed was unjust, harsh and excessive.

The Board acknowledges and adopts the long-standing test in this industry, stated in Third Division Award No. 37359 where that Board declared:

"In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion."

In this case, the Board does not find sufficient reason to cause it to disturb the discipline assessed by the Carrier.

AWARD

The Claim is denied.

Roger K. MacDougall
Chair and Neutral Member

Kelly Haley
Vice-President
Employee Member

Michelle McBride
Director Labor Relations
Carrier Member

Dated: _____

At: Chicago, IL