

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 403 – Award No. 403 (Ventura)
Carrier File No. 14-10-0196
Organization File No. 150-13D2-108.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 15, 2010, when Claimant, Arturo D. Ventura (6551915), was issued a Level S 30-day Record Suspension with 3 year probation, for failure to stay within track limits while hy-railing on June 2, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct.
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 compensated for his lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Arturo Ventura, has been employed by the Carrier since 1995. On June 14, 2010, the Carrier charged Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to stay within his track and time limits while hy-railing on June 2, 2010, at approximately 1120 on the Bakersfield Subdivision and for being dishonest in providing information

following the incident. Following the investigation, the Carrier found that Claimant had committed the infractions alleged, in violation of Maintenance of Way Operating Rules 1.6 Conduct and 6.3.1 Main Track Authorization. The Carrier issued Claimant a Level S 30-day record suspension and a three year review period.

Maintenance of Way Operating Rule 1.6, Conduct, provides, in relevant part:

Employees must not be:

* * *

4. Dishonest

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. . . .

Maintenance of Way Operating Rule 6.3, Track Occupancy, 6.3.1., Main Track Authorization, provides, in relevant part:

Use one of the following on main tracks, controlled sidings or any track where CTC is in effect:

* * *

- Rule 10.3 (Track and Time)

* * *

- Rule 15.2 (Track Bulletin Form B)

* * *

Occupying or Fouling Track

Before occupying a main track, controlled siding or any track where CTC is in effect, employees must have information concerning all track bulletin Form B's in effect that may overlap their authority. Employees continuing to occupy a main track, controlled siding or any track where CTC is in effect after midnight must contact the train dispatcher to obtain any additional Form B's that may have been issued.

* * *

When requesting authority or establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until authority is received or protection is established. The employee requesting authority must be qualified on these rules and must

tell the train dispatcher or control operator where the main track will be entered.

* * *

Multiple Work Group—Job Briefing

When two or more work groups are using the same authority, the EIC of the authority must have a job briefing with each work group.

Multiple Work Group—Documentation

The employee in charge of the authority must document the following on the "Multiple Work Groups Using the Same Authority" form:

- Authority number
- Name of each work group using the authority
- Time acknowledgement received
- Time authority limits are cleared

* * *

Confirmation of Limits Prior to Granting Authority

Following a verbal request for authority, the following will apply:

1. If the authority can be granted as requested, the train dispatcher or control operator will restate the limits to the requesting employee for confirmation.
2. If confirmation is received from the employee, the train dispatcher or control operator will issue the authority with no change in the confirmed limits.
3. If unable to grant authority with limits as requested, the train dispatcher or control operator will state limits that can be given, asking employee if usable.
4. If changed limits are usable, the train dispatcher or control operator will require the employee to repeat the changed limits to confirm understanding before issuing limits. If the authority issued is different from that discussed with the train dispatcher or control operator, employee must not repeat the authority until a confirmation of the limits requested is identical to the authority being issued.

* * *

On the day of the incident, Claimant was working as a Track Supervisor, h-railing the main line, with track and time authority on two separate pieces of track, between East and West Angiola, and between West Angiola and East Corcoran. Claimant did not have track and time authority in between these two locations, in an area referenced, but not defined, by the Carrier witnesses at the investigation as the "OS." Apparently, that was the area in between certain signals and referred to as the "west end of Angiola."

Clarence P. (Pat) Newell, Roadmaster at Carrier's Bakersfield Subdivision, testified that he was Claimant's immediate supervisor at the time of the incident. He testified that Claimant had track and time authority from MP 941.05 to 941.76 or .78, and then from 942.85 to 949.9. He described the "OS" area as from 942.76 to .85. He stated that at approximately 1419 hours on the day of the incident, the chief dispatcher paged him to inform him that Claimant had exceeded his limits. An email from the dispatcher was entered into evidence at the investigation, and read as follows:

At 1122 pt Bakersfield DS received an exceeds alert for Ventura at MP 942.84. During the conversation with DS as to his location Ventura stated it was a thumbwheel error and he was between switches on the Main track at Angiola. The dispatchers (sic) concern was that Ventura had T & T on the Main track between E and W angiola as well as between W Angiola and E Corcoran, but did not have authority for the OS section at W Angiola. After the DS confirmed from Ventura his location between switches at Angiola is when the request was entered for the OS at W Angiola. Replay and review from the San Bernardino Signal indicates his vehicle may have proceeded into the OS at W Angiola with out (sic) authority.

The record also includes transcripts of two audio files, both for the same time period, from 1100 to 1130 on the date of the incident. Other than referring to one recording as from a "side phone," and the other as "Avtec," the record does not explain why there are multiple dispatch recordings or whether different dispatchers are speaking. The first transcript begins at 11:05:01, and shows the recording beginning again at 11:22 AM 36 seconds. There is no discussion between the dispatcher and Claimant until just before the second time notation, where the transcript shows the following exchange:

Gang 10849: Armbruster Bakersfield Subdivision, gang #10849 using Form B restriction #8393 running between Milepost 942.7 to Milepost 942.8, it's on the main track, Armbruster authorizes Art Ventura to proceed through my limits and passing his red board at Milepost 942.7 without stopping and is maximum authorized speed, over.

Claimant: I understand permission received Foreman Armbruster's Form B 8392, working between 942.7 to Milepost 942.8 without stopping at-, at his red flag located at Milepost 942.7, west bound for you guys at the west end of Angiola.

The transcript shows that at 11:22 AM 36 seconds and at 11:23 AM 56 seconds, the dispatcher stated, "BNSF Bakersfield Sub Dispatcher to Ventura, over," but there is no audible response.

The second recording, from the side phone, begins at 11:00 AM 42 seconds, and then shows a recording beginning at 11:23 AM 33 seconds. There is no conversation between Claimant and the dispatcher, or apparently any conversation concerning Claimant, in either of these transcript segments. At 11:24 AM 35 seconds, the following exchange takes place:

Claimant: Trudy (the dispatcher), Ventura.

Dispatch: Yes.

Claimant: Trudy, I've got to request the time there on the west of Angiola, I've got a request right now though.

Dispatch: Well, I can't do anything until you talk to me about exceeding the limits, so are-, are you out of the limits, or where are you at?

Claimant: I-, I'm, no, I'm just west of Angiola. I set my HLCS on the siding instead of putting it somewhere for the main track, over.

Dispatch: So it was thumbwheel error?

Claimant: Yeah, thumbwheel error, over.

Dispatch: Alright. Alright. You had me held up there, I can't move anything unless I talk to you.

Claimant: Sorry Trudy.

In a recording beginning at 11:27, the dispatcher tells an unidentified third party that she needs to talk about Claimant, who said there had been a thumbwheel error, and that the matter should probably be investigated.

Mr. Newell testified that after receiving the dispatcher's email he contacted Claimant, who told him that he had never entered the OS and had been between the switches, between the west end and east end of Angiola. Mr. Newell stated that Claimant told him he did not go into the OS, that is, the west switch at Angiola. Mr. Newell stated that Claimant maintained that the problem was an error on a system known as hy-rail compliance limits, which has a "thumbwheel" that needs to be set at, for example, M for main track, S for siding, etc. The thumbwheel would need to be changed to the correct

track to avoid an error. If the thumbwheel is not set correctly, an "exceeds" alarm sounds, constituting a thumbwheel error. Mr. Newell added that he later spoke to Claimant again, who then told he that he might have gone past the "lbonds," apparently a switch where a siding and main track come together, and into the OS area.

Mr. Newell explained that Claimant did not have track and time authority in the area where he passed over the lbonds and went into an OS section, although he had it on either side of the OS area. He explained that the beginning of the OS area was 942.78, and the last part of it was 942.85. Mr. Newell further explained that when a vehicle goes into an OS, that does not constitute a thumbwheel error, but rather is defined as exceeding limits.

Mr. Newell stated that Claimant was required to have positive protection to enter the OS area. He acknowledged that authority to enter Form B limits could constitute such authority, and Claimant could have proceeded pursuant to such authority so long as he followed all applicable rules. However, Mr. Newell testified, even if Claimant was protected by track and time up to the location at issue, and then was protected by authority to enter Form B limits, he would still have been out of his limits. He did not explain why this would be so. He also did not explain what, if any, requirements for proceeding pursuant to Form B had not been followed.

Mr. Newell testified that Claimant never told him that he had Form B protection, and he believed that Claimant had not been true and honest in his account of the incident. He did acknowledge that Claimant properly followed the procedures to properly notify the dispatcher of a thumb wheel error.

Signal Supervisor James Newell also testified at the investigation. He interpreted various documents including downloads which, he explained, showed the thumbwheel on Claimant's vehicle set to main line, and an exceeds limits alarm for 11:22:21. He also testified that authority to enter Form B limits could constitute on-track authority, and Claimant could have proceeded pursuant to such authority so long as he followed all applicable rules.

Dennis J. Armbruster testified at the investigation that he was the employee in charge of a Form B at the location in question, at the time of the incident. He explained that he was providing on-track protection for himself and any workgroups within his Form B limits. He stated that Claimant had been cleared through his limits, and was under his protection while between the switches on the main track. He stated that Claimant received his permission to move through the Form B limits prior to entering them. A written statement, signed by Mr. Armbruster and his co-worker William Geary, was entered into evidence at the investigation:

On Tuesday June 2, 2010 we had a form b at the west end angiola. Mr. art Ventura (track sup) was put on our form b list/multiple work group. We brief that this was going to be his protection while being at the west end of

angiola (942.8) this briefing took place prior to him (art Ventura fouling the switch at west angiola.

Mr. Geary also testified at the investigation, and confirmed that Claimant was protected by the Form B under which he and Mr. Armbruster were working that day.

Claimant testified at the investigation that he did not exceed his limits on the day at issue. He stated that he used Mr. Armbruster's Form B as his positive protection at the west end of Angiola, at the switch where the Carrier's records showed him exceeding his limits. He also noted that he had track and time authority on either side of the switch. He stated that his protection in the OS section was the Form B provided by Mr. Armbruster, as he did not have his own authority on the west end of Angiola. He stated that he did brief and clear through Mr. Armbruster's limits before he entered them.

Claimant stated that he should have put his HLCS unit on N/A while he proceeded through Mr. Armbruster's switch, and had he done no exceed would have been noted on his vehicle. So, he explained, what had occurred was a thumbwheel error, and he so informed the dispatcher.

Claimant maintained that he was never out of protection, as he was covered by his own track and time authority, or the Form B authorization. He stated that he was under protection, either his own track and time or the Form B, at all times.

Claimant acknowledged that when Mr. Newell called him a few hours after the incident he first told him there had been a thumbwheel error. He also acknowledged that he later told Mr. Newell he might have crossed into the west end of Angiola. He also acknowledged that he did not tell Mr. Newell he had Form B protection. However, Claimant maintained, he did not intend to be dishonest or withhold information. Rather, he explained, he did not realize until he thought about the situation later that he actually had had protection at the location at issue.

The Carrier's Policy for Employee Performance Accountability (PEPA) provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules.

The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal, except that the serious-incident review period will be reduced to 12 months for employees who have completed at least five years' service and who have been injury and discipline-free for that period. The PEPA also provides that certain aggravated offenses, listed in Appendix C, may subject an employee to dismissal for a single offense. Those violations include: 1) Theft or other act with intent to defraud the carrier of monies or property not due. Claimant's personal record shows a Level S, 30-day record suspension, with a 12-month review period, issued October 26, 2009 for failure to properly use lookout protection.

The Carrier asserts that this case is not complicated. Simply put, the Carrier states, Claimant was on a track without proper authority. Moreover, the Carrier points out, the record establishes that Claimant admitted his violation to Roadmaster Newell. Further, the Carrier notes, Claimant gave three different versions of what occurred—that the matter involved a thumbwheel error and Claimant was not outside his limits; that he did in fact exceed his limits; and that he had Form B protection. While, the Carrier states, Claimant maintained that he was nervous and not dishonest, there is no excuse for his having given multiple versions of what transpired.

Moreover, the Carrier points out, an email from the dispatcher on duty, offered into evidence at the investigation, confirms that Claimant had track and time authority at two locations, but not at the location he was occupying in between those two. The dispatcher's statement, the Carrier states, confirms that Claimant made a request for authority at that location after the dispatcher became aware that it was lacking. However, the Carrier stresses, authority cannot be requested after the fact. Therefore, the Carrier concludes, Claimant's violation has been proven.

With respect to the penalty, the Carrier asserts that Claimant's violation was serious, and could have resulted in catastrophic consequences. The fact that there was no injury, the Carrier stresses, does not absolve Claimant of his culpability. The Carrier notes that since this was Claimant's second serious violation within 12 months, he was subject to dismissal under Carrier's PEPA. Thus, the Carrier concludes, it granted Claimant leniency, and its determination as to the penalty should not be disturbed by this Board.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states that the individual who assessed the discipline prejudged Claimant's guilt from the outset and could not have rendered an impartial ruling following the investigation. On the merits, the Organization contends that this case arises from the Carrier's confusion concerning Claimant's use of main track authorization options. Claimant, the Organization contends, made a proper transition from Rule 10.3 Track and Time to Rule 15.2 Track Bulletin Form B. The record clearly establishes, the Organization contends, that Claimant had Rule 10.3 protection, and when he reached the end of that authority he contacted the employee in charge of a Form B and obtained permission to continue on his track inspection assignment through the Form B to the rest of the track upon which he had authority pursuant to his Rule 10.3 track and time authority. The record testimony, the Organization states, shows that Claimant was protected on the main track at all times. Further, the Organization states, the record shows that the matter involved simply a "thumbwheel error," which Claimant and the dispatcher handled properly and in accordance with Carrier rules. Moreover, the Organization points out, following the incident Claimant recalled some additional facts and brought them to the Carrier's attention, but there is nothing to indicate that he had been dishonest as charged by the Carrier. Therefore, the Organization concludes, the Carrier failed to prove its charges against Claimant, and requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, the Carrier bears the burden of proving, by substantial evidence, that Claimant failed to stay within his track and time limits, thereby occupying track without proper authority, and that he was dishonest concerning the incident. We find that the Carrier has failed to meet its burden of proof.

The record is clear that, as the Carrier asserts, Claimant had track and time authority on two pieces of track, and that he did not have such authority in the area in between, referred to as the OS area on the west end of Angiola. The record is also clear, as he acknowledged at the investigation, that Claimant entered that area.

The applicable Carrier rules provide, as the Carrier's witnesses acknowledged at the investigation, that proper authority to occupy track may be established by track and time authority and/or authority to enter limits established by a Form B. The record is clear, from Mr. Armbruster's testimony and the dispatch communications entered into evidence, that Mr. Armbruster was the employee in charge of a Form B at the west end of Angiola, that he briefed with Claimant that the Form B would be his positive protection in that area, and that he granted the authority prior to Claimant's entering Mr. Armbruster's limits.

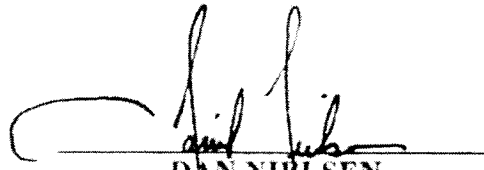
The Carrier maintains that Claimant requested authority to enter the OS area only after he had already exceeded his limits, and it is true that a dispatch communication shows Claimant requesting authority on the west end of Angiola at 11:24, two minutes after the exceeds alarm on his vehicle, and approximately two minutes after the dispatch conversation confirming the existence of the Form B authority. Nevertheless, Claimant maintained at the investigation that between his two track and time authorities and the Form B he was under protection at all times, and the Carrier, in its response to the claim, addresses the Form B only to state that Claimant was dishonest because he did not mention it at the time of the incident. While he may not have mentioned it, the record is clear that Claimant in fact did have authority through Mr. Armbruster's Form B at the west end of Angiola. The Carrier does not address the significance of that authority to the situation at issue, nor does it explain why it concluded that Claimant had exceeded his limits notwithstanding the existence of the Form B. The Carrier bears the burden of making and explaining the record, and its failure to address the Form B in this case causes us to conclude that it has not proven, by substantial evidence, that Claimant exceeded his limits or occupied track without authority.

As for the charge that Claimant was dishonest, we agree with the Carrier that it was odd that Claimant never mentioned the Form B at the time of the incident. However, clearly he did not fabricate the existence of that authority. He had the authority, and the transcripts and the testimony of Mr. Armbruster demonstrate that he had it prior to his exchange with the dispatcher. On this record, we can conclude only that Claimant was, as he maintained, confused, and addressed only his track and time authority, rather than his track and time authority along with his Form B authority. The Carrier had reasonable

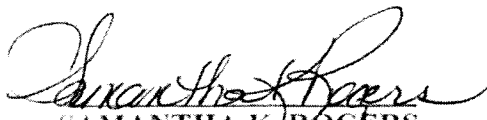
cause to suspect his statements, but the balance of the record supports them. We therefore conclude that the Carrier has failed to meet its burden of proving Claimant guilty of dishonesty. For all of the foregoing reasons, we sustain the claim and order the Carrier to rescind the discipline issued against Claimant and adjust his personal record accordingly.

AWARD

Claim sustained. The Carrier is ordered to comply with this award within 45 days.



DAN NIRLSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this 28 day of Feb , 2012.