

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway Company
(Former St. Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on June 17, 2003, when it issued Mr. K. L. McGee a 30-Day Level-S suspension; alleging that while working as Track Foreman in Jasper, AL, on June 16, 2003, he entered his tract [sic] and time limits without contacting the other gangs working in those limits; in violation of Maintenance of Way Operating Rule 6.3.1.
2. As a consequence of the Carrier's violation referred to in part (1) above, the discipline mark for this case shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement. [Carrier's File 12-03-0151. Organization's File B-2816-4].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. Kenneth L. McGee, was working as an Extra Gang Track Foreman in or near Jasper, Alabama, on June 16, 2003, engaged in replacing a track panel in a road crossing. Mr. McGee was hired by the Carrier on June 2, 1998, but had been on the job in Jasper one week.

According to the record in this case, Roadmaster Gerald Buzbee, the Claimant's immediate supervisor, examined the Claimant's record of track and time authorities on the afternoon of June 16, 2003. That record indicated that he had joint, overlapping authority with two other employees, but had not communicated with either of them for the purpose of having a job briefing. Maintenance of Way Operating Rule (MWOR) 6.3.1 governs such communications, under the subtitle "Overlapping Authority." This segment of the Rule reads as follows:

When an employee receives track and time, track warrant, track permit, DTC, or OCS joint with another employee or train or when authority received overlaps with

a track bulletin Form B, the employee must not occupy the overlapping limits until employees and/or trains listed on the authority are contacted and a job briefing determines the location of each working limit within the joint authority limits and the employee in charge (EIC) within any overlapping working limits. All working limits that have been established within authority limits must be documented on the "Working Limits" form.

According to Mr. Buzbee, the Claimant admitted that he did not contact the other employees with overlapping limits, stating that he attempted to reach them by radio, without success. He therefore put out flags to protect the location he was working, and proceeded with the work of taking out an 80-foot section of track on the crossing, preparatory to replacing it with a new track panel.

Mr. Buzbee, on the same day, wrote a letter which he served on the Claimant the following morning, June 17, 2003, issuing him a 30-day suspension for violation of MWOR 6.3.1. The suspension would begin on June 17 and he would be returned to work on July 17, 2003.

The Parties' Agreement permits an employee to be disciplined without an investigation; however, if an investigation is timely requested, it must be afforded, and a precise statement of the charges must be provided in writing. On June 19, the Organization's General Chairman wrote Mr. Buzbee, requesting that the Claimant be returned to service, paid for all time lost, and the charges removed from his personal record. He further requested an investigation under provisions of the Safety Incident Analysis Process (S.I.A.P.), designed to analyze incidents, implement a safety activity plan to eliminate recurrences, and scheduled follow-up to ensure compliance.

The request for an S.I.A.P. was denied, but an investigation was set for and held on July 9, 2003, on the charge of alleged failure to comply with MWOR 6.3.1 and failure to contact other employees with joint track and time limits. A transcript of testimony and evidence taken in the investigation was prepared and appears in the record before this Board.

The Claimant failed to appear at the investigation, which convened at 9:00 a.m. He was ably represented by the Organization's General Chairman. The investigation was twice recessed to permit the General Chairman to attempt to communicate with the Claimant, and was resumed at 10:10 a.m. The Conducting Officer refused to postpone the investigation, as requested by the General Chairman. The record includes a receipt for Certified Mail, signed by the Claimant, for the letter setting the investigation for 9:00 a.m. on July 9, 2003.

The sole witness was Roadmaster Buzbee. As discussed above, he testified about his examination of the Claimant's track and time record on June 16. He further testified that when the Claimant could not contact the other employees by radio, he should have attempted to communicate by cellular telephone or, in the alternative, have the train dispatcher contact them.

He said the Claimant did not have the other parties' cellular telephone numbers, but if the Claimant had contacted him, he could have supplied the numbers.

The Claimant's representative was handicapped to a degree, in presenting a defense to the charges, by the Claimant's absence. He did, however, determine that the other employees and the Claimant had participated in a job briefing when they first went to work on June 16, in which the day's activities were lined up. He also developed that the Claimant protected his work site with red flags as prescribed by the MWOR:

60. Q. He, he didn't have joint time with any trains?
A. No, sir.
61. Q. So there was no danger of a train coming into his, his limits?
A. No, sir.
62. Q. Was there any, any danger present with the, there was no injuries, I know that, was there any near misses or anything along that line?
A. No, sir.
63. Q. You stated that Mr. McGee had placed red flags?
A. Yes, sir.
64. Q. What would you believe would be the purpose of the red flags?
A. That's in our Maintenance of Way Rules also. He established a working limits and you have to place red flags 50 feet outside of where you're working from both sides.
65. Q. So that would of kept any on track machinery or equipment or track inspectors or anything from coming into his working limits?
A. Well a red flag is just that, it won't stop nothing if, if it's moving equipment the flag's not going to stop it.
66. Q. But they're supposed to stop and not go past the red flag?
A. Correct.
67. Q. So, and did he, to the best of your knowledge did he set those flags before he took that 80 foot panel of track out?
A. The flags were there when I arrived.

Mr. Buzbee also testified that the Claimant's failure to comply with MWOR 6.3.1 constituted a "Serious Rule Violation" (a "Level-S Violation") as defined in the Carrier's Policy for Employee Performance Accountability (PEPA), Appendix B, Section 4:

Failure to comply with rules or procedures that protect employees or machinery where such protection is defined by dispatcher, prescribed flags, other signal device, track bulletins, or in writing.

The investigation closed at 10:58 a.m. The Claimant had still not appeared by that time.

Eight days later, the Conducting Officer advised that he had carefully read the transcript of the investigation and he sustained Roadmaster Buzbee's decision to assess a 30-day suspension. That decision was promptly appealed by the Organization's General Chairman, who argued that the Claimant was a relatively new Foreman on a main line where track and time authority with multiple work groups is common. He had formerly worked as a Yard Foreman, where such authorities are not used. Mr. Buzbee testified that the Claimant had only a week's experience on this gang.

The Organization points out that the other work groups had been briefed in the morning conference call and knew what their respective work plans were. One of them was waiting to come to the Claimant's location when summoned to surface the track on the crossing. The other was a Signal Maintainer who never occupied the track, but used his track and time limits to check relays at crossings.

The Organization further characterizes the Claimant's offense as a minor infraction, since no train was involved and no one was placed in danger, by Mr. Buzbee's admission. It suggests that a lesser penalty or an S.I.A.P. would have been more appropriate. It points to the case of another employee who committed the same violation — failure to monitor overlapping authority and not contacting other employees with joint track and time — on the same date in the same area. He was given a Level 1 Formal Reprimand.

The Organization also objects to the Carrier's refusal to postpone the investigation, in view of the Claimant's failure to be present, thereby resulting in an incomplete hearing, and the omission of some pertinent facts.

The Organization believes that the 30-day suspension was assessed for the purpose of subsequently bringing about the Claimant's dismissal, in a separate proceeding. It deems the discipline in this case to be capricious, arbitrary and extreme, and requests the Claimant's reinstatement with pay for all time lost, and his record be cleared of the charge.

The Carrier responds that the Claimant was properly notified of the hearing, and his absence was at his own risk. He was represented by the Organization, which had the opportunity to call witnesses and present a defense on the Claimant's behalf.

The Carrier also argues that the Claimant admitted to Mr. Buzbee that he violated the MWOR cited in the notice of charges, and that the PEPA characterizes this offense as a "Serious Rule Violation" which warrants a 30-day suspension. The Carrier states its decision is supported by the investigation record and the Claimant's personal disciplinary history.

The Carrier further rejects and denies all other arguments, and denies the claim in its entirety.

The Board has carefully studied the investigation transcript and attached evidentiary exhibits, and the Parties' arguments. The Claimant's dismissal is the subject of a separate dispute and will not be considered in this case.

The Board believes the Carrier acted properly in refusing to further postpone the investigation. Proper notice was given the Claimant, for which he gave a receipt. The Organization has not shown that he was unable to attend by reason of accident or other unforeseen cause. His absence was at his own peril.

The Board has considered the PEPA. A Carrier may devise its own rules, with which employees are expected to abide, so long as those rules do not conflict with or supersede the provisions of a collective bargaining agreement. The PEPA, and the MWOR, are such Carrier-promulgated rules. The Board's initial impression was that the letter of MWOR 6.3.1 was violated by the Claimant, which constitutes a "Serious Rule Violation," as defined by the PEPA. The Board, however, in reviewing any part of the PEPA may rightfully consider the entirety of the PEPA. The following paragraph is instructive in this particular case:

Circumstances surrounding a serious incident may reduce an employee's personal culpability. In such cases the employee's supervisor may choose to handle the incident according to the general guidelines. If there is any doubt as to how an incident should be handled, supervisors are instructed to err on the side of leniency.

The Board is persuaded that there are circumstances here which mitigate the Claimant's personal culpability. First, although he was a qualified Foreman, and familiar with the MWOR, he lacked experience on a main line using track and time authority jointly with other work groups. His previous experience was in a yard setting, where differing rules apply.

Second, when he was unable to establish radio communication with the other two employees, he properly put out red flags to protect his work site, and he relied on the morning conference call's job briefing to make the others aware of his work, as well as his awareness of their own work. The Board finds it almost incredible that Roadmaster Buzbee would testify, "Well a red flag is just that, it won't stop nothing if, if it's moving equipment the flag's not going to stop it." Granted, the job briefing is required, but having failed to communicate by radio with the other employees, the additional protection of the flags can hardly be slighted as "just that." The Claimant did comply with the applicable flag rule and the Board believes that it provided substantial protection for his work site. The possibility of accident or injury under the circumstances here is so remote as to warrant a lesser penalty.

Moreover, the assessment of a lesser penalty to another employee, who committed the same infraction, on the same date, in the same working area, under the same supervisor, is a

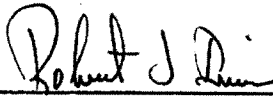
relevant consideration. It is an accepted arbitral principle that employees may be assessed differing degrees of discipline for the same infraction. This generally occurs when their overall work record and disciplinary history warrants the disparate treatment. The personal record of the other employee in question has been made available to the Board. It shows no disciplinary entries since his employment in 1974, until June 16, 2003. But there seems to be something else here. The Carrier argues that this is a track authority violation which is categorized as a "Serious Rule Violation" in the PEPA, warranting a Level-S 30-day suspension. But, the Board observes, at the same time, the other employee was given a Level 1 Formal Reprimand for the same offense, by the same supervisor, under similar, if not identical, circumstances

While their personal records may be dissimilar, those records do not change a Level 1 offense to a Level-S offense, nor the converse. This disparate treatment lends some merit to the Organization's suggestion that the 30-day Level-S suspension was assessed for the purpose of bringing about the Claimant's subsequent dismissal. The 30-day actual suspension is reduced to a Level 1 Record Suspension for 15 days. The Board considered the Claimant's previous disciplinary record in making this determination.

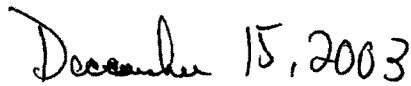
The Board finds there was compliance with the applicable provisions of Agreement Rule 91, substantial evidence was adduced at the investigation to prove the charges made, but the discipline assessed is excessive in light of the mitigating circumstances.

AWARD

The claim is sustained in accordance with the Opinion. The Claimant shall be paid for all time lost within sixty (60) days from the date of this Award.



Robert J. Irvin, Referee



Date