

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 439 – Award No. 439 – Ruvalcaba
Carrier File No. 14-12-0369
Organization File No. 190-13N1-1273

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 6, 2012, when Claimant, Alexander Ruvalcaba (1568260), was disciplined with a Level S 30 Day Record Suspension with a 1-year review period for his alleged failure to report an unusual condition that may affect the safe and efficient operation of the railroad while working as a Head Welder on June 4, 2012 on the Bakersfield Subdivision. The Carrier alleged violation of MOWOR 1.1.3 Accidents, Injuries, and Defects, and MOWOR 1.3.1 Rules, Regulations and Instructions.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline with seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 6, 2012, continuing forward and/or 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, A. Ruvalcaba, has been employed by the Carrier since 2003. On August 6, 2012, following an investigation, the Carrier assessed Claimant a Level S 30-day record suspension, with a one-year review period, for his failure to report an unusual

condition that might affect the safe and efficient operation of the railroad, while he was working as the Head Welder on the Rail Change Out Truck, changing out a rail, on the Bakersfield Subdivision on June 4, 2012. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.1.3 Accidents, Injuries and Defects, and 1.3.1 Rules, Regulations and Instructions.

The applicable Carrier Maintenance of Way Operating Rules provide, in relevant part:

1.1.3 Accidents, Injuries and Defects

Report by the first means of communication any defects in tracks . . . or any unusual condition that may affect the safe and efficient operation of the railroad . . .

1.3.1 Rules, Regulations and Instructions

* * *

Maintenance of Way Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty. When amendments are made to the Maintenance of Way Operating Rules, employees must have a copy of the general rule with their rule books, make notation of the change in their rule book or obtain a copy of the revised page.

* * *

Engineering Instructions. Employees governed by the Engineering Instructions must be familiar with and comply with all their provisions.

C.P. Newell, Carrier Roadmaster at Bakersfield, California, testified that on the evening of the incident, there was to be a rail change out, and he met with the gang and explained how to cut in the transition rail. Claimant, a Maintenance Welder, was there to assist the rail change out gang to replace the rail. The crossing had been opened up to allow the rail change out.

The next afternoon, Mr. Newell stated, he received a call from a truck driver who had traveled to the location to put the crossing back together. He informed Mr. Newell that there was a defect, as the rail had been ground back on a mismatch. Mr. Newell traveled to the location and discovered 18 inches of rail that had been ground back. Mr. Newell took photographs of the scene, which were entered into evidence at the hearing.

Mr. Newell explained that a mismatch is where one end of a rail butts up to another end and it is not completely flush and sticks out. He explained that the condition can cause serious problems, including derailment. Mr. Newell added that the gang had left behind a mismatch, and had attempted to fix it by grinding the rail back. He stated that the mismatch was at the joint, and the next day a crew had to go in and cut in a rail eliminating that joint. Mr. Newell explained that the photographs showed the mismatch,

and also that there was proper rail on hand. The gang, he stated, should have cut nine to 10 feet of rail back up to match to the actual rail, to cut into the newly installed rail.

Mr. Newell added that the track at issue is usually Class 5, but it had been reduced to 30 miles per hour because of the defect. The track was then returned to timetable speed, and it was not good for that speed because of the mismatch on the top of the rail. Mr. Newell explained that if it is necessary to leave a mismatch in the track, the track speed must be lowered at that location.

Mr. Newell entered into evidence a May 2007 e-mail from Division Engineer John Palacios to himself and other Roadmasters. In relevant part, it stressed the importance of communicating to field leadership the necessity to install properly matched rail for all repairs or, if not possible, to use comp bars and/or weld immediately. The e-mail also stated that grinding was not an acceptable solution to blend rail height mismatch. The e-mail directed the Roadmasters to confirm that they had communicated the instructions to their respective teams and that all Foremen and Welders were conversant with these requirements and possessed the proper rail height measuring tools.

Mr. Newell testified that the instructions in the e-mail, that employees should not grind to blend rail height mismatch, had been communicated to every employee, including welders, on conference calls, and face to face meetings with the Roadmasters. He added that grinding was not a known practice, and causes much faster rail deterioration.

Mr. Newell stated that the mismatch was the condition referenced in the Investigation Notice, as it was a definite hazard which could cause a derailment. He stated that Claimant did not report the mismatch, but instead ground the rail back. Grinding, he explained, is the cover up of a defect. Mr. Newell stated that Claimant should have contacted him rather than grinding the rail. Mr. Newell stated that Claimant also left a mismatch at the scene, as the truck driver found the mismatch the next morning. Mr. Newell said he did not speak to Claimant concerning the incident.

Claimant testified at the investigation that he was welding the west joint when the Foreman instructed him to grind the rail. He stated that he understood completely that it was not acceptable to weld a ground rail, but no one shot any welds on the rail he ground. He maintained that he did not know what, if any, speed restrictions had been placed on the location.

Claimant explained that he understood the importance of lining rail ends before making a weld. He stated that before he was asked to grind, he knew there was a mismatch, which he estimated was of "moderate" proportions. He stated that he used a hand grinder, and acknowledged that the distance he had to go back in order to achieve a smooth running surface "possibly" indicated a significant rail mismatch. He explained that the important thing, to him, was that when he was instructed to grind he was not instructed to weld, which, he was aware, would have been a rule violation.

He added that having ground the rail down, it was within standard to be used to cross the track, and he was not privy to whatever conversations his supervisors had concerning what would happen after that point. His job, he stated, was to make the rail acceptable for the track speed that evening. He added that it was his understanding that this sort of temporary fix was acceptable. He stated, however, that he agreed with Mr. Palacios' e-mail that this type of short-term fix created long-term problems. He stated that he did not believe he violated any rules by grinding out the ball of the rail.

Claimant maintained that when he left the area the running surfaces were smooth and properly matched. He knew that that grind would need to be removed, and another rail put in, because one cannot weld on the grind. He stated that the supervisor made a poor judgment, but he was simply following instructions and correcting a problem so they could run the trains. He maintained that he had nothing to report, as he did not know the supervisors' plans and was simply doing as he was told.

Claimant maintained that he had never seen the e-mail to Mr. Newell before the hearing, and had no reason to question his supervisor's instruction to grind. He maintained that he did not leave a defect as the rail matched. Claimant did, however, concede that it was not acceptable under Carrier Rules to grind a rail joint.

Claimant's personal record shows no prior discipline.

The Carrier asserts the record is clear that Claimant chose to grind rail, an unacceptable repair, in an effort to cover up a rail defect. The Carrier argues that Claimant violated Carrier Rules by failing to report the defect, and the discipline assessed was appropriate given the serious nature of the violation. The Carrier urges that the claim be denied.

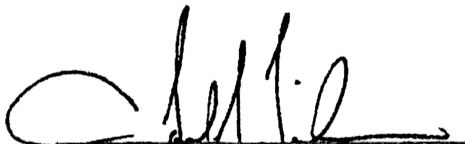
The Organization asserts that there was no evidence of any noncompliance on Claimant's part with any Carrier rules. The Organization contends that the case represents an unbridled abuse of power by Carrier Officers to use Carrier Rules out of context to accuse an employee of serious violations, regardless of the offense. The Organization urges that the Carrier has failed to meet its burden of proof and the claim should be sustained.

We have carefully reviewed the record in its entirety. Mr. Newell testified that it is not an acceptable practice to grind rail to cover a mismatch, and that, pursuant to instructions from his superior, this policy has been repeatedly communicated to all employees, including Welders. This testimony, despite Claimant's claim that the practice is acceptable in limited situations, is sufficient to establish the existence of a policy, communicated to employees, prohibiting grinding to correct a mismatch. Therefore, even if he received instructions to grind, Claimant was obligated to report the existence of this unsafe condition rather than covering it up by grinding, and he failed to do so. Indeed, he apparently left the mismatch uncorrected, a situation which caused a safety hazard because it required a slow order which was not in place. The Carrier has met its burden

of proving Claimant's guilt by substantial evidence. We see no reason to disturb the penalty deemed appropriate by the Carrier.

AWARD

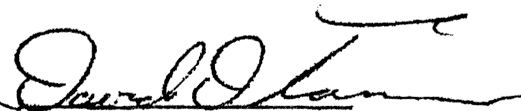
Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this *20th* day of *Feb*, 2014.