

Award No. 18
Case No. 18
NMB Case No. PLB-07602-000018

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-12-0381
Organization File No. C-12-D040-14

Claimant — Francisco A. Valerio

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. Francisco A. Valerio by letter dated April 27, 2012, for alleged violation of MOWOR 5.13 Blue Signal Protection of Workmen and MOWOR 6.3.2 Protection on Other Than Main Track in connection with charges of failure to comply with instructions for blue signal protection of workmen when the lock and flag were removed without conducting a briefing with the Mechanical Department on the west rip track in Eola yard at approximately 1115 am on 3/12/12.
2. As a consequence of the violation referred to in Part (1) above, Claimant Francisco A. Valerio shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant, a Grinder Operator based at the Eola Yard in Aurora, Illinois, entered service with the Carrier on November 23, 1974. This is one of two cases arising out of the same incident, for which this Claimant and a co-worker, Foreman Steven Wawryk, Jr., were both disciplined. The

other case, decided in Award No. 17 of this Board, involves the same issues and the two awards should be read as companion cases.

On March 12, 2012, Claimant and a co-worker, Foreman Steven Wawryk, were working in the Downers Grove area. The Temporary Roadmaster, Kelly Pendergraft, asked the two men to take an MOW Tie Inserter from Downers Grove back to one of the house tracks at the Eola Yard for storage. The Tie Inserter is a rail-based vehicle so they were operating on track. Wawryk briefed with Pendergraft and with the Yardmaster at Eola before heading to the Yard. Wawryk subsequently briefed several other times with the Eola Yardmaster: to let him know their location, waiting for clearance to enter the house track to deliver the Tie Inserter, and the like. Eventually, at about 11:15 a.m., the Yardmaster cleared Wawryk and Claimant to move the Tie Inserter to the southernmost of the four rip tracks (or house tracks) located in the West Yard, and they began to move into the area. The Yardmaster had said nothing to Wawryk about anyone else working in or around the house tracks. In actuality, Hulchers, a contractor, was working on the northernmost track, transferring material from one rail car to another.

Blue flag protection is a means of protecting crews who are working on, around and under stationary rail cars. MOWOR 5.1.3, Blue Signal Protection of Workmen, sets forth detailed instructions: "This rule outlines the equipments for protecting railroad workmen who are inspecting, testing, repairing and servicing rolling equipment. In particular because these tasks require the workmen to work on, under or between rolling equipment, workmen are exposed to potential injury from moving equipment." One aspect of the Rule is that when a blue flag has been placed and a switch manually locked to prevent movement into a track area, the flag and lock should only be removed and unlocked by the craft or group of workmen who placed them originally.

Ralph (Bud) Newman, a Carman in the Mechanical Department at Eola, is in charge of providing blue flag protection for all Hulchers activities. Newman testified that on March 12, 2012, he had placed blue flags and locked the switches at on both the east and west ends of the rip track, indicating that no one should move equipment into the area. The blue flag protection was not limited to the one track on which Hulchers was working, but applied to all four tracks.¹

Claimant and Wawryk were moving the Tie Inserter toward the west end of the rip track when they came upon the blue flag. They stopped and considered what to do. They had just been cleared by the Yardmaster to move the Tie Inserter onto the southern rip track. They had not been notified that anyone would be working in the area, with or without blue flag protection. They could see Hulchers transferring material from one rail car to another on the outside of the northernmost

¹ Newman testified that he blocked off two tracks, noting on a diagram. However, his diagram notations show that more than two tracks were affected.

track. The way ahead was clear and their track well away from the Hulchers crew. The type of lock used is one commonly used and Claimant had a key for it. Wawryk removed the blue flag and Valerio unlocked the switch. They moved the Tie Inserter onto the southern track, replaced the flag and relocked the switch, and left to return to their regular work duties. Both men testified that they had not actually removed blue flag protection before, but that it was common practice for MOW employees to stop and make sure an area was clear so that they could move forward safely in other circumstances.

The Carrier was alerted to Wawryk's and Claimant's actions when Hulchers called Newman to report that a machine was coming into the protected area and wanted to know if they could continue working. Newman told them to stop working and went to investigate. Claimant and Wawryk were gone by the time Newman arrived at the west rip. He could see that the flag was in place and the lock was secured, but there was an extra machine on the southernmost track. Newman is unfamiliar with MOW equipment and did not know what it was. Newman reported the blue flag removal to Nate French, who was assisting Temporary Roadmaster Kelly Pendergraft. French was aware that a tie machine was being moved into the area and he tracked down Wawryk and Valerio, who explained what they had done. They had not spoken to anyone in the Mechanical Department before acting because they had been given permission by the Yardmaster to make their move onto the southernmost house track. They thought that they were in compliance with instructions they had been given. French testified that he had tried to call Wawryk and Valerio earlier in the morning to brief them that the tracks were blocked but had been unable to get through and did not try again. Wawryk testified that the Yardmaster never said anything to him about work being done on any of the other rip tracks, only that they were cleared to move into the area.

Because removing blue flag protection is considered a "rules failure of a critical nature," Claimant and Wawryk were removed from service and given a urinalysis. Following the investigation on April 2, 2012, the Carrier found Claimant guilty of violating MOWOR 5.13 Blue Signal Protection of Workmen and MOWOR 6.3.2 Protection on Other Than Main Track and determined that a Level S 30 Day Record Suspension with a three-year review period was appropriate under the PEPA.

According to the Carrier, the record is clear that Claimant violated MOWOR 5.1.3 when he and Wawryk ignored the blue flag protection and removed it without first briefing with the Mechanical Department. This is a serious safety violation and termination was warranted.

The Organization's perspective is that the discipline in these two cases is a form of harassment. There was confusion about how to proceed and a lack of communication. Both the Roadmaster and Yardmaster were aware that the tie machine was on its way to the west rip track, yet neither saw fit to notify Wawryk and Valerio. Wawryk spoke at least four times to the

Yardmaster. Eventually, the Yardmaster gave them the go-ahead to move the machine, which they did. They stopped to see if the way ahead was clear and that they could safely move, as is commonly done by MOW forces. They could see Hulchers and that they were well clear of the contractor's crew. The move was safely made and no harm occurred. This was a simple mistake in communication. Claimant's and Wawryk's actions were in compliance with the clearance that they had been given and they should not have been disciplined.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

Blue signal protection is critically important to the safety of crews that work on stationary rolling stock, and violations of MOWOR 5.1.3 are not to be taken lightly. Claimant and Mr. Wawryk did technically violate MOWOR 5.1.3 when they removed the blue flag and unlocked the switch lock when they moved the tie machine onto the southernmost rip track on March 12, 2012. However, the record establishes that they were under the clear impression that they had been authorized by the Yardmaster to move onto that track and that they were, in effect, authorized to do what they did. Wawryk spoke to the Yardmaster at least four times, and at no point did the Yardmaster notify him that the rip tracks were blocked. The final communication from the Yardmaster was that they were cleared to move. Temporary Roadmaster Kelly Pendergraft said nothing to Wawryk and Valerio about the blue flag protection. Nate French, who was assisting Pendergraft, attempted to notify them at one point, but gave up when he was unable to get through to Wawryk immediately. It appears to the Board that the responsibility for what happened should be shared by a number of individuals. There is no indication that the Yardmaster, Pendergraft or French was disciplined for their roles. Singling out Wawryk and Valerio is a form of disparate treatment, especially in light of the evidence that they took every precaution to move the tie machine in a safe and cautious manner. At most they should have been issued first level reprimands.

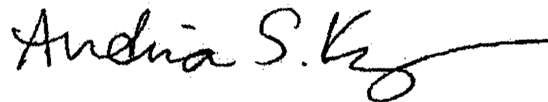
Claimant's Level S 30-Day Record Suspension shall be reduced to a formal reprimand with a 12-month review period (first level PEPA violation).

AWARD

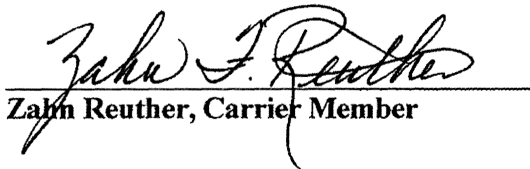
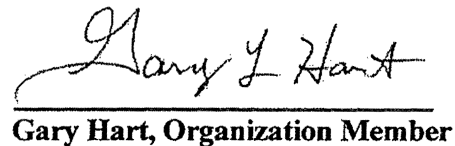
Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member


Zahn Reuther, Carrier Member
Gary Hart, Organization Member

March 10, 2014

Date