

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

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

Case No. 397 – Award No. 397 – Schrader
Carrier File No. 14-10-0197
Organization File No. 80-13N1-1092.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing September 8, 2010, when Claimant, D.D. Schrader (6434120), was issued a Level S 30-day Actual Suspension with 3 years probation, concerning his failure to properly protect men and equipment by releasing the track authority on which he was occupying on September 8, 2010. The Carrier alleged violation of MOWOR 6.3.1.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from 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.

The Claimant, D.D. Schrader, has been employed by the Carrier since 1974. On September 27, 2010, the Carrier, by letter, notified Claimant that he had been dismissed for his failure, on September 8, 2010 at Dougherty, Oklahoma, to properly protect men and equipment by releasing the track authority upon which he was occupying. The letter

stated that it had been determined that Claimant was in violation of Maintenance of Way Operating Rule 6.3.1 – Train Location. On October 6, 2010, the Carrier notified Claimant that he was to attend a formal investigation in connection with this matter. Following the investigation, on October 26, 2010, the Carrier, by letter, notified Claimant that as a result of the investigation he had been found to have violated applicable Carrier rules as alleged. The Carrier assessed Claimant a Level S 30-day actual unpaid suspension with a three-year review period. The letter stated that the discipline decision reflected the unique circumstances of the case and had been made solely as a matter of managerial leniency. The letter further noted that the Carrier had given consideration to Claimant's personnel record and had assessed the discipline in accordance with its Policy for Employee Performance and Accountability (PEPA).

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

Releasing Authorities

Track and Time, Track Permits, Track Warrants, Foul Time and Occupancy Control System limits must be cleared and reported clear to the control operator or train dispatcher before time expires. Before any of these authorities are released, all equipment and employees must be clear of the limits and reported clear to the designated control operator or train dispatcher.

The employee must request any additional time before the authorized time has expired. If the employee can not clear the track before the expiration time of the authority, authority is extended until the control operator or train dispatcher is contacted.

The facts of this case are not in dispute. On the day of the incident, Claimant, a foreman, and his supervisor, Jack Blackwell, who was acting as Roadmaster on the Carrier's Red Rock Subdivision, were hy-railing across the Claimant's territory. They were in the process of moving from one track authority to another using the smart mobile client, a program operated by a computer within the vehicle to acquire on-track authority. Their vehicle was also equipped with the Hy-Rail Compliance System, or HLCS, a GPS-based system which works in conjunction with the smart mobile client as a safety overlay to warn employees if there is an issue as to their track authority.

Mr. Blackwell testified at the investigation that on this territory employees are required to have track and time authority, to allow employees to perform work on the track without interfering with train movement and/or without the hazard of a train striking the employees. If the authority is released, he explained, there is nothing to protect employees on the track.

On the day at issue, Claimant obtained track authority via the smart mobile client. He had multiple authorities that day, and he and Mr. Blackwell were at the end of one

authority, ready to transition to the next. The practice, Mr. Blackwell explained, would be to release the previous authority when they entered the next one.

However, Mr. Blackwell testified, Claimant released the authority they were occupying before they entered the next one. He stated that he only realized this had occurred when he looked down and saw a red light going off and the GPS system indicating that they were out of their limits. Mr. Blackwell stated that when the alarms started going off Claimant immediately set off the track at the nearest crossing, and there was no injury or other adverse incident. He stated that they were very close to the next authority when Claimant released the previous one, and actually traveled into that authority to get off the track. Mr. Blackwell added that he and Claimant had not briefed and he was not aware of what Claimant was going to do.

Claimant admitted at the investigation that he released authority for the section they were occupying before they were actually off that section of track. He also acknowledged that he was experienced on that track and with the track authority systems, and stated that he simply made a mistake. He explained that he "got mixed up" about his limits and thought he was outside the first limits when he released that authority. He added that he believed his limits were to the switch behind him when they were in fact to the switch in front of him. He added that this was the first time such a thing had occurred in the 10 years he had been working on this territory.

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. The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal. The policy also states that the circumstances surrounding a serious incident may reduce an employee's personal culpability, and the matter may be handled according to the general guidelines, and if there is any doubt supervisors are to err on the side of leniency. Claimant's discipline record shows a Level S, 30-day record suspension with a 12-month probation period, issued March 1, 2010, for inappropriate comments made to a co-worker.

The Carrier first asserts that Claimant received a fair and impartial investigation and there was no procedural violation of the Agreement, contrary to the Organization's arguments, as it complied with Rule 91. Moreover, the Carrier states, Claimant's suspension did not commence on September 8, 2010, as the Organization asserts, but on September 29, 2010, and then continued until his return to work on October 28, 2010.

On the merits, the Carrier asserts that this case is not complicated and it has clearly met its burden of proving Claimant's guilt by substantial evidence. The record conclusively demonstrates, the Carrier states, that Claimant was on a track without the proper track authority from the dispatcher, and that he became confused and released the wrong track. Indeed, the Carrier points out, Claimant admitted as much, as he acknowledged that he made a mistake and gave up authority on track he was sitting on.

because he was "confused on (his) limits." The Carrier notes that various arbitration boards in this industry have held that an admission satisfies the Carrier's burden of proof, no further proof is needed, and the only question is the degree of discipline. Therefore, the Carrier states, there can be no doubt that Claimant violated Carrier rules.

With respect to the penalty assessed, the Carrier urges that the gravity of the situation cannot be overstated. The Carrier notes that its rules are in place to protect its employees, and employees must comply in order to protect themselves and their co-workers. The fortunate fact that there was no injury in this situation, the Carrier states, does not relieve Claimant of his responsibility. The Carrier notes that Claimant received a Level S violation earlier in 2010, and the discipline in this case was assessed in accordance with the PEPA, with consideration given to Claimant's personal record. For all of these reasons, the Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization notes that the Carrier determined that Claimant was guilty of the charges and dismissed him before any investigation was held to determine the facts of this matter. The Organization contends that it was impossible for him to receive a fair and impartial hearing under these circumstances.

On the merits, the Organization states that Claimant became confused and believed that his track authority for the second track segment started behind him and released the first authority. The Organization notes that an alarm was immediately received in the vehicle which notified Claimant that there was an issue with on-track protection, and Claimant's vehicle immediately crossed over a switch into the current track authority.

Claimant, the Organization stresses, accepted full responsibility for the incident, and no one was in danger. The Organization urges that Claimant committed no flagrant rules violation, and notes that his supervisor, who was in the vehicle with him, received no discipline.

With respect to the penalty, the Organization states that the instant situation involves a performance rather than behavioral issue. The Organization asserts that progressive discipline is intended to deal with the latter situation, but for a performance issue such as this one the more appropriate method of correction would be non-disciplinary action, such as coaching counseling or training. The Organization points out that the Claimant has 37 years' seniority, with the only discipline on his record during the last 10 a "minor blemish" for which he accepted full responsibility. In addition, the Organization asserts, Claimant did not return to service until October 28, 2010, and was off more than the 30 days assessed in the Carrier's October 26 letter. The Organization concludes that the Carrier has failed to produce evidence in support of its charges and, even if it had, the discipline assessed is extreme and unwarranted as Claimant committed no flagrant violation of any Carrier rules. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity that denied Claimant his right to a fair and impartial investigation. On the merits, the rule at issue is a serious one, intended to safeguard the safety of employees working on tracks by ensuring that they do not occupy track without authority. While his conduct was inadvertent, there is no question that Claimant violated this rule, as he admitted, and this admission is sufficient to satisfy the Carrier's burden of proof. The fact that the Carrier has multiple layers of protection in place does not excuse Claimant's failure to provide one of them. He failed to do so, and this constitutes just cause for discipline.

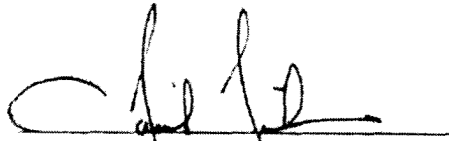
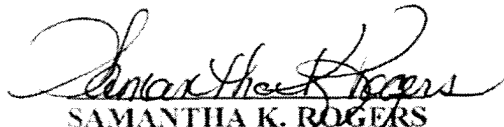
The Organization objects that this incident cannot be just cause to discipline Claimant if it is not also cause to discipline Roadmaster Blackwell, who was present in the vehicle with him. The Roadmaster had no opportunity to prevent the violation, and had no role in causing it. Blackwell, having played no role whatsoever, cannot be subject to discipline merely by his presence. Thus, the fact that he was not disciplined has no relevance to the discipline assessed against Claimant.

With respect to the penalty, this was, as the Carrier points out, Claimant's second serious violation within a review period, and, under the PEPA, could have subjected him to dismissal. Had he been dismissed, the Organization's arguments over the proportionality of the penalty might have more weight. However, the Carrier did not dismiss him. It exercised leniency, and in so doing brought the penalty into greater conformance with the actual conduct and Claimant's history. The Board is hard pressed to attempt the line drawing exercise between not quite enough leniency and just enough leniency, particularly given the well settled principle that leniency is the province of the Carrier. Given Claimant's potential exposure under the rules, we cannot say that the Carrier's decision to impose a 30-day actual suspension with a three-year review period represents an unfair or arbitrary exercise of its discretion to determine penalties.

Finally, the Organization asserts that Claimant served more than the 30 day suspension assessed, and must be made whole for his time off in excess of the penalty. The Organization states that he went without pay from September 8 through October 28. Certainly Claimant cannot be made to serve more than the suspension imposed, but the record does not conclusively establish that he did. Specifically, the notice of suspension imposes a suspension from September 27 through October 26 with credit for time already served. The Personnel Activity Tracking System shows Claimant in service on September 27 and 28, and returning to service on October 28. Beyond that, there is no evidence concerning the actual time off resulting from this incident. The record evidence before the Board is not sufficient to say that Claimant lost time outside of the period of his suspension. If the Carrier's personnel records demonstrate that he did lose such time, he is entitled to be made whole for it. Accordingly, we have ordered that he be made whole for lost time, if any, in excess of the thirty day suspension imposed by the Carrier.

AWARD

Claim denied, except to the extent that Claimant is entitled to be made whole for lost time, if any, in excess of the suspension imposed by the Carrier.


DAN NIELSEN
Neutral Member
SAMANTHA K. ROGERS
Carrier Member
DAVID TANNER
Organization Member

Dated this 26th day of February, 2012.