

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 396 - Award No. 396 – Reves and Bannister
Carrier File No. 14-10-0208
Organization File No. 50-13N1-1071.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 16, 2010, when Claimants, Steve M. Reves (6491559) and Chad Bannister (1721042), were each issued a Level S 30-day Record Suspension with a 3-year probation, concerning their failure to establish proper protection before performing work on yard track on July 21 2010. The Carrier alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimants' records this discipline and that they be compensated for 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 Claimants, Steve M. Reves and Chad Bannister have been employed by the Carrier. On August 11, 2010, the Carrier charged Claimants to attend an investigation "for the purpose of ascertaining the facts and determining (their) responsibility, if any, in connection with (their) alleged failure to establish proper protection before performing

work on yard track, MP 214.7, Hutchinson, Kansas, at approximately 1030 hours on July 21, 2010, while assigned as Welder and Welder Helper.” The notice indicated that the investigation would determine possible violation of Maintenance of Way Operating Rule 6.3.2 Protection on Other Than Main Track. Following the investigation, the Carrier found that Claimants had violated this Carrier rule as alleged, and assessed each of them a Level 3 30-day record suspension with a three year review period.

Maintenance of Way Operating Rule 6.3.2, Protection on Other than Main Track, provides, in relevant part:

To establish protection on a track other than a main track, controlled siding or any track where CTC is in effect, use one or a combination of the following:

- All switches that provide direct access to the track must be:
 - Lined against movement.
 - Properly tagged.
 - Effectively spiked, clamped or locked with an effective locking device.
- A red flag or light must be placed as outlined in Rule 5.4.7 (Display of Red Flag or Light). A derail capable of restricting access to the track where work will occur must be locked in derailing position near the red flag or light with an effective locking device. The red flag or light must be placed at least 150 feet from the work location when the track speed is greater than 5 MPH or at least 50 feet from the work location when the track speed is 5 MPH or less.

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- Place a flagman to hold all trains and on-track equipment clear of the working limits.
- Establish discontinuity in the rail to prevent movement into the working limits. Place red flags 150 feet in advance of the working limits.

When establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established. The employee assigned the responsibility of yard movements must be notified of the work to be done. To establish protection on a track other than a main track, controlled siding or any track where CTC is in effect, use one or a combination of the following:

The facts of this case are not in dispute. Joseph Jay Diefenbach, Roadmaster at Wellington, Kansas, testified that at the investigation that he, along with Welding Supervisor Kent Davis and Roadmaster Mark Crowe, were performing team testing on the La Junta Subdivision on the day of the incident. He explained that they came to the Hutchinson Yard, where Claimants were working, and they observed Mr. Bannister welding on a frog, with Mr. Reeves standing over him.

Mr. Diefenbach stated that as the Carrier officers pulled up, they noticed that the two employees did not have a derail or a red flag or anything else between them and a locomotive on the same track on which they were working. He added that they approached the employees and asked them about it, as they had not established any protection as required by the applicable Carrier rule for protection on other than main track. Although a revised version of the rules was issued the day of the incident, and the new rule, Maintenance of Way Operating Rule 6.3.2, was entered into evidence at the investigation, there was no evidence that the relevant portions of the rule had been changed from the previous version, nor that the employees were unaware of the rule's requirements at the time of the incident.

Mr. Diefenbach testified that he was not aware if there was any protection behind the locomotive to prevent any cars from shoving into the locomotive, which was approximately 100 feet away. However, he did acknowledge that there was no crew on the train.

Mr. Diefenbach explained that the employees were working on the 109 track with no derails between them and the train which was also on the track. He acknowledged that one of the protections listed in 6.3.2 was to line switches against movement, but the employees were working on a frog and there was no way to line that switch to prevent a train from coming over them. Further, he stated, there was no switch on the track where Claimant was working between them and the train.

Mr. Diefenbach also stated that another form of protection involves placing a flagman to hold all trains and on-track equipment, and they asked Claimant and his co-worker if they were using that form of protection and they replied they were not. He stated that the employees asked if they could use a lookout in the yard, and he replied that they could not, but he asked them whether they had the form filled out and they acknowledged that they did not. Mr. Diefenbach also stated that there was no red flag displayed at the worksite and a flagman is required to have a red flag. Mr. Diefenbach explained that he asked the employees if they had one and they said no, that their protection was derails and switches had lined against them. He stated that Claimants told the Carrier officers they expected the train crew would come and brief with them before they moved the train.

Willard Davis, Welding Supervisor, Kansas Division, testified that he was part of the testing team that discovered the matter at issue. He stated that they asked the employees what they were using for protection, about the particular frog they were working on, because there were two locomotives and a lot of cars sitting in the track and

he did not see a derail. Mr. Davis added that Mr. Bannister told the Carrier officers that the train crew would have to come and tell them what was going on, and Mr. Davis replied that that was not a form of protection. In particular, he stated, he told them that someone could shove cars in that track and the locomotives would come right over them.

Carrier Roadmaster Mark R. Crowe also testified at the investigation. He stated that when he and the other two Carrier officers observed Claimants, Mr. Reves was acting as a look-out while Mr. Bannister was welding, but that procedure was required oversight for the welding operation, not track protection. He stated that although the two employees did have the lead locked and switched properly, there was a locomotive sitting on the track they were working on and they did not have any protection between themselves and the train. He confirmed that there was no crew on the train. He also testified that the employees did not have proper protection on the adjacent track. Mr. Crowe asserted that safety was the responsibility of everyone in the workgroup.

Mr. Reves testified at the investigation that he and Mr. Bannister had a job briefing before beginning their work on the day at issue, and discussed that their protection would be throwing switches against movement and the use of derails. He stated that Mr. Bannister, the lead welder, was the employee in charge of their operation.

Mr. Reves added that he believed the train was about 150 feet from their work location. He stated that the "thought" he was functioning as a flagman, to protect Mr. Bannister. However, he admitted that he was not equipped with a red flag and that was part of a flagman's responsibility. He also admitted that Rule 6.3.2 required the employees to put up a derail, and it was his responsibility to ensure that they worked safely.

Mr. Bannister also testified at the investigation. He confirmed that he and Mr. Reves had a job briefing prior to beginning work, and discussed that he would work on the frog in the yard and Mr. Reves would function as a flagman. However, Mr. Bannister acknowledged, he did not believe Mr. Reves was equipped with a red flag. He also admitted that they should have had a derail up in front of the train to protect against movement, but did not put one up until the Carrier officers arrived at the scene and required them to do so. He added that although he was the employee in charge and required to make sure they worked safely, safety was the responsibility of all employees involved.

The Carrier asserts that this case is not complicated: On July 16, 2010, Claimants were welding a frog with no protection between where they were working and a locomotive sitting on the same track. The Carrier states that Claimants violated the applicable Carrier rule which requires a derail, along with a red flag or light, between their location and the locomotive's. As for the Organization's contention that Rule 6.3.2 was revised on the day after Claimants' violation, the Carrier notes that the portion of the rule requiring the derail and red flag remained unchanged from the rule's previous version.

The Carrier points out that three witnesses testified that they were performing a safety audit when they came upon Claimants, who were working without protection and could have had a train come through on top of them. Indeed, the Carrier states, Mr. Reves admitted at the investigation that it was his responsibility as flagman to have a red flag and he did not have one. He also, the Carrier notes, acknowledged that Rule 6.3.2 requires that he put up a derail, and that this, too, was his responsibility. Claimants' admissions, the Carrier urges, is sufficient to satisfy its burden of proof, and there can be no doubt that Claimants violated Carrier rules.

With respect to the penalty assessed, the Carrier argues that it is not possible to overstate the seriousness of this violation. The Carrier notes that its rules are in place to protect its employees, and the employees must comply in order to protect themselves and their co-workers. The fortunate fact that there was no injury in this situation does not relieve Claimants of their responsibility. The Carrier concludes that it was correct in determining that Claimants' conduct warranted a Level S violation, and the discipline was assessed in accordance with its PEPA, with consideration given to Claimants' personal records. The Carrier notes that Claimant the discipline in this case was assessed in accordance with the PEPA, with consideration given to Claimants' personal records. Indeed, the Carrier states, it showed Mr. Reves leniency, as this was his second Level S violation within nine months and he was subject to dismissal. 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 Claimants. First, the Organization states, the rule Claimants were found guilty of violating was not in effect at the time of the relevant events, as it was implemented one day later. The Organization also notes that the investigation notice referred to Claimants by the wrong job titles, further confusing the matter.

On the merits, the Organization asserts that the issues in this matter are whether the switches that provided direct access to the track upon which Claimants were working were lined against movement, and whether Claimants were protected by a watchman or lookout. The Organization states that the testimony of the Carrier witnesses shows that the only tracks not protected by derails or lined switches were 108 and 109, which Mr. Reves was protecting as a welder helper/watchman under Track Welding Rules and Procedures Chapter 1 General Rules and Procedures page 1-18 and 1-19, Rule 1.7.3, which provides, "The grinder operator (welder helper) shall act as a watchman when men or equipment are fouling the track and/or the welder is welding or grinding. The grinder operator must be alert at all times and will be held responsible for the safety of men and equipment." This rule clearly required Mr. Reves, who was working as watchman, to protect the welding or grinding, but did not require him to be a flagman. The Organization notes that the discipline notice misidentified Mr. Reves as a welder instead of a welder helper, and in fact Mr. Bannister was the lead welder and therefore the employee-in-charge.

The Organization further asserts that this investigation demonstrates a complete violation of the parties' agreement, as the Carrier was using a Group 3 Class O Track

Supervisor as a Roadmaster because the Carrier had not placed an exempt employee in this position. The Agreement, the Organization states, does not allow for this possibility and shows the Carrier's inability to staff engineering positions at every level, including management. The Organization notes Claimants' testimony that Track Supervisor Nathan Anderson, who sent them to this work location on the day at issue, was relieving for the Roadmaster.

In conclusion, the Organization asserts that the Carrier seeks to charge Claimants with violation of a rule that was not in effect at the time of their supposed infraction. Moreover, the Organization states, the Carrier seeks to redefine ATSF Agreement 1984, revised 2004, by forcing Track Supervisors to replace vacant Roadmaster positions whenever the Carrier determines it needs a replacement Roadmaster for no first line supervisor for those duties. This case also reveals a glaring fault with the Carrier's Operations Testing Procedures, as it must be asked who is supervising the territories of the absent Roadmasters while they are off their territories during such testing. The Organization concludes that the Carrier has failed to produce evidence sufficient to support a finding of any rule violation, and the discipline assessed is extreme, unwarranted and unjustified. The Organization requests that the claims be sustained.

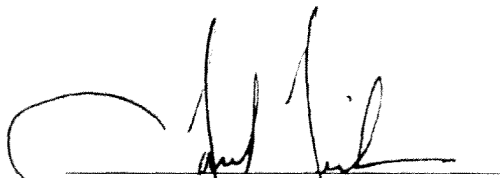
We have carefully reviewed the record in its entirety. First, we find no merit to the Organization's procedural argument that the employees were prejudiced because the Carrier cited a rule which was part of a revision that issued the day after the incident. The record reflects that the relevant portions of the rule remained intact, and it was clear from the record that the employees were aware, at the time of the incident, of the specific requirements of the directive at issue. Nor do we find evidence of any other procedural irregularity which deprived Claimants of their right to a fair and impartial investigation. We also chose not to address the Organization's arguments concerning the Carrier's management staffing, as it has not been shown to have any bearing on the events at issue.

On the merits, the record is unclear as to exactly where the Claimants established protection and, other than the track upon which they were working, where protection was lacking. What is clear, however, is the rule's requirement that a derail be placed between the employees working on the track and a train occupying the same track, or that a flagman, equipped with a red flag, protect the work scene. What is also clear is that Claimants were aware of these requirements, admitted that it was their responsibility to ensure a safe work environment, and admitted that they failed to take the necessary steps to do so in this case. Therefore, their guilt has been proven by substantial evidence.

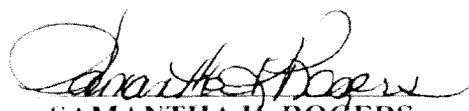
As the Carrier asserts, the situation here placed the employees in a potentially dangerous situation. Their assertion that they would rely on a train crew to notify them before a train traveled over them seems a cavalier approach to the situation, delegating their safety to the train crew, and ignoring the possibility that someone might shove cars behind the train, moving it forward toward them. Under these circumstances, there is nothing to demonstrate that the discipline assessed against Claimants was unreasonable or unwarranted, especially in view of the Carrier's Policy for Employee Performance Accountability (PEPA), and Claimants' personal records.

AWARD

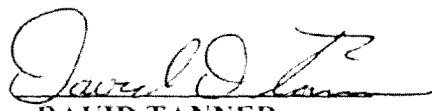
Claims denied.


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DAN NIELSEN
Neutral Member


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SAMANTHA K. ROGERS
Carrier Member


A handwritten signature in black ink, appearing to read 'David Tanner', is written over a horizontal line.

DAVID TANNER
Organization Member

Dated this 28 day of Sep , 2012.