

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 404 – Award No. 404 (Ventura)
Carrier File No. 14-09-0197
Organization File No. 190-13N1-0993.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing September 1, 2009, when Claimant, Arturo D. Ventura (6551915), was issued a 30-day Record Suspension with a 1 year review period, concerning his failure to properly use Lookout Protection on September 1, 2009. The Carrier alleged violation of MOWOR 6.3.3 Visual Detection of Trains.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the 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.

Claimant, Arturo D. Ventura, has been employed by the Carrier since 1995. On September 2, 2010, the Carrier notified Claimant to attend an investigation "to determine all facts and place responsibility, if any, in (his) alleged failure to properly use lookout protection on September 1, 2009, at Milepost 974.8 on the Bakersfield Subdivision," in possible violation of Carrier Maintenance of Way Operating Rule 6.3.3 Visual Detection of Trains. Following the investigation, the Carrier determined that Claimant had

committed the violations alleged and assessed him a Level S 30-day record suspension and a one-year review period.

Maintenance of Way Operating Rule 6.3.3, **Visual Detection of Trains**, provides, in relevant part:

Authority or protection is not required when using visual detection of trains as outlined below.

STATEMENT OF ON-TRACK SAFETY form

A lone worker using individual train detection or a lookout using train approach warning to establish on-track safety must complete this form prior to fouling a track.

To complete this form:

1. Provide the following information:

* * *

Designated Place of Safety:

Method of Warning:

A. Lone Workers

Lone workers using individual train detection must complete the form entitled, "Statement of On-Track Safety" prior to fouling a track. The completed form must be in the employee's possession when used to establish on track safety.

Each employee providing protection for a work group, and each lone worker, shall maintain immediate access to a working radio, which can be a portable radio capable of monitoring transmissions from train movements in the vicinity.

* * *

B. Lookouts

Lookouts must complete the form entitled "Statement of On-Track Safety" prior to anyone fouling the track. The completed form must be in the employee's possession when used to establish on-track safety. Work groups may use a lookout to perform minor work or a routine inspection using train approach warning.

Lookout Responsibilities

Lookouts must adhere to the following:

* * *

- Identify a place of safety where they and employees they are protecting can go when a train approaches.
- Communicate the place of safety to the other employees prior to the track being fouled.

* * *

- Use a method to warn employees of the approach of a train or on-track equipment . . .

* * *

Stephen M. Hedemann, Carrier Supervisor of Structures for California Division North, testified at the investigation that on the date of the incident he was performing a pre-job survey with Roadmaster Sam Rubio for a rail relay project on the Bakersfield Subdivision. They were parked at the road crossing at Douglas Avenue.

Mr. Hedemann stated that he and Roadmaster Rubio noticed in their mirror that Claimant was walking along the track with his co-worker, Track Supervisor Van Dyne, taking wheel measurements, heading east to west in approach of the Douglas Avenue road crossing. He and Mr. Rubio decided to approach the two employees to ascertain their track protection, as well as to discuss the upcoming job.

Mr. Hedemann explained that the employees told them they were using lookout protection and showed the two Carrier officers the form they were using. Rule 6.3.3, Visual Detection of Trains, requires the completion of an appropriate form. Mr. Hedemann stated that the form was out-of-date, and did not have any notation for method of warning or place of safety. Mr. Hedemann and Mr. Rubio told the employees that at the very least they could make the effort to include that briefing information on the form. He stated that the employees told him that there was no current form available in their vehicle. However, he explained, all employees are required to carry a copy of Maintenance of Way Operating Rules and a current copy of the form is available in the Appendix for them to use.

Mr. Hedemann testified that he and Mr. Rubio also asked the employees if they had a working radio, and they replied that they did not, as they had left their pack set in Claimant's vehicle. Mr. Hedemann explained that he and Mr. Rubio concluded that the employees were not in compliance with all aspects of Rule 6.3.3.

He explained that the employees had not violated Part B, which pertains to lookout protection, but had violated Part A, which requires that each employee providing protection for a work group, and each lone worker, shall maintain immediate access to a working radio. Mr. Hedemann acknowledged that Part B does not indicate that an employee must have a radio, but explained that when an employee is working as a lookout, it is no different than a lone employee and the individual is actually an employee providing protection for a work group. Therefore, he stated, under Rule 6.3.3, whether an employee is a lone worker or a lookout, he must have access to a working radio.

Roadmaster Rubio also testified at the investigation, and confirmed Mr. Hedemann's testimony. He added that they told the employees if they had put the missing information on the outdated form it probably would have been acceptable, so long as there was something to demonstrate that they had briefed about these matters. He stated that the employees did not inform him that they had in fact briefed about those matters, the place of safety and method of warning. At that point, he stated, Mr. Van Dyne scribbled the information on the top of the form. Mr. Rubio also testified that the employees acknowledged they did not have a pack set and had decided to foul the track regardless.

Mr. Rubio also acknowledged that Part B of Rule 6.3.3 does not require a radio, but employees must follow both Parts A and B. He explained that when, as in this situation, two employees are working together, they constitute a work group, and an employee providing protection for a work group must have a radio. He also added that employees, working under either section of the rule, must use the Statement of On-Track Safety, although that document does not reference the requirement that the employee carry a radio.

Track Supervisor Van Dyne testified at the investigation that he and Claimant were using lookout protection at the time of the incident, and he was the lookout. He acknowledged that they used a version of the form that had been determined to be outdated, but stated that they were using a Roadmaster's vehicle and that form was what was in the vehicle. He also acknowledged that the day before he had used a different copy of the form, one that required the method of warning and place of safety to be noted. He also stated that he had a copy of the Maintenance of Way Operating Rules with him, and could have used the form in the book, but that would have made his book incomplete. He further acknowledged that he and Claimant were a work group, and that Part A of Rule 6.3.3 requires a work group to maintain immediate access to a working radio.

Mr. Van Dyne maintained that he and Claimant had briefed concerning the method of warning and place of safety, but had not written it down on the form. He stated that he and Claimant told the Carrier officers they had briefed these matters.

Claimant testified at the investigation that he and Mr. Van Dyne had briefed the two items that were missing from the outdated form. He also maintained that Mr. Van Dyne completed the form and he was unaware that it was outdated, as he did not look at it. Claimant also acknowledged that he and Mr. Van Dyne comprised a work group, but maintained that they were working under Part B of Rule 6.3.3, which does not require employees to have a radio. He stated that in his testing concerning the Maintenance of Way Operating Rules there were no specifics as to a work group being required to use a radio for protection.

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 as well as "other serious violations" of Carrier rules.

Claimant's personal record reveals a prior 30 day record suspension, with a one year probationary period, in 2009 for failure to properly use lookout protection.

With respect to the Organization's procedural argument concerning the involvement of Roadmaster Rubio, the Carrier states that the Organization presented a defense for Claimant and had the opportunity to raise this issue during the investigation but did not. The Carrier urges that there was no prejudgment, and awards in this industry hold that the fact that a Carrier officer fills multiple roles during an investigation is not prejudicial to the Claimant. In particular, the Carrier points out, Claimant's admissions that he utilized the wrong form for working under "Statement of On-Track Safety," that items were missing, and that he did not have a radio to contact trains, are sufficient to support the issuance of discipline against him.

The Carrier states that the issues of site distance and protection from trains are serious ones, and Claimant's violation could have cost him his life. The Organization, the Carrier asserts, bases its claim on the erroneous contention that the entirety of Rule 6.3.3 did not apply to Claimant, a track supervisor, and his co-worker.

The Carrier notes that Claimant and the Organization assert that Claimant's conduct should have fallen under paragraph B of Rule 6.3.3. However, the Carrier argues, in reality Claimant was working under the entirety of Rule 6.3.3, which clearly requires that an employee providing protection for a work group, as well as each lone worker, shall maintain immediate access to a working radio. Claimant and the other employee, the Carrier stresses, did not have the proper form, the form was not filled out correctly and they did not have a radio with which to contact trains. The Carrier contends that it is clear that Claimant committed the violations alleged.

The Carrier concludes that violations of Rule 6.3.3 have led to tragedy, and argues that it acted appropriately in assessing discipline for a serious offense. Therefore the claim should be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states that Roadmaster Rubio, the same individual who charged Claimant, testified against him in the hearing, then found him guilty of the charges and issued the discipline letter. Therefore, the Organization asserts, Claimant was denied his right to a fair and impartial investigation.

On the merits, the Organization asserts that at the relevant time Claimant was running a measuring wheel and his co-worker was acting as a lookout. The Organization states that the employees were working under Part B of Maintenance of Way Operating Rule 6.3.3, and utilizing a Roadmaster's vehicle. The Organization notes that the employees needed a Statement of On Track Safety form, and the only form in the vehicle

was an outdated one, missing two items which had been added to the current form. The employees, the Organization stresses, covered the missing items and hand wrote them on the available form, as demonstrated by an exhibit entered into evidence at the investigation.

As for the Carrier's contention that the employees needed to have a radio readily available, the Organization states that there is no such requirement in Part B of Rule 6.3.3 for employees who step onto a track using lookout protection. The Organization argues that the employees complied with all aspects of the applicable rules, and the Carrier has failed to prove its charges by substantial evidence.

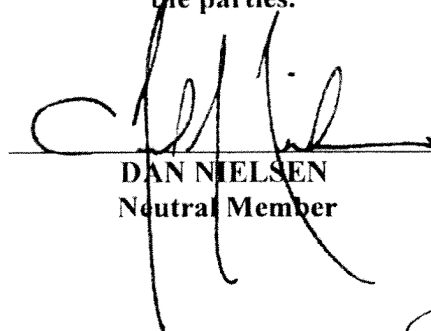
With respect to the penalty, the Organization states that even if Claimant were guilty of the charges, the discipline issued is excessive in proportion to the asserted offense. The Organization requests that the claim be sustained.

We have carefully reviewed the record in its entirety. The essential facts of this case are not in dispute. Claimant and his co-worker were utilizing a lookout for on-track protection. The co-worker, Mr. Van Dyne, was the lookout. They utilized an outdated form, which was missing several critical pieces of information, and they were working without a radio. Roadmaster Rubio observed this and brought charges against them, alleging that they violated Rule 6.3.3. He then testified against them at the hearing, and subsequently reviewed the evidence and issued discipline. There is ample precedent for the proposition that having a Carrier Officer play multiple roles in the disciplinary process is not, *per se*, a violation of the contract's promise of a fair hearing. It depends, however, what those roles are. Here Roadmaster Rubio weighed his own testimony and judged his own credibility, as well as the credibility of those whose testimony would stand in opposition to his. He found them guilty of the charges he brought, based upon the testimony he gave. A Claimant in such a proceeding would necessarily feel that the outcome was predestined, no matter how strong or weak the evidence.

The promise of a fair hearing, of necessity, includes some operational flexibility, but the conduct of the hearing in this case went beyond what is permissible. The Board therefore concludes that we need not reach the merits of this case, and that the discipline imposed against Claimant cannot stand. The claim is sustained and the discipline is to be removed from Claimant's record.

AWARD

Claim sustained in accordance with the Findings. The Carrier is directed to comply with this Award within 45 days following the date on which the Award is signed by the parties.



DAN NIELSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this *2nd* day of *August*, 2012.