

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway Co.)

Case No. 405 – Award No. 405 (Corchado)
Carrier File No. 14-10-0020
Organization File No. 190-13S1-0923.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 10, 2009, when Claimant, Ricardo M. Corchado (1100403), was issued a Level S 30-day Record Suspension with a 1 year review period, concerning his failure to provide protection for himself on Main Track. The Carrier alleged violation of MOWOR 6.3.1 Main Track Authorization.
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, Ricardo M. Corchado, has been employed by the Carrier since 1996. On August 10, 2009, the Carrier notified Claimant to attend an investigation "to determine all facts and place responsibility, if any, in (his) alleged failure to provide protection for (himself) on a Main track at approximately 1220 hours on the Stockton Subdivision while he was working at Sunmaid, MP 996.8 . . . " The letter stated that the Claimant was in possible violation of Maintenance of Way Operating Rule 6.3.1 Main Track Authorization. Following the investigation, which was held on November 30,

2009, 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.

At the time of the incident, Claimant and his co-worker, Foreman Terry Rodriguez, had received time and track authority for Main Track #1, Sunmaid, milepost 996.8. Samuel Rubio, Jr., Roadmaster for Fresno, California, was hrrailing eastward with two track supervisors, Cary Garcia and Alex Franco. As the three Carrier officers approached Sunmaid, Track Supervisor Garcia called Claimant to inform him of their whereabouts and request permission to proceed through his limits.

Mr. Rubio testified at the investigation that as they approached Claimant's limits, when he was at approximately Milepost 997, he observed three individuals walking from off track on the Main Track #2 side. He stated that one individual walked straight across but the other two, Claimant and Mr. Rodriguez, stopped foul of Main Track #2 and remained there for 10 to 15 seconds. He added that Claimant had gone between both rails, and paused between Main Track #1 and Main Track #2, still foul of Main Track #2, because he was right on the edge of the tie.

Mr. Rubio acknowledged that he first observed Claimant and the other two employees when he was approximately 2/10 of a mile from their location, but maintained that he could see them clearly, as employees are required to wear bright orange clothing while on track. He stated that they traveled very quickly to Claimant's location and Claimant did not walk off Main Track #2 until Mr. Rubio was about 100 to 150 feet away. Mr. Rubio added that Mr. Rodriguez stepped over the Main Track #2 rail, still on the edge of the ties and considered foul of Main Track #2, waiting for them to approach, and only stepped off once they arrived. Once they approached and stopped the employees, Mr. Rubio explained, the employees stepped off Main Track #2 and came up to their vehicle.

Mr. Rubio testified that when he arrived he asked Mr. Rodriguez, the crew's Foreman, about his protection on Main Track #2 while he and Claimant were foul of the track, and Mr. Rodriguez replied that they were using a lookout, Mr. Gomez, the individual Mr. Rubio had seen walk directly across the track. Mr. Rubio stated that he told Mr. Rodriguez Mr. Gomez could not be the lookout because he was busy raking ballast, and asked him again about his protection on Main Track #2. Mr. Rodriguez asked Claimant if they hadn't setup lookout protection, and Claimant said the protection was Mr. Gomez. Mr. Rubio repeated that Mr. Gomez could not function as lookout because he was performing work.

Mr. Rubio testified that he told the employees to remain clear of Main Track #2 because they had no protection. He left briefly to get his vehicle, and then returned by himself to interview the employees. He stated that Mr. Gomez told him that he had never been the lookout for the work group on Main Track #2. Mr. Rubio did not testify to any statements made by Claimant or Mr. Rodriguez during this second set of interviews, nor, apparently, did he take written statements from the employees. Mr. Rubio testified that

he told the employees they had been foul of Main Track #2 without authority and removed them from service.

Foreman Terry Rodriguez testified at the investigation that after Claimant received their track and time authority for Main Track #1, they walked across Main Track #2 to Main Track #1 and noticed the hyrail vehicle approximately 700 or 800 feet away. He stated that Claimant went across Main Track #2 only to retrieve the flags to set up protection, and he never stopped or paused on Main Track #2.

Mr. Rodriguez acknowledged that he and Claimant could have obtained track and time authority for Track #2, but there was no need for them to do so because their work was on Main Track #1. He stated that none of them ever stopped on Main Track #2. He did state that they stood on Main Track #1 at the inside rail on the ties, briefing, but were fouling Main Track #1, not Main Track #2, as they stood between the tracks. He also stated that when the hyrail vehicle pulled up no one was foul of Main Track #2. He insisted that they never fouled Main Track #2 except to just cross over.

Mr. Rodriguez acknowledged that Roadmaster Rubio told the employees they were fouling Main Track #2, but Claimant told Mr. Rubio that they were not. He stated that Mr. Rubio had been too far away to see whether they were foul of Main Track #2, and by the time he pulled up Claimant had already walked up across Main Track #2 to the truck to retrieve the flags. He stated that both he and Claimant were foul of Main Track #1, on the inside rail on the ties, when Mr. Rubio pulled up.

Claimant testified at the investigation that he was working as Assistant Foreman of the Extra Gang at the time of the incident, and was the employee in charge of obtaining track and time authority for the gang. He stated that he and Mr. Rodriguez had walked across Main Track #2 to Main Track #1 where they would be performing their work, and he decided to go back across Main Track #2 to get a flag to protect their work limits. He stated that as he was going back to Main Track #1, Mr. Rubio told him that he had observed him standing on Main Track #2 in violation of Carrier rules.

Claimant stated that when Mr. Rubio pulled up he and Mr. Rodriguez were standing adjacent to the inside rail of Main Track #1, between the two tracks, conversing, for about five seconds, and then he told Mr. Rodriguez that he was going to go back to the truck for some flags. He also maintained that they were fouling Main Track #1, not Main Track #2.

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 shows no prior relevant discipline.

It is undisputed that the applicable Carrier rules also allow employees to cross a track without stopping but do not allow them to stand idle or foul of the track for any reason.

The Carrier asserts that this case is not complicated, as Claimant and his supervisor were witnessed fouling a Main Track line without protection. The Carrier points to the testimony of Roadmaster Rubio that the two employees stopped on Main Track #2. The Carrier acknowledges that the rules allow an employee to cross a track without stopping, but they do not allow the employee to stand idle and foul of the main track for any reason.

The Carrier states that Claimant and his co-worker violated Carrier rules, putting themselves in danger, and the discipline assessed was not harsh or capricious in light of the safety violation. As for the claim for pay and mileage, the Carrier notes that Claimant admitted he had received notice of the investigation, so there was no reason for him to show up at his work site rather than the location of the hearing. The Carrier requests that the claim be denied in its entirety.

The Organization points out that there were three witnesses to the relevant events, and only one, Mr. Rubio, gave testimony against Claimant. Even in that testimony, the Organization asserts, there is doubt as to what actually occurred, as Roadmaster Rubio was approximately 1000 feet, or three football fields, away, causing doubt as to whether he actually saw what he believed he was seeing. From that distance, the Organization stresses, one could have mistaken the employees as being next to Track #2, but they were not, as both Claimant and his supervisor testified. The contrary testimony, the Organization stresses, came only from an individual who was 1000 feet away.

The Organization asserts that Claimant and his supervisor crossed Main Track #2 and stopped between the two tracks, next to and foul of Main Track #1 on which they had protection. Further, the Organization states, Claimant stood there for approximately 10 seconds, then moved back across Main Track #2 to retrieve flagging equipment. The Organization points to the testimony of Mr. Rodriguez, who stated that the two employees were standing on Main Track #1 at the inside rail and ties, so they were fouling Main Track #1, where they had track and time authority, but not Main Track #2. All of the employees' moves, the Organization asserts, were made within the rules and guidelines governing the working conditions of Carrier employees.

In addition to the claim on the merits, the Organization asserts that on the day of the investigation, November 30, 2009, Claimant reported for work as usual and, after 30 minutes, informed his Roadmaster that he needed to travel to Fresno, California for his hearing. The Organization notes that the Roadmaster paid Claimant for 30 minutes and then counted him AWOL for the rest of the day, when he was doing what the Carrier had directed him to do. For all of these reasons, the Organization requests that the claim be sustained in its entirety.

We have carefully reviewed the record in its entirety, and must conclude that the Carrier has failed to meet its burden of proving the charges against Claimant by substantial evidence. The issue in this case is whether Claimant violated Carrier rules by fouling a track on which he had no protection. The Carrier's case against Claimant is based upon the testimony of its Roadmaster, who stated that he clearly saw Claimant and his co-worker standing on that track from approximately three football fields away. While he contended that they stood there for 10 to 15 seconds, he also maintained that he came to within 100 to 150 feet of their location while they were still fouling the track, apparently as they stood between Tracks #1 and #2. Both employees acknowledged that they stood between the tracks, but maintained that they fouled only Track #1 on which they had time and track authority.

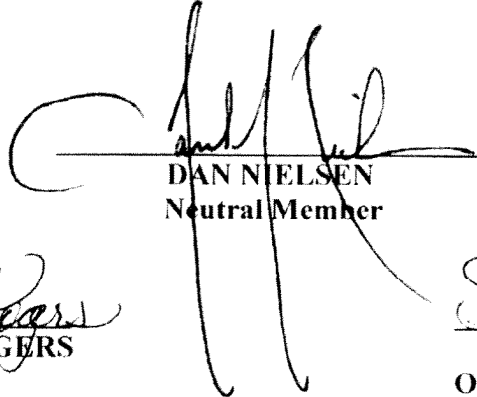
We have carefully reviewed the record in its entirety. The issue in this case is whether Claimant violated Carrier rules by fouling a track on which he had no protection. The Carrier's case against Claimant is based upon the testimony of its Roadmaster, who stated that he clearly saw Claimant standing next to the rails of Track #2 from approximately three football fields away. We agree that the question of distance makes it possible that Mr. Rubio was honestly mistaken as to what he saw, and if that was the only evidence of fouling the track, it would be difficult to conclude that there was substantial evidence to support the discipline. That, however, is not the only evidence.

Mr. Rubio testified that Claimant continued to foul the track as the hyrail drew nearer, standing within a foot or so of the rail, and only moved away towards his truck when the hyrail was within 100 feet or so. There is significantly less issue of Mr. Rubio's ability to see Claimant's position relative to the rail as the hyrail came closer and closer to his location. He also stated that Claimant and his co-worker, Mr. Rodriguez, claimed to have lookout protection on Track #2 from Mr. Gomez. The employees would have had no reason to make that claim if they had not been fouling Track #2, since no protection would have been needed. Claimant denies all of this, but that presents a question of credibility and credibility is for the Hearing Officer. While there is room for differing conclusions, we cannot say that the Hearing Officer's decision to credit Mr. Rubio was unreasonable in light of the record as a whole. Crediting Mr. Rubio's testimony on the disputed points yields substantial evidence that Claimant violated Rule 6.3.1. As the record supports the conclusion that Claimant violated the Rule, and since the penalty imposed was consistent with the Carrier's Policy for Employee Performance Accountability (PEPA), we conclude that the claim as it regards discipline must be denied.

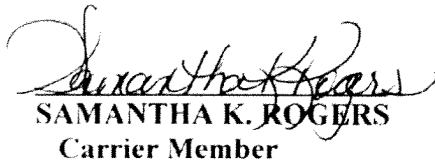
There was no record evidence concerning the Organization's argument that Claimant should be entitled to mileage for traveling to the investigation, and that aspect of the claim is denied.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

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