

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**  
(Former ATSF Railway Co.)

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Case No. 406 – Award No. 406 – Claimant: Rodriguez  
Carrier File No. 14-10-021  
Organization File No. 180-13S1-0922.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 10, 2009, when Claimant, Terry D. Rodriguez (6569255), was issued a Level S 30-day Record Suspension with a 1 year review period, concerning his failure to provide protection for himself on the 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, Terry D. Rodriguez, has been employed by the Carrier since 1975. 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.

Samuel Rubio, Jr., Carrier Roadmaster in Fresno, California, testified at the investigation that at the time of the incident he was in his vehicle with his Track Supervisors, Cary Garcia and Alex Franco, making a monthly hyrail inspection on his territory. He stated that Claimant and his gang were at Sunmaid, where they had just completed about two weeks' worth of tie renewal. He explained that Sunmaid has two main tracks running through it.

Mr. Rubio testified that Claimant needed to complete his work on Main Track #1, away from Main Track #2, and Claimant's gang obtained track and time authority for Main Track #1. Mr. Garcia obtained permission from Claimant to hyrail through his limits and they proceeded in that direction. Mr. Rubio stated that as they approached milepost 997, he observed three individuals coming from the field side of Main Track #2, and walk onto the track. They were at milepost 996.8. He acknowledged that there was a curve in the track but maintained that his vehicle was out of the curve when he observed the employees. He added that one individual walked straight across, but two individuals stopped for 10 to 15 seconds. He stated that he observed Claimant standing between the rails of Main Track #2, with his co-worker Mr. Corchado standing about a foot outside of the track, still fouling the track.

Mr. Rubio stated that he asked Mr. Garcia, who was sitting next to him, if he saw that the employees were foul of the track, and Mr. Garcia agreed that they were. He stated that as they approached Mr. Corchado turned and walked away, perhaps realizing that they were there. Claimant remained standing on Main Track #2 until the hyrail drew near, and then stepped down to approach the vehicle.

Mr. Rubio testified that they pulled up to Claimant and asked what protection he had on Main Track #2, and Claimant replied that they had track and time, but Mr. Rubio reminded him that the authority was only on Main Track #1. Then, Mr. Rubio stated, Claimant told him that they had a lookout, Mr. Gomez, the third crew member. Mr. Rubio stated that he told Claimant that Mr. Gomez could not be the lookout because he was working. Mr. Rodriguez asked his co-worker, Mr. Corchado, about their protection on Main Track #2, saying "don't we have lookout protection setup?" Mr. Corchado agreed that the protection was Mr. Gomez, but Mr. Rubio told the employees again that that could not be the case because Mr. Gomez was performing work.

Mr. Rubio testified he left to retrieve his truck, and returned a short time later. He interviewed all three employees, and Mr. Gomez told him that he had not been posted as a lookout and had not filled out a statement of on-track safety. He stated that Mr. Gomez left and he then asked the other two employees why they had been foul of Main Track #2 without protection, and Claimant admitted that they had fouled the track, stating that he knew he was in the wrong and asking if it could just be handled "in-house," to which Mr. Rubio replied that that was not possible as they had committed a serious safety violation.

Track Supervisor Cary Garcia testified at the investigation that he was hyrailing with Mr. Rubio and Track Supervisor Franco at the time of the incident. He stated that when he first saw Claimant's gang he was coming off Parker Avenue, which was still in the spiral of the curve, almost half a mile away from where the employees were. He added that from his vantage point it looked like two men "could have been" fouling Main Track #2. He added that he was in control of the hyrail so he was periodically looking back and forth, making sure it was safe to travel. At the investigation, Mr. Garcia was not asked whether Mr. Rubio had commented to him that the employees were fouling the track, or whether he had agreed with the comment.

Mr. Garcia stated that no one was standing in the middle of Main Track #2 at the time they approached. He stated that as they approached Claimant was standing "close" to Main Track #2.

Claimant testified that he had been the employee in charge of the work at Sunmaid, although his co-worker Mr. Corchado was in charge of track and time authority. He denied that they had fouled Main Track #2 at any time. He stated that he stood on the passenger side of the hyrail as it approached so he could speak with Mr. Rubio, but almost immediately went to the other side, away from Main Track #2, because Mr. Rubio exited the vehicle on that side. Claimant stated that he had never, at any time, stood on Main Track #2, and that other than approaching the hyrail, he had not stood between the tracks. He said he walked across Track #2 because his truck was parked on that side, but that he simply walked straight across and did not foul the track. Claimant denied ever telling Mr. Rubio that he knew he was in wrong, or admitting that he had fouled Main Track #2.

Ricardo Corchado testified that he is an Assistant Foreman, and had been in charge of securing track and time for Main Track #1 on the day in question. He stated that he and Claimant had gone to the truck while he secured authority to foul Track #1 and gave permission for the hyrail to travel through his authority. They then crossed the tracks to Track #1, but as the hyrail approached he decided to go back to get his Track and Time book, so he could show the supervisors the limits they had. He crossed back, got the book, and returned to the hyrail. When he got there, Claimant told him that Mr. Rubio was claiming they had been fouling Track #2. Mr. Corchado denied that he or Claimant had fouled Track #2 or been on the track at all, other than to walk straight across it. He said they had no protection on Track #2, since all of their work was on Track #1.

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'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 history shows no prior discipline for almost 20 years.

The Carrier asserts that this case is not complicated, as the record clearly establishes that Claimant and his fellow supervisor were witnessed fouling a main line track with no protection. While the Organization questions whether the Carrier's witness, Roadmaster Rubio, had a good view of the relevant events, the Carrier points to his clear and detailed testimony as to what occurred. The Carrier concludes that Claimant's violation of Carrier rules put himself and his co-worker in danger, and the discipline assessed was neither harsh nor capricious considering the seriousness of the incident. For these reasons, the Carrier urges that the claim be denied.

The Organization points out that there were four witnesses who testified at the investigation concerning the events at issue, and three gave consistent accounts, with only Carrier Roadmaster Rubio offering a different version. The Organization stresses that Carrier rules allow employees to cross track so long as no work is performed and the way is known to be clear, which is, the Organization states, what occurred here.

The Organization notes Roadmaster Rubio's testimony that Claimant and his co-worker stopped on Main Track #2 for 10 to 15 seconds and were therefore fouling the track, but stresses that Mr. Rubio was somewhere between one-half mile and 700 feet away when he supposedly made this observation, and was also coming out of a curve, circumstances which would have made it quite easy for him to make a mistake. The Organization also points out that another Carrier witness, Cary Garcia, testified that there was no one on Main Track #2 as they approached.

For all of these reasons, the Organization concludes that the Carrier failed to provide substantial evidence to support the charges against Claimant and, even if it had, the discipline assessed is extreme and unwarranted in relation to the asserted offense. The Organization therefore urges that the claim be sustained.

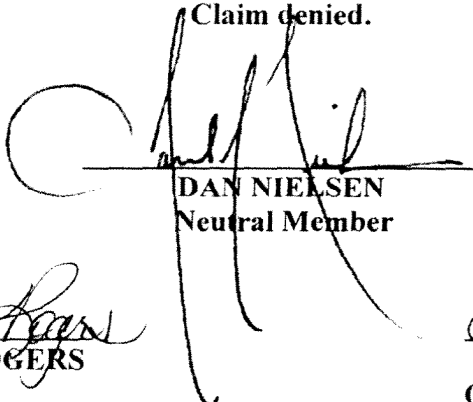
We have carefully reviewed the record in its entirety. The issue in this case is whether Claimant violated Carrier rules by fouling a track on which he had no protection. The Carrier's case against Claimant is based upon the testimony of its Roadmaster, who stated that he clearly saw Claimant standing on that track 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, and only stepped off the track to approach the vehicle and speak with him. He also stated that Claimant initially said he had track and time on Main Track #2, and when he was reminded that the track and time was only for Main Track #1, he claimed to have lookout protection on Track #2 from Mr. Gomez. His co-worker, Mr. Corchado, echoed this claim. 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. Finally, Mr. Rubio stated that Claimant admitted they had fouled the track, and asked if he could just treat it as an internal matter, to be resolved informally. 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 must be denied.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
Neutral Member

  
**SAMANTHA K. ROGERS**  
Carrier Member

  
**DAVID TANNER**  
Organization Member

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