

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway)

Case No. 410 – Award No. 410 – Portillo
Carrier File No. 14-11-0090
Organization File No. 100-13C2-1075.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing February 23, 2100, when Claimant, Anastacia Portillo (1724368) was issued a Level S 30-day Record Suspension with a 1 year review period, concerning her failure to properly secure and pin up the work head assembly on track machine, which resulted in assembly striking a road crossing and damaging the machine on December 15, 2010. The Carrier alleged violation of MOWOR 6.50.3 Equipment Components Clear and Engineering Instruction 14.3.3 Maintaining Roadway Equipment, Section A, Item No. 9.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and she be compensated for her 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, Anastacia Portillo, has been employed by the Carrier since 2006. On December 29, 2010, the Carrier notified Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (her) responsibility, if any, in connection with (her) alleged damage to on track machine X0100634, while (she was) working as (a) Machine Operator on DS01 on December 15, 2010 at MP 707.75 at or near Dora, AL on the Springfield Division, Birmingham Subdivision." No rules were cited in the Investigation Notice. Following the investigation, the Carrier found that Claimant committed the actions alleged, in violation of Maintenance of Way Operating Rule 6.5.3—Equipment Components Clear, and Engineering Instructions 14.3.3—Maintenance Roadway Equipment, Section A Item No. 9, and assessed her a Level S 30-day record suspension with a one-year review period.

Maintenance of Way Operating Rule 6.5.3, Equipment Components Clear, provides, "Before passing over crossings, switches, derails and frogs, be sure all equipment components will clear."

Engineering Instructions 14.3.3 Section A. **Safety Precautions**, Item 9 provides:

For track travel, operators must:

- Follow all applicable safety rules
- Shut down all moving components.
- Secure and lock all working components in the stowed position, such as wings, workheads, clamp frame, plows, brooms, cutter heads, broom assemblies, and hoisting and swing components.

Rufus Abney, Carrier Supervisor of Railway Equipment Special Projects, testified at the investigation that he is responsible for supervising and maintaining work equipment, and investigating injuries, breakdowns and related matters. On the evening of December 15, 2010, he was notified that there had been an incident involving damage to a machine operated by Claimant, a Norco NVCAR Voslow screw machine, from contact with a concrete crossing plank. He sent traveling mechanic Ryan Newton to look at the machine, and traveled to the scene the next morning.

Mr. Abney testified that when he inspected the machine it was not in an up and locked position because the guide rods were bent. He stated that if the work heads had been properly locked and secured as required by the rules, they would not have struck the concrete crossing plank, resulting in damage and bending the work head guide rods, and no damage would have been incurred. He testified that the work heads were not in an up and locked position while it had been traveling in a reverse motion.

Mr. Abney added that he personally straightened the guide rods as much as he could with a track jack so they could work. Mr. Abney stated that the estimate for new guide rods and clipper assembly was \$3000. He stated that he had documentation for the order for new machine parts but did not have it with him at the hearing. He explained that he estimates damage and then fills out a machine damage report, which was entered

into evidence at the investigation. At the investigation, Mr. Abney stated that the new parts had been installed and the damaged parts were no longer available for inspection. He explained that the guide rods and clipper assembly on the left side work head had been replaced. The clipper assembly, he stated, is a small wire at the bottom of the work head.

Mr. Abney testified that mechanic Buddy Eschenbacher tested and repaired the machine shortly after the incident. A handwritten statement by Mr. Eschenbacher was entered into evidence at the investigation. It recited, with respect to the machine at issue, "Head No. 1 was damaged when it hit a crossing damage was minor fixed in in 10 min. with a cumalong & chain." Mr. Abney explained that it is normal for Maintenance of Way employees to make temporary repairs to a piece of equipment in order to have it functional to complete that day's work, until permanent repairs can be made, and that was what Mr. Eschenbacher accomplished. He added that permanent repairs were required after the fact. Mr. Abney further stated that even if the work head was damaged to the point that it had to be repaired, the machine could be worked, even if the guide heads were bent and the machine was not 100% productive.

Claimant testified at the investigation that at the time of the incident she had operated the machine at issue for about three months. Claimant stated that she had found no exceptions to the machine during her morning inspection, but during the day's second job, the work heads on her machine "kept bleeding down." She stated that she informed her foreman of the situation by radio, and he insisted that she hurry as they were pushing for time. She stated that she asked for a mechanic and the foreman refused because he was pushing for time. Claimant maintained that she considered the machine unsafe to run but the foreman refused to call a mechanic and threatened to charge her with insubordination if she refused to run the machine. Claimant stated that she was unaware that she could have "empowered herself" and taken the machine out of service.

Claimant testified that at the location where she was working there was one board of a road crossing and, prior to backing up, she saw the board in the road crossing. She maintained that prior to going across the one board and then a road crossing, she locked up and pinned up her work heads. She stated that prior to going across the crossing she confirmed that the work heads were locked up by checking that the little red pins are in the holes, which show that the work heads are locked. She acknowledged that she must visually inspect the pins. She also acknowledged that she must actually activate the work assembly to confirm that it is locked, and she did so.

She stated that the work head came into contact with the one crossing board because all that morning the left side kept bleeding down. She maintained that the work head could "bleed down" even if it had been properly pinned up, if there had been vibrations from the movement. However, she also maintained that the work head was not hit on the road crossing, rather just a small piece of wire at the bottom of the machine.

Claimant also maintained that following the incident all of the machine's functions were working properly for the remainder of her shift and she completed

approximately three hours of work before any repairs were performed. She also maintained that the screw assembly still fit properly but was "just a hair" off, and that it had been screwing straight prior to the incident. She also maintained that beyond Mr. Eschenbacher's repairs none were made on the machine when she worked it from the 15th through the 18th. She stated that if the guide rods had been bent it would not have been possible to continue working on the machine.

Claimant's personal record shows no prior discipline.

The Carrier asserts that this case is not complicated: The Organization's position that there was no damage to the machine at issue is based upon Mechanic Eschenbacher's statement, but disregards Supervisor of Railway Equipment Rufus Abney's statement that the damage was caused by Claimant's failure to have the component locked up and the work head in the locked position while traveling. The Carrier also notes Mr. Abney's testimony that there was approximately \$3000 worth of damage, which necessitated permanent repairs to the guide rods, which were completed. The Carrier points to the simple fact that the heads on the machine were not locked up properly while the machine was traveling, and it hit a crossing. Claimant, the Carrier notes, admitted that she had an accident with her machine and damaged it. This admission alone, the Carrier states, is sufficient to satisfy its burden of proof. With respect to the degree of discipline assessed, the Carrier asserts that the Organization's argument amounts to a request for leniency. However, the Carrier states, it is well established that the granting of leniency is solely within the discretion of the Carrier. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states, the Notice of Investigation was deficient as it lacked reference to any specific rules allegedly violated by Claimant, and the defect was compounded by the Carrier's placing those rules into evidence at the investigation. These actions, the Organization states, put Claimant and her representative at a distinct disadvantage in preparing a proper defense. Further, the Organization notes, the Hearing Officer prevented Claimant from participating in her defense by interrupting her questioning of a Carrier witness.

On the merits, the Organization states that the Carrier has failed to meet its burden of proving Claimant's guilt by substantial evidence. There was no evidence, the Organization points out, that any permanent repairs were made to the machine Claimant supposedly damaged so badly it could not operate; all that was presented was an estimate for the cost of replacement parts. There were, the Organization points out, no photographs of the purported damage nor work orders showing any damage was ever repaired. The Carrier's own Mechanic, the Organization states, stated that repairs were accomplished with a "come-along" and a chain and took only 10 minutes. Moreover, the Claimant's testimony that she was able to work her machine for the rest of the day at issue with no slowdown shows that the Carrier's claim of substantial damage is dubious.

With respect to the penalty assessed, the Organization notes that Claimant is a five-year employee in the infancy of what could be a long and productive career with the

Carrier. The Organization states that discipline is meant to be an employer action to correct an employee's unacceptable behavior or performance problems. When addressing behavior problems, the Organization asserts, discipline should be progressive in nature, escalating the penalty for each subsequent occurrence. For employee performance, however, the Organization urges, the more appropriate method is to correct an employee through non-disciplinary measures such as coaching and counseling, training, accommodation and/or reassignment. Claimant, the Organization asserts, should have been given the opportunity to improve rather than having been subjected to serious discipline. The Organization concludes that the discipline assessed was extreme, unwarranted and unjustified and urges that the claim be sustained.

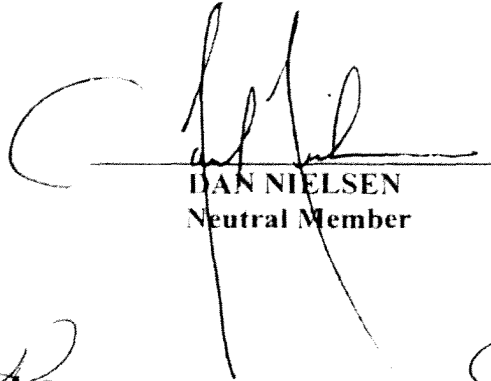
We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which deprived Claimant of her right to a fair and impartial investigation. In particular, the Investigation Notice was quite specific as to the time and particulars of the asserted violation, and the Organization has not pointed to any requirement that the specific rules alleged to have been violated be cited in the Investigation Notice.

On the merits, the Organization's case appears to rest upon its assertion that in fact there was no damage to Claimant's machine. Mr. Abney gave detailed testimony to the contrary describing the nature and extent of the damage. This presents a question of credibility and credibility is for the Hearing Officer. We find the record sufficient to conclude that there was damage to the machine as described by Mr. Abney.

As to the particulars of the incident itself, Mr. Abney also explained in detail how he determined that the work heads had not been secured as required by Carrier's rules. Claimant gave confusing and contradictory evidence in her defense, asserting both that her machine was unsafe and that it had worked perfectly well with only minor adjustment after the incident. She also asserted that she had in fact secured her machine properly, that the work head was struck because it kept "bleeding down," and that the work head had in fact never struck the crossing plank and only a small wire made contact. The evidence presented by the Carrier, which, as the Hearing Officer apparently found was not credibly contradicted by the Claimant, is sufficient to meet its burden of proving her guilt by substantial evidence. As for the penalty, it was assessed in accordance with the Carrier's PEPA and we cannot say that it represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine the appropriate disciplinary sanction.

AWARD

Claim denied.

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DAN NIELSEN
Neutral Member

A handwritten signature in black ink, appearing to read 'Samantha K. Rogers', is written over a horizontal line.

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 *Sept*, 2012.