

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 416 – Award No. 416 – Claimant: Van Dyne
Carrier File No. 14-10-0216
Organization File No. 190-13N1-1064.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 2, 2010, when Claimant, Daniel L. Van Dyne (6582514) was issued a Level S 30-day Record Suspension with a 3 year review period and a six month suspension of his Track Supervisor rights, Assistant Track Supervisor rights, Foreman rights and Assistant Foreman rights or any position that would require him to be an Employee in Charge during this six month suspension, concerning his failure to stay within his Track and Time Authority while hyrailing on July 2, 2010. The Carrier alleged violation of MOWOR 6.3.1 Main Track Authorization, Releasing Authorities.
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, Ty G. McKinney, has been employed by the Carrier since 1996. On July 13, 2010, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to stay within his track and time authority while hyrailing westbound on July 2, 2010 on the Bakersfield Subdivision at MP 994.4 at approximately 1420 hours. The notice alleged

that Claimant had violated Maintenance of Way Operating Rule 6.3.1, Main Track Authorization. Following the investigation, the Carrier determined that Claimant had committed the violation alleged and, taking into consideration his personal record, assessed him a Level S 30-day record suspension with a three-year review period. The Carrier also suspended for six months his Track Supervisor rights, Assistant Track Supervisor rights, Foreman rights and Assistant Foreman rights. During the suspension, the Carrier also prohibited Claimant from assuming any position that would require him to be an Employee in Charge. In addition, he was required to complete Book of Rules Training and TMDS Training prior to the reinstatement of rights and, for the following year, to meet once per month with the Roadmaster.

Carrier Rule 6.3 Track Occupancy provides, in relevant part:

6.3.1 Main Track Authorization

Use one of the following on main tracks, controlled sidings or any track where CTC is in effect:

- Rule 10.3 (Track and Time)

Occupying or Fouling Track

When requesting authority or establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until authority is received or protection is established. The employee requesting authority must be qualified on these rules and must tell the train dispatcher or control operator where the main track will be entered.

Samuel Rubio, Jr. Carrier Roadmaster in Fresno, California, testified at the investigation that, at the time of the incident, Claimant was a Track Supervisor under his supervision. He stated that the Chief Dispatcher notified him of an exceeds alarm on the Hyrail Limits Compliance System in Claimant's hyrail vehicle. He explained that at the time Claimant had two separate track and time authorities, one between the eastbound and westbound control signals at CALWA Crossing, and the second starting at the westbound control signal of CALWA, milepost 994.9 and west to Sunmaid. While they have similar names, these are two different locations along the track. Rubio explained that one authority ended at CALWA Crossing and the other began at CALWA, and Claimant was missing a piece of authority on the east leg of the way, between the two authorities, and had not sought or obtained authority in that area.

On the day of the incident, a Signal Maintainer was working at CALWA Crossing, and the dispatcher placed blocks around his track and time to remind himself not to send anything through that area. This effectively took that segment of track out of service. The block was between Claimant's two authorities. Claimant, Mr. Rubio testified, made the assumption that his authority went all the way through when it did not.

He stated that an employee is required to know his track and time limits and request and receive what he needs.

Mr. Rubio added that Claimant acknowledged he had authority in one area, and then in another, but the colors on the Smart Mobile Client, a computerized system within the vehicle which denotes the various authorities with colors, fooled him. A document entered into evidence shows how the limits are color coded on the device. Track and time authority is designated as blue and a block is designated as purple.

Mr. Rubio testified that in response to Claimant's statement that the computer made everything look blue, making him think he had authority straight through, he had the dispatcher create a similar situation so that he could observe how the screen looked. He stated that the segment between his authorities went purple, so it was colored all the way through.

Mr. Rubio explained that the user of the Smart Mobile Client sends a request to the dispatcher for a segment of track, and the dispatcher reviews the request and issues the authority, which comes over the computer as a PDF file. The employee then reviews the authority, which provides him with all information as to track and time, limits, and other related matters.

Mr. Rubio added that all employees receiving track and time are required to read and understand their permits. Claimant's printed authorities, he stated, clearly showed the missing segment of track. He added that employees are not to rely on the computer screen as the primary indication of their authority, because, for example, the authority indicated could belong to another employee. However, he explained, it does have good information because if the mouse is placed over a segment it will tell who has the authority.

Mr. Rubio stated that Claimant had been hyrailing through the territory at issue for the previous five years and frequently had to obtain time and track authority. He added that he was not aware of any employees being confused by the CALWA and CALWA Crossing tracks.

Claimant gave a written statement concerning the relevant events, and testified at the investigation that he was a Track Supervisor at the time of the incident and had been for three or four years. He also stated that he had been using the Smart Mobile Client for at least a couple of years. He acknowledged that the PDF document sent by the dispatcher, which he prints out, establishes his actual authority, and the Smart Mobile Client is a representation of that authority. He also acknowledged that blue areas on the Smart Mobile Client could represent another employee's authority. Claimant maintained that he had notified a Carrier officer that there was a safety issue with the colors on the screen.

Claimant acknowledged that he had authorities at two locations with similar names, and in between was a segment of track on which he did not have authority. He

also acknowledged that the dispatcher had blocks on that segment of track, so it was out of service and no trains were going to run on it. He acknowledged that he went through that area, thinking he had authority all the way through. He stated that the color of the block looked very similar to the blue showing his time and track authority, and he took a quick glance at the screen and assumed he had authority all the way through. He stated that this was the first time he had seen a block placed adjacent to the track and time. He also acknowledged that even if an entire area were blue on the Smart Mobile Client, it would not give him the authority to go through the designated area, because the blue could represent another employee's time and track authority.

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. A second serious violation committed within the review period may result in dismissal. Claimant's personal record shows a Level S 30-day record suspension issued October 27, 2009 for failure to stop the controls of moving equipment on main track while copying track and time and releasing track and time authority; a Level S 30-day record suspension issued October 26, 2009 for failure to properly use lookout protection; and violations in 1997 and 2000.

The Carrier asserts that this case is not complicated, at Claimant admitted, in his written statement and his hearing testimony, that he hyrailed outside his track and time authority. It is well established, the Carrier states, that such an admission is sufficient to satisfy its burden of proof.

The Carrier further asserts that the discipline assessed was appropriate, given the seriousness of the violation, which could have had catastrophic results, with consideration given to Claimant's personal record. The Carrier concludes that the penalty complied with its (PEPA and should not be disturbed by this Board.

The Organization states that numerous factors contributed to this incident and the matter would have been appropriately addressed through training, counseling and coaching rather than the imposition of such serious discipline. First, the Organization states, there are two adjacent main track locations with similar names, CALWA and CALWA Crossing. Claimant had track authority at both locations and, the Organization states, the similar names can cause confusion when displayed on the computer screen. The Organization adds that there is a short stretch of track between the two locations and when an individual records track authority he receives it between CALWA and CALWA Crossing. There are no switches, the Organization explains, nor any way for a train to enter this sort section of track other than dropping out of thin air. Claimant, the Organization stresses, had authority on both sides of this location.

The Organization further contends that problems with the Smart Mobile Client, a computer-based system that uses colors to show track authorities, contributed to this incident. The Organization notes that Claimant had authority on two pieces of track, and

the dispatcher had placed a block on the short piece of track in between to protect it from trains. However, the Organization contends, the colors used for authority and for a block are so similar that they appear the same, so an employee can easily assume he has on track authority in a block area, even though the employee would be protected and no train could get to them. This, the Organization states, is what occurred here; Claimant mistook the block for track and time authority.

The Organization also asserts that Claimant never entered an area he lacked permission to enter. Although he did not have track and time, the Organization contends that he did have permission from the employee in charge of the location and was protected from trains while moving through this short area. The Organization urges that the Carrier has failed to support its charges against Claimant.

As for the penalty assessed, the Organization states that it would have been more appropriate to correct a performance error such as the one alleged here with coaching, counseling or other non-disciplinary corrective measures, and argues that the discipline assessed is arbitrary, excessive and unwarranted. The Organization urges that the claim be sustained.

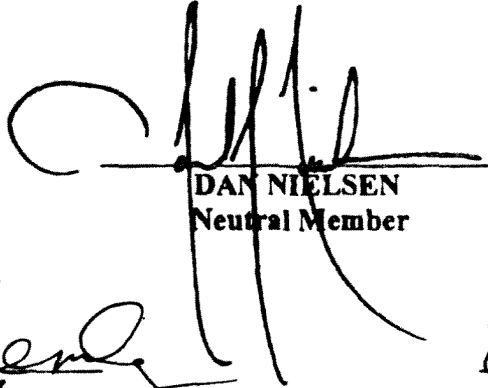
We have carefully reviewed the record in its entirety. The record is clear, and Claimant admits, that he entered a segment of track when he had no authority to do so. While the Organization attempted to defend his conduct on the bases that there could be confusion caused by similar track names and by the colors demonstrated on the Smart Mobile Client, the record does not support the conclusion that there was any excuse for Claimant's conduct. He did not request authority for this piece of track. He acknowledged that his primary authority was the written document from the dispatcher and that, for several reasons, an employee cannot rely upon the Smart Mobile Client as the primary evidence of his authority. The inescapable conclusion is that Claimant was simply careless, and entered an area which was blocked to allow an employee to perform work.¹ As the Carrier argues, Claimant's conduct could have had catastrophic consequences, and there is no record support for the Organization's argument that the employee in charge of the blocked area gave Claimant permission to enter. Thus, Claimant's guilt has been proven by substantial evidence.

With respect to the penalty, Claimant committed an extremely serious offense. Given that and his personal record, we cannot say that the Carrier's decision to impose a Level S 30-day Record Suspension with a three year review period and a six month suspension of his Track Supervisor rights, is extreme or unwarranted.

¹ The Organization's argument that a train could not have crossed through this area because Claimant had authority on either side of it ignores the fact that the Maintainer working on that segment was not protected from the Claimant, nor the Claimant from him, since neither one expected the other to be there.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 21st day of May, 2013.



PLB5850-417

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 417 – Award No. 417 – Claimant: Franklin
Carrier File No. 14-11-0181
Organization File No. 170-13C2-1115.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July February 23, 2011, when Claimant, Matthewton J. Franklin (1162254), was issued a Standard Formal Reprimand, concerning his failure to follow manufacturer's instructions by placing diesel fuel into a gasoline powered welder causing loss of service to welder on February 23, 2011. BNSF first knowledge was on March 2, 2011. The Carrier alleged violation of MOWSR 1.4.3 Manufacturer Specifications.
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, Matthewton J. Franklin, has been employed by the Carrier since 1997. On March 14, 2011, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to follow manufacturer's instructions by placing diesel fuel into gasoline powered welder AT95961, causing loss of service to the welder, while working as Structures Mechanic on BBCX0283 on Wednesday February 23, 2011. The notice stated that the Carrier's first knowledge of the incident was March 2, 2011, and that the

investigation would determine possible violation of Maintenance of Way Safety Rule 1.4.3 Manufacturer Specifications. Following the investigation, the Carrier found that Claimant had committed the violation alleged and assessed him a Standard Formal Reprimand.

Carrier Maintenance of Way Safety Rules provides, in relevant part:

S-1.4.3 Manufacturer Specifications

Read and follow the manufacturer's instructions when using tools and equipment.

On February 23, 2011, Claimant was working as Lead Mechanic. Carrier Structures Foreman Ivan J. Dixon testified at the investigation that on that day he instructed Claimant to fuel the two welders, a diesel welder and a gas welder, that the gang used at the jobsite. A receipt entered into evidence showed that Claimant purchased diesel fuel for his truck on February 23, 2011.

Mr. Dixon added that Claimant had experience fueling these different types of machines and used them often. He stated that the diesel welder has a tag designating it as such and the gasoline welder has an indication on the cap. Patrick H. Senf, Carrier Supervisor of Structures at Flagstaff, Arizona, explained that it was common practice for a gang to top off small gasoline or diesel powered equipment when the employees fuel their trucks.

Mr. Dixon also testified that Claimant had a new hire, Calvert Tso, assist him in fueling the truck and welders on February 23. He stated that Claimant, as Lead Mechanic, was the employee in charge of the work. He added that Mr. Tso, as a new hire, did not know how to fuel the truck and/or welder, and was not aware of the distinction between diesel and gas welders. He explained that it was Claimant's responsibility to teach him.

Mr. Senf testified that on or about March 2, 2011 he came up to the gang's truck and observed that there was a welder on the back of the truck that they were not using, and they were using a welder that belonged to someone else. He stated that he asked the employees why and the Foreman responded that their welder was out of service because diesel fuel rather than gasoline had been put into it. He added that the welder remained out of service for approximately three weeks. A repair bill for \$458.36 was entered into the investigation record. Claimant was not at work on March 2, 2011, when Mr. Senf discovered that there was a problem with the welder.

Claimant testified at the investigation that on February 23, 2011 he was with Mr. Tso, the helper, who put the wrong fuel in the welder. He stated that the pumps, diesel and gasoline, were clearly marked at the fuel station. Claimant maintained that he did not personally fuel any welders that day. He explained that he handed Mr. Tso, who was standing in the back of the boom truck, the diesel fuel pump and instructed him to fuel

the diesel welder. He maintained that he was not aware that Mr. Tso put the fuel in the gas welder. Claimant acknowledged that as he was lead mechanic Mr. Tso was following his instructions. He maintained that the welders were clearly labeled as to the type of fuel needed.

Photographs of the two welders, taken by Claimant, were entered into the investigation record. Neither shows the serial number of the equipment. Claimant explained that the photograph of the diesel welder, one of the welders in the back of his truck, has a notation on the top indicating "diesel only." A photograph of the gas welder has no indication or notation on the gas cap as to the type of fuel required, and Claimant, who took the photograph, acknowledged that nothing on it said gasoline only.

Claimant maintained that he worked the day after the incident but the gang did not use the gas welder over those two days. He stated that he worked the following week at a different location. Under questioning by the Organization representative, Claimant stated that he did not know for a fact that the welder was filled with diesel fuel on February 23 and that it could have been filled the following week. He also stated that Mr. Tso did not tell him that he fueled the gasoline welder and he was under the impression that he only filled the diesel welder.

The Carrier asserts that this case is not complicated, as Claimant was working as Lead Mechanic and was responsible for fueling the welders at the time at issue. The record includes, the Carrier notes, the receipt for repair to the welder from the damage caused by filling it with diesel fuel.

The Carrier states that although Claimant tried to blame a newly hired employee, it was Claimant's responsibility to see that the welders were fueled correctly and to train the new employee properly. Indeed, the Carrier points out, Claimant admitted that he handed the new employee the diesel fuel pump but did not make sure he fueled the correct welder. As Claimant did not ensure that the work was performed correctly, the Carrier concludes, it has proven by substantial evidence that Claimant violated Carrier rules as alleged. The Carrier urges that there is no reason to disturb the penalty it deemed appropriate and the claim should be denied in its entirety.

The Organization asserts that the Carrier has failed to prove the violation against Claimant by substantial evidence. The Organization points out that eight days elapsed from the time Claimant last fueled his truck and it was discovered that the welder had not been fueled properly. Anyone, the Organization states, could have fueled the welder during this period of time.

Moreover, the Organization notes, Claimant testified that he did not personally fuel the welders in the back of his truck; that task was performed by his helper. The Organization further points to Claimant's testimony that he instructed the helper to fuel the diesel welder and never mentioned the gas welder. Further, the Organization disputes the Carrier's contention that it was Claimant's responsibility to instruct the helper on how to use a fuel nozzle. For all of the reasons, the Organization urges that the Carrier has

failed to meet its burden of proof. Even if the Carrier had proven its case, the Organization concludes, the discipline assessed is excessive in relation to the charges and the claim should be sustained.

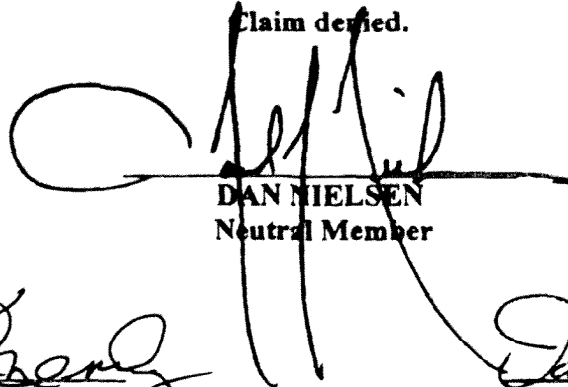
We have carefully reviewed the record in its entirety. The evidence shows that on February 23, 2011 Claimant's supervisor instructed him to fuel the welders in his truck. The record is clear, as Claimant acknowledges, that as Lead Mechanic Claimant was responsible for ensuring that the work was performed properly. Claimant apparently handed a diesel fuel nozzle to a novice employee, with instructions to fuel the diesel welder. There is no evidence that Claimant watched the employee perform the work, explained the difference between the different fuel requirements for the different welders, or otherwise ensured that the helper had sufficient knowledge to do the job properly. The record is clear that the gas welder was improperly fueled, causing it damage.

At the investigation, Claimant equivocated as to whether he knew at the time that the helper had improperly fueled the welder. He maintained that both welders were clearly marked as to fuel requirements, while at the same time providing photographs that showed that the gas welder had no such indication. This leads to the conclusion that a new employee might well have made a mistake. While Claimant attempted to create the impression that the welder could have been fueled on another occasion before the mistake was discovered, there was no evidence that that was the case, and the circumstances strongly favor the conclusion that this was the occasion on which the diesel was put into the gas welder. The supervisor instructed them to fill both welders. Claimant handed the new worker the diesel pump and did not monitor him thereafter. The new worker presumably followed his orders and fueled both welders. The gas welder was thereafter found to have diesel fuel in it.

The most reasonable inferences to be drawn from Claimant's own description of events suffice to meet the Carrier's burden of proving that he failed to ensure that the machinery was fueled correctly. We cannot say that the penalty assessed is unreasonable or excessive under the circumstances.

AWARD

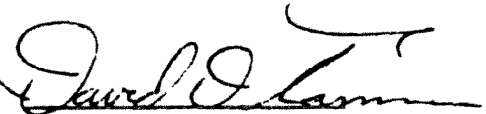
Claim denied.

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DAN NIELSEN
Neutral Member

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JOY MENDEZ
Carrier Member

A large, stylized handwritten signature in black ink, appearing to be 'David Tanner', written over a horizontal line.

DAVID TANNER
Organization Member

Dated this 21st day of MAY, 2013.