

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 426 – Award No. 426 – Claimant: Gonzales
Carrier File No. 14-12-0073
Organization File No. 170-13N1-1177.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 12, 2011, when Claimant, William Gonzales (6542831), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged opening a switch without proper authorization while working as Assistant Foreman on September 16, 2011. 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 reinstated, if applicable, with seniority, with all rights unimpaired, the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing December 12, 2011, continuing forward and/or 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, William Gonzales, has been employed by the Carrier since 1995. On September 19, 2011, the Carrier charged Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged opening switch without proper authorization while working

as Assistant Foreman on TRPX0017 on the Clovis Subdivision at MP 855.1 on Friday, September 16, 2011.” The notice stated that the investigation would determine possible violation of Maintenance of Way Operating Rules 6.3.1 Main Track Authorization and GCOR 1.1.2 Alert and Attentive. At the opening of the investigation, the Carrier read into the hearing record a postponement notice dated October 26, 2011, which had added as possible violations Maintenance of Way Operating Rules 1.1 Safety, 1.3.1 Rules, Regulations and Instructions, 1.6 Conduct, 8.3 Main Track Switches, and 9.18 Electrically Locked Switches and Derails, and which eliminated 1.1.2 Alert and Attentive. The Organization objected strenuously to the introduction of the new Rules. Following the investigation, the Carrier determined that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rule 6.3.1 Main Track Authorization, and, giving consideration to its Policy for Employee Performance and Accountability (PEPA) and Claimant’s personal record, assessed him a 30-day record suspension with a three-year review period.

Maintenance of Way Operating Rule 6.3.1 provides, in relevant part:

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.

Carrier Southwest Division Assistant Roadmaster Jeremy Papenfuhs testified at the investigation that on September 16, 2011, he was filling in as Roadmaster on RP 17. The Chief Dispatcher notified him of a track indication and he traveled to the scene. Upon arrival, he learned that the electric time release box on a switch had been opened, the switch lock had been removed from the switch, and the derail had been thrown. He learned that Claimant, the gang’s Assistant Foreman, had been responsible.

Mr. Papenfuhs spoke to Claimant, who gave a written statement which was read into the investigation record. It provided, “I unlocked box and switch padlock but didn’t touch the handle or foot latch. Wait for track and time. In meantime I walked to derail and unlocked it and put derail in dirt.”

Mr. Papenfuhs stated that Claimant had violated Maintenance of Way Operating Rule 6.3.1, and that Maintenance of Way Operating Rule 9.18 does not allow a switch to

be unlocked without authority. He added that when he arrived at the scene the case door was unlocked to the switch. He stated that Claimant told him he had unlocked the time release box because he was in a hurry.

Claimant testified at the investigation that he was responsible for opening the switch so the gang could enter the main track. He maintained that Foreman Todd Keen requested that he unlock the electric lock box, because Mr. Keen did not have a key, so Claimant did so. Claimant maintained, however, that he did not unlock the switch lock on the switch itself. He explained that he unlocked the electric lock box switch, put the lock on the tie, and walked away. He added that Mr. Keen was sitting next to him in a cart and Claimant told Mr. Keen that he had unlocked the box and the derail was down, so when they got the time he could start timing it out and get ready to unlock the switch and throw it.

Claimant acknowledged that placing the derail in the dirt did not protect any equipment that might have come in from the main track. However, he stated that the switch was never left unprotected, because Mr. Keen was sitting right by it. He added that after the incident he spoke to a Signal Department employee who informed him that if he unlocked and opened the box it would not throw a red signal, so someone else must have altered the switch position.

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 a review period of 36 or 12 months depending upon the employee's length of service and discipline/injury records. Claimant's personal record shows a Level S 30-day record suspension, with a 12-month review period, assessed January 1, 2007 for failure to protect men and track and occupying main track without proper authority and a Level S 30-day record suspension, with a 12-month review period, assessed July 20, 2010, for failure to operate a Company vehicle in a careful and safe manner.

The Carrier asserts that on September 16, 2011, Claimant opened the box on a mainline switch, which gave an error indication to the dispatcher and the train crew. The Chief Dispatcher notified Mr. Papenfuhs, who traveled to the scene and observed that Claimant had removed the lock and opened the box on a switch. The Carrier argues that Claimant committed a Rules violation, as he took these actions prior to receiving authority from the dispatcher.

The Carrier notes that Claimant admitted at the investigation he was responsible for opening the switch for the gang to enter the main track, as he also admitted in his written statement given at the time of the incident. The Carrier states that it is well-established such an admission is sufficient to satisfy its burden of proof. The Carrier asserts that Claimant's actions clearly violated MOWOR 6.3.1, Main Track Authorization, as well as the Carrier's policy on Critical Decisions. The Carrier urges that the discipline assessed was appropriate, given the serious nature of the violation and Claimant's personal record.

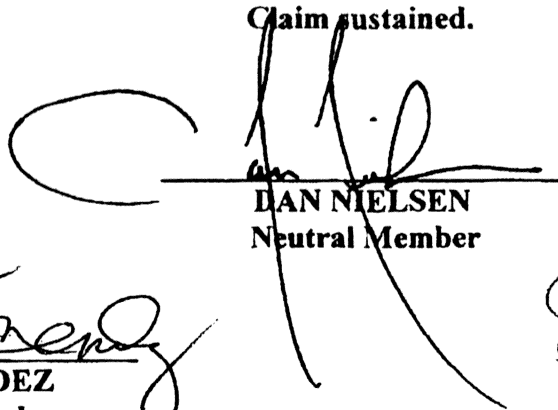
The Organization states that MOWOR 6.3.1, the Rule the Carrier alleges Claimant violated, has nothing to do with this case. That Rule, the Organization explains, deals with different types of authority, where on track to use each type, and the establishment of working limits and other necessary actions before an employee can occupy or foul track. The Rule also addresses overlapping authority.

The Organization acknowledges that Claimant freely admitted he took the actions that led to these charges, and the technical aspects of the situation were corroborated by a Carrier Officer. However, nothing in Claimant's admitted conduct warrants the assessment of a Level S violation. The Organization adds that during the investigation a great deal of time and effort was exerted to establish the true facts of what occurred, but the Organization is confident that nothing that did take place rose to the level necessary for the Carrier to assess this sort of discipline. Moreover, even if Claimant were guilty of a serious violation, the Organization asserts, the appropriate response for correcting such a performance issue is non-disciplinary measures such as coaching and counseling, training, accommodation and/or reassignment. The Organization concludes that the discipline rendered is arbitrary, excessive and unwarranted, and urges that the claim be sustained.


We have carefully reviewed the record in its entirety, and must agree with the Organization that the Carrier has not demonstrated that Claimant violated Maintenance of Way Operating Rule 6.3.1, the only Rule cited in his discipline notice. There is no evidence that Claimant was the employee in charge, nor is there any evidence that employees or equipment fouled track before protection was established. The Carrier argues that Claimant's conduct is a clear violation of that Rule, but does not explain why this is the case. Our careful review of the Rule indicates, as the Organization asserts, that this Rule does not address the instant situation. While, during the investigation, the Carrier discussed Claimant's possible violation of another Rule, that rule was cited neither in the original investigation notice nor in the discipline notice, and the Carrier simply did not prove that Claimant violated the Rule for which he was disciplined. We sustain the claim on that basis.

AWARD

Claim sustained.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 15th day of October, 2013.