

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 432 – Award No. 432 – Claimant: Pigg
Carrier File No. 14-11-0236
Organization File No. 120-13N1-1160.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing September 29, 2011, when Claimant, Jason E. Pigg (1671577), was disciplined with a Level S 30-day Record Suspension with a 1 year review period for his alleged failure to place yellow-red flag less than two miles before restricted area while assigned as a foreman on July 18, 2011. The Carrier alleged violation of MOWOR 5.4.3 Display of Yellow-Red Flag.
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, of seniority, with all rights unimpaired; the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing September 29, 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, Jason E. Pigg, has been employed by the Carrier since 2005. On August 11, 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 place yellow-red flag less than two miles before restricted area, MP

554.2, on August 11, 2011, while assigned as Foreman on the Hereford Subdivision.” On August 12, 2011, the Carrier issued a Corrected Notice changing the incident date and Milepost location to July 18, 2011 and Milepost 554.1, respectively. The Carrier alleged that Claimant had violated Maintenance of Way Operating Rule 5.4.3 Display of Yellow-Red Flag. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and assessed him a Level S 30-day Record Suspension with a one-year review period.

The applicable Carrier Maintenance of Way Operating Rules provide, in relevant part:

5.4.3 Display of Yellow-Red Flag

A. Restriction Specified in Writing

Two Miles Ahead of Restricted Area. Yellow-red flags warn a train to be prepared to stop because of men or equipment. To make sure the train is prepared to stop at the right location, employees must display a yellow-red flag 2 miles before the restricted area.

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Less Than Two Miles Ahead of Restricted Area. Where the restricted area is close to a terminal, junction, or another area, employees will display the yellow-red flag less than 2 miles before the restricted area. This information will also be included in the track bulletin, track warrant, or general order.

Claimant was working as Foreman, Amarillo Main Line Section #1, on July 17, 2011, the day of the incident. He was the employee in charge of Form B #3449, from Milepost 550.7 to 552.5. The Form B Restrictions Listing indicated that the yellow/red flag Milepost was 554.1.

Carrier Supervisor Engineering Support Kory James Kirk testified at the investigation that he was covering Roadmaster duties at the Amarillo Yard at the time of the incident. He stated that he had been instructed to confirm the yellow-red flag placement at MP 554.1 for Claimant’s Form B, but when he arrived at the location the flag was not there. Mr. Kirk explained that he was instructed to wheel off the distance from where the flag should have been placed to where it actually was, and measured 1,297 feet from the listed location, at approximately Milepost 554.35.

Mr. Kirk further explained that because of the Form B listing and the applicable Rule, the flag should have been short flagged at Milepost 554.1 because there was a crew change location at Milepost 554.2, so eastbound trains swapping crews at that location could see the yellow-red flag as they moved towards the Form B. Mr. Kirk stated that he measured to where he had visually observed the flag, and where Section Foreman Robert

Ward had informed him the flag was located. He acknowledged that someone had taken it down by the time he made the actual measurement.

Mr. Ward testified at the investigation that he was working under Claimant's Form B at the time of the incident. He stated that he could not answer whether Claimant's flags were outside the prescribed limits, past Milepost 554.1. He acknowledged that he helped Mr. Kirk determine where the flags were located, and confirmed that they had been moved before Mr. Kirk made his measurements, but refused to answer more than yes or no to the Hearing Officer's questions. He maintained that he had no way of verifying whether the flags had been placed correctly. Mr. Ward stated, however, that he did see the yellow-red flag that day, on the west side of Junior Tower, which he stated is located just west of MP 554.2.

During the hearing, the witnesses referenced a track chart which was not included in the investigation record. The chart apparently had no specific reference for Junior Tower, and showed the I-40 bridge at Milepost 554.2, with a yard office and tower at 554.15. The mileage noted on the milepost increases in the west direction.

Truck Driver Pete Place testified at the investigation that he was also working under Claimant's Form B. He stated that he helped determine where MP 554.1 was located to help Claimant set the yellow-red flags there and observed them at MP 554.1. He stated that the flags were not located west of Junior Tower, but rather were east of that location. He added that he did not help take the flags down and was not present when Mr. Kirk made his measurements.

Claimant testified at the investigation that he had received the corrected Investigation Notice. Claimant acknowledged that he was running the Form B at the time of the incident. He denied having placed the yellow-red flag in the wrong location. Claimant stated that he placed the flag west of Junior Tower, but could not state whether Junior Tower was located at Milepost 554.2. Claimant stated that I-40 was adjacent west to Junior Tower. Claimant maintained that Mr. Kirk did not ask him about his flag placement. He said he was not present to see whether Mr. Kirk had Mr. Ward help him find the flag placement. Claimant maintained that he did place the yellow-red flag less than two miles before the restricted area.

Claimant's personal record shows no previous discipline.

The Carrier states that the facts of this case are clear: Claimant failed to place the yellow-red flag in the proper location at Milepost 554.1, as Mr. Kirk testified that the flag had been placed at Milepost 554.35 in error. This was a critical situation, the Carrier asserts, as there was a crew change point at Milepost 554.2 and Claimant's placement of the flag in the wrong location meant that both crews could not see the flag which would notify them that they were entering Claimant's Form B. Moreover, the Carrier maintains, the Form B was explicit and showed exactly where the flag needed to be placed, at Milepost 554.1. Claimant, the Carrier argues, committed a clear violation of Maintenance of Way Operating Rule 5.4.3, which is specific concerning the importance

of displaying the yellow-red flag so that train crew members can be prepared to stop. The Carrier concludes that it has met its burden of proving Claimant's guilt by substantial evidence, and that the discipline assessed was appropriate. The Carrier urges that the claim be denied.

The Organization asserts that the Carrier failed to provide any evidence to support its contention that Claimant failed to follow Rule 5.4.3. The Organization notes that the Carrier's witness alluded to measuring to a location where there was no yellow-red flag as evidence of Claimant's failure to follow the applicable Rule, but no other witness substantiated the witness' account. The Carrier, the Organization contends, failed to provide any explanation for how Claimant violated the Rule, and there is no proof that any violation took place. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. There is no dispute that Claimant's Form B required him to place the yellow-red flag at Milepost 554.1. Mr. Kirk's testimony was clear that he checked that location and saw no flag there, and later measured to where he had observed the flag, 1,297 feet away and well past the crew change location the Form B specification was intended to protect. Claimant denied having placed the flag in the wrong location, and the two employees who were working under his Form B gave contradictory testimony. While Mr. Pete confirmed Claimant's account, Mr. Ward's account tended to corroborate Mr. Kirk's. Mr. Ward could not confirm that the flag had been placed properly, but he stated that he saw it west of Junior Tower, which would mean it was placed west of the required location, echoing the observation of Mr. Kirk.

Contrary to the assertion of the Organization that the Carrier has provided no evidence to support its charges, the clear testimony of Mr. Kirk and Mr. Ward demonstrates that the flag was not placed at the proper location and, notwithstanding the denial of Claimant and his co-worker, is sufficient to meet the Carrier's burden of proving Claimant's guilt by substantial evidence. As the Carrier asserts, this is a serious violation of a rule intended to ensure employee safety. We see no reason to disturb the penalty deemed appropriate by the Carrier.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID TANNER
Organization Member

Dated this *//th* day of *December*, 2013.