

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 440 – Award No. 440 – Roach
Carrier File No. 14-12-0383
Organization File No. 20-13C3-122

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 24, 2012, when Claimant, Earnest R. Roach (7965171), was disciplined with a Level S 30 Day Record Suspension with a 1-year review period for his alleged failure to properly record the location and time that the main track switch was initially used and finally returned to the normal position at Acme (MP 197) on July 11, 2012 on the Red River Valley Subdivision. The Carrier alleged violation of MOWOR 1.1 Safety, MOWOR 1.1.1 Maintaining a Safe Course, and MOWOR 8.2 Position of Switches.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 24, 2012, 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, E.R. Roach, was initially hired by the Carrier in 1978. On July 16, 2012, the Carrier notified Claimant to attend an investigation in connection with his alleged failure, on July 11, 2012, to properly record the location and time that the main track switch was initially used and returned to the normal position at MP 195 on the Red

River Valley Subdivision. The Carrier asserted that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.1 Safety, 1.1.1 Maintaining a Safe Course, and 8.2 Position of Switches. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, noting the violation's location as Acme (MP 197) on the Red River Valley Subdivision, and assessed him a Level S 30-day Record Suspension with a one-year review period.

The applicable MOWOR provide, in relevant part:

1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

* * *

1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course.

8.2 Position of Switches

* * *

When operating on a main track switch, switch point lock or derail, the employee in charge must record the following information on the form entitled Position of Switches/Derails:

- Name and location of the main track switch, switch point lock or derail used.
- Time the employee initially operates the main track switch, switch point lock or derail.
- Time the main track switch, switch point lock or derail is finally restored to the proper position.

* * *

The facts of this case are not in dispute. There is no switch at Milepost 195 on the Red River Valley Subdivision, the location set forth in the Investigation Notice. Phil Dodson, Carrier Roadmaster at Amarillo, Texas, testified at the investigation that Claimant, a Surfacing Gang Road Foreman, reported to him. On July 11, 2012, Mr. Dodson was performing Operations Testing, along with Division Engineer Greg Rickard and Assistant Director of Maintenance Production Jason Watkins. They approached Claimant's gang at about 9:00 to 9:30 a.m. Mr. Dodson explained that Claimant had obtained authority approximately three hours earlier, at 6:45 a.m., but had not documented that he had thrown the switch at Milepost 197, Acme, or the time at which he had done so.

Mr. Dodson testified that while he was present the switch was open and lined for main track use, but there was no documentation concerning the switch. The switch, Mr.

Dodson explained, was within Claimant's authority limits and Claimant told him he had thrown the switch.

Mr. Dodson added that it was important to document that a switch has been thrown, as there have been incidents where employees opened switches and forgot to line them back to normal position, causing catastrophic results such as trains running into equipment or other trains. In order to prevent a train from going into a switch the employee did not expect to be lined, the Carrier determined that the safe course was for whoever used the switch to document throwing it and when they returned it.

Mr. Dodson testified that the employee is required to document his actions at the time he operates the switch. He stated that he interpreted the rule to require the employee to record his actions immediately, as they were performed.

Mr. Rickard and Mr. Watkins testified at the investigation and confirmed Mr. Dodson's account of events. Both stated that Claimant remained in the vicinity of the switch at all times that they were present. Mr. Watkins stated that Claimant told them that he threw the switch and then just became busy and failed to make the notation.

Claimant confirmed at the investigation that when he was approached by the three Carrier Officers, he had operated the switch at Acme but had not documented it on the Position of Switches/Derails form. He stated that he documented the time he threw the switch on his glove. Claimant explained that his truck is not always located right at the switch, and he does not carry his track warrant book with him at all times. So, he stated, it is just simpler for him to make the switch notations on his glove.

Claimant's personal record shows a Level S 30-day record suspension, with a 12-month review period, issued on December 29, 2010 for discourteous behavior; a Level S 30-day record suspension in 2003 for leaving the track unsafe for operation; and an earlier unrelated dismissal and reinstatement.

The Carrier first asserts that Claimant received a fair and impartial investigation, as Claimant was well aware of the nature of the charges against him, notwithstanding the minor error in the milepost notation in the Investigation Notice. In addition, three Carrier Officers discussed the matter with him on the day of the incident, so he was cognizant of the violation alleged and well able to prepare a defense. It is clear, the Carrier argues, that the notation in the Investigation Notice was simply an inconsequential error.

On the merits, the Carrier states that the facts of this case are not complicated. Claimant was the Foreman of a gang working on a switch at Acme, when three Carrier Officers conducted an audit. All three, the Carrier notes, testified that Claimant failed to document, on the required form, that the switch had been thrown, and that they discussed the matter with Claimant at the time. Claimant, the Carrier continues, admitted he did not document the thrown switch on the form, but had instead written it on his glove. This, the Carrier asserts, is not an accepted practice. As is well settled, the Carrier states, Claimant's admission that he did not record the information properly is sufficient to

satisfy the Carrier's burden of proof. The Carrier concludes that Claimant has violated its Rules as alleged, and the discipline is appropriate, as it was assessed in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and Claimant's record. 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 that the Investigation Notice was defective, as it referenced a violation of Milepost 195 on the Red River Valley Subdivision, where there is no switch, with no other identifying information as to the location at issue. This defect alone, the Organization states, required that the hearing be cancelled.

On the merits, the Organization asserts that the Carrier did not meet its burden of proving Claimant guilty of any Rules violations. The Organization states that the essence of the Carrier's argument is that Claimant did not write down the time that he operated the switch at Milepost 197, but that simply is not true; Claimant did write it down, on the prescribed form. The Carrier, the Organization maintains, assumes that the applicable Rule requires that the writing must be completed at a specific time, but no such directive appears in the Rule. The Organization notes that Claimant held the piece of track for surfacing operations for more than three hours and never left the general area, so no railroad asset or other employee was ever in danger. Claimant's testimony, the Organization states, clearly shows that he understood the rule as written, and the only requirement was that at some time the documentation needed to be listed on the form. The Rule did not specify any critical timeframe, and Claimant did not violate the Rule by failing to make the notation sooner. The Organization concludes that even if Claimant had committed misconduct, the discipline assessed is excessive and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which denied Claimant his right to a fair and impartial investigation. While there was an error in the Milepost number noted in the Investigation Notice, the record is clear that Claimant was aware at all times of the location and incident in dispute and suffered no prejudice due to the error.

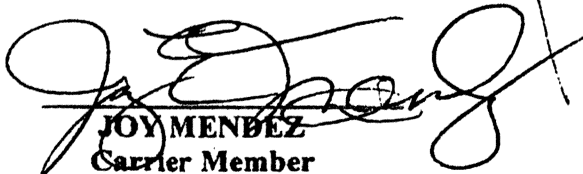
On the merits, there is no dispute as to the facts of this case. Claimant admitted that he did not record the time he operated the switch on the Position of Switches/Derails Form, as required in MOWOR 8.2, instead noting it on his glove. While the Organization contends that the Rule does not require that the information be recorded immediately and does not specify a timeframe, the rule requires the notation "when operating," the reasonable interpretation of which is that the notation must be made as close to contemporaneously as practicable. In this case, approximately three hours passed between the time Claimant opened the switch and the Carrier Officers discovered that he had not made a notation. Indeed, in his hearing testimony, Claimant never stated that he intended to record his actions on the form at all, contending that it was his understanding that he simply needed to document and doing so on his glove was sufficient. The Rule is specific as to the type of documentation required, and Claimant

did not meet it, violating Carrier requirements intended to protect employee safety. The Carrier has proven his guilt by substantial evidence. With respect to the penalty, the Rule at issue is an important one, intended to heighten employee awareness of the potential dangers of leaving a switch open, such as having a train go into a switch its crew did not expect to be lined, by requiring employees to document, in a specific manner, the opening of a switch and the fact that it is closed before track authority is released. We see no reason to disturb the penalty deemed appropriate by the Carrier.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


JOY MENBEZ
Carrier Member


DAVID TANNER
Organization Member

Dated this 20th day of Feb, 2014.