

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

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

Case No. 442 – Award No. 442 – Fisher
Carrier File No. 14-12-0324
Organization File No. 1405-13C2-1224

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 31, 2012, when Claimant, Jeffrey Fisher (1724871), was disciplined with a Level S 30 Day Record Suspension with a 3-year review period for his alleged failure to properly pin and lock the work heads before traveling on his Pup Tamper machine resulting in the left work head of the machine to come in contact with signal components while traversing a turnout while working as a Pup Tamper operator on the Lafayette Subdivision on April 19, 2012. The Carrier alleged violation of EI 14.3.3 Maintaining Roadway Equipment, and MOWOR 6.50.3 Equipment Components Clear.
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 31, 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, J. Fisher, has been employed by the Carrier since 2006. On April 24, 2012, 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, at approximately 1200 hours on Thursday, April 19, 2012 at MP 127.6 on the Lafayette Subdivision while assigned as the Pup Tamper operator on SC08, to ensure the work heads on tamper X5600245 were properly locked up, resulting in the left work head of the machine coming in contact with signal components while traversing a turnout at the West siding switch at New Iberia. The Investigation Notice alleged that the impact caused damage to the work head assembly of the tamper and also damaged the switch point control housing. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Engineering Instruction (EI) 14.3.3 Maintaining Roadway Equipment and Maintenance of Way Operating Rule (MOWOR) 6.50.3 Equipment Components Clear, and assessed him a Level S 30-day record suspension with a three-year review period.

EI 14.3.3 Maintaining Roadway Equipment, provides, in relevant part, "The Operator is responsible for the maintenance, safety, and care of assigned equipment. The Operator must follow (the following detailed) instructions." **MOWOR 6.50.3, Equipment Components Clear**, provides, "Before passing over crossings, switches, derails and frogs, be sure all equipment components will clear."

Eric Nelson testified at the investigation that at the time of the incident he was newly assigned as an Assistant Production Roadmaster on the gang in New Iberia, Louisiana. He stated that on April 19, 2012, the Surface Gang Foreman notified him that there had been an incident at the New Iberia, Louisiana switch, so he traveled to the location. He stated that the machine was there with the work heads down and not in the locked position. Mr. Nelson added that a mechanic was already on the scene, and he informed Mr. Nelson that the machine was not locked up. Mr. Nelson stated that the machine sustained approximately \$600 damage, and he never learned the cost of replacing the switch components.

Claimant testified at the investigation that he had no knowledge or recollection of any incident on April 19, 2012 involving failure to lock and pin up tamper heads resulting in hitting a switch with the Pup Tamper. He acknowledged that he was assigned to operate the Pup Tamper on Gang SC08 on that date, but denied that he was assigned to Tamper X5600245, the machine referenced in the Investigation Notice. He stated that he was assigned to Tamper X54600254.

Claimant's personal record shows no previous discipline.

With respect to the Organization's procedural arguments, the Carrier states that Claimant received a fair and impartial investigation, as the Investigation Notice was issued within the required time limits and included sufficient information for Claimant and the Organization to prepare a defense. Indeed, the Carrier notes, the Notice was very specific as to the details of the incident. Further, the Carrier states, while there might have been a typographical error in the machine number noted on the Investigation Notice, Claimant admitted that he was the Pup Tamper operator on Gang SC08, and Roadmaster

Nelson testified that there had been an accident with that gang's Pump Tamper. Thus, the Carrier argues, there was no procedural error which interfered with Claimant's rights.

On the merits, the Carrier maintains that Roadmaster Nelson testified that the Pup Tamper Operator on this gang failed to properly pin and lock the work heads before traveling, causing the machine's left work head to come into contact with signal components while traversing a turnout. The impact, the Carrier adds, caused damage to the tamper's work head assembly and damaged the switch point control housing. Claimant was, the Carrier contends, the machine's operator, and the Carrier has proven, by substantial evidence, that he violated Carrier Rules as alleged. The Carrier concludes that the discipline assessed was appropriate given the seriousness of the offense. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. The Organization asserts that Claimant was denied his right to a fair and impartial investigation as the Investigation Notice listed no specific rules Claimant allegedly violated, nor were any such rules specified at the investigation.

On the merits, the Organization argues that there was no evidence that Claimant failed to follow the Carrier Rules he was found to have violated. The Organization states that the Carrier produced no written statement or record of any damage or repairs to any equipment, nor was there any eyewitness testimony that Claimant failed to follow required procedures. The Organization notes Claimant's denial that he ever operated the machine specified in the Investigation Notice. The Organization asserts that the Carrier failed to meet its burden of proving Claimant's guilt by substantial evidence. The Organization concludes that the discipline assessed is extreme and unwarranted, and urges that the claim be denied.

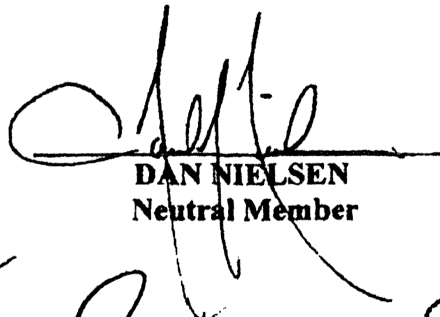
We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, the Carrier's evidence against Claimant consists solely of Mr. Nelson's testimony that he was called to the scene and observed a machine with the work heads down and not in locked position, and that there was damage to the machine, later estimated to be \$600, and to the New Iberia switch. He was not aware of the monetary cost of the damage to the switch. Mr. Nelson did not identify the number of the gang to which the tamper belonged, nor did he identify the machine by type or number. Claimant acknowledged that he was the Pup Tamper operator on Gang SC08, but maintained that the machine he operated had a different number than the one noted in the investigation notice. He professed a lack of awareness of any incident involving the machine noted in the Investigation Notice, and gave no testimony concerning any possible incident involving his machine.

The Carrier maintains that the incorrect machine number was simply a typographical error, and this may well be the case. Such a typographical error would likely not, in and of itself, defeat the Carrier's case. Nevertheless, we must conclude that the very sketchy evidence presented is insufficient to meet the Carrier's burden of

proving, by substantial evidence, that Claimant is guilty of the misconduct alleged. Mr. Nelson testified simply that he observed a damaged machine. There was no testimony as to Claimant's duties that day, whether anyone observed the incident, when and/or by whom the incident was discovered, or anything else to conclusively tie responsibility to Claimant. For these reasons, we sustain the claim and order this discipline removed from Claimant's record.

AWARD

Claim sustained. The Carrier is ordered to comply with this Award within 45 days.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 20th day of Feb, 2014.