

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

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

Case No. 445 – Award No. 445 – Jackson
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 August 17, 2012, when Claimant, Steven C. Jackson (1672658), was disciplined with a Level S 30 Day Record Suspension with a 1-year review period for his alleged failure to understand a radio communication with regards to train movement for Form B instructions when a train did not understand and correctly repeat the instructions Claimant had communicated while working as Foreman on the Marceline Subdivision on June 26, 2012. The Carrier alleged violation of MOWOR 15.2 Protection by Track Bulletin Form B and MOWOR 2.6 Communication Not Understood or Incomplete.
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 August 17, 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, C.J. Jackson, has been employed by the Carrier since 2005. On July 2, 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 misunderstanding of a radio communication with regards to train movement for Form B instructions when a train did not understand and correctly repeat the instructions (he) communicated on June 26th 2012 at approximately 1050 hours which resulted in the train traveling through the Form B limits at track speed at MP 433 on the Marceline Sub near Atherton, MO while assigned as foreman UC05." Following the investigation, the Carrier determined that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rule (MOWOR) 15.2 Protection by Track Bulletin Form B and 2.6 Communication Not Understood or Incomplete. The Carrier assessed Claimant a Level S 30-day record suspension with a one-year review period.

MOWOR 15.2 Protection by Track Bulletin Form B, A. Instructions provides formats for an employee in charge of a Form B to use to establish communication with a train and to grant a train permission to proceed through Form B limits. **B. Repeat Instructions** provides that a train crew member must repeat such instructions, and the employee giving the instructions must acknowledge them before they can be followed. **MOWOR 2.6 Communication Not Understood or Incomplete** provides, in relevant part, "An employee who does not understand a radio communication or who receives a communication that is incomplete must not act upon the communication and must treat it as if it was not sent."

At the opening of the investigation, the Hearing Officer read the Investigation and Postponement Notices into the record, and then asked Claimant if he wished to present any evidence or make a statement. Claimant declined, and the Hearing Officer then asked him if the hearing had been fair and impartial. The Organization representative objected that the hearing had just begun. The Hearing Officer then read into the record the Carrier Rules allegedly violated. Next, the Hearing Officer told Claimant that the train had not received his complete instructions due to interference, that the train repeated an incorrect maximum authorized speed back to Claimant, and Claimant did not stop and re-send his orders. The Hearing Officer then stated that if Claimant wished to defend himself that was the time for him to do so. The Organization representative stated that the case should be presented through the questioning of witnesses, and the Hearing Officer asked Claimant if he had any witnesses to present. Claimant declined.

The Hearing Officer then asked Roadmaster Daniel Parish if he had anything he wished to add, and he replied that he did not. The Organization representative stated that he had questions for Mr. Parish.

In response to the Organization representative's questions, Mr. Parish stated that at the time of the alleged violation he was undercutting track on the Marceline Subdivision near Atherton, Missouri. He added that he was working on Main Track 1, and the train was cleared through on Main 2. He explained that the gang was working on radio channel 88, and the trains were calling on Channel 30. At the time, he added, there was radio chatter from other workgroups interfering with communications. He stated that the work groups were all in the clear before the train's arrival.

The Hearing Officer then proceeded to question Mr. Parish. Mr. Parish stated that when the train arrived, the gangs were still in work mode, as they understood that the train was called through at restricted speed of 25 miles per hour. Had they been aware the train would run at maximum authorized speed, Mr. Parish stated, he would have had the workers dismount their machines and get off onto the field side of Main Track 1.

Mr. Parish answered "from what he proceeded to hear, yes" to the question whether Claimant heard the instructions correctly repeated back from the train. He stated that "they" could not determine, due to the radio interference, whether those were the instructions he had given the train. He added that Claimant had intended to bring the train through at 25 miles per hour as protection for the gang, but the train did not repeat that back to Claimant. The Hearing Officer asked Mr. Parish, "So . . . Claimant did not clearly relay the instructions to the train, or hear the instructions correct, or have the right speed okayed through the limits of that gang?" Mr. Parish replied, "That's correct."

The Carrier points to Roadmaster Parrish's testimony that because of radio interference the train crew did not hear Claimant's instruction to run the train at a restricted speed of 25 miles per hour. The train crew, the Carrier notes, called the incorrect speed back to Claimant but he did not respond with a correction. As a result, the Carrier states, the train ran by the gang working on the next track at a speed over the maximum authorized. The Carrier contends that it has proven, by substantial evidence, that Claimant is guilty of the Rules violations alleged. The Carrier argues that this was a serious violation, as there was the potential for catastrophic consequences. The Carrier concludes that the discipline assessed was appropriate given the nature of the offense, the Carrier's Policy for Employee Performance Accountability and Claimant's personal record. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. First, the Organization notes that the Hearing Officer opened the hearing by informing Claimant how he had violated Carrier Rules and asking him if he had any response. The Organization asserts that it is apparent that the Carrier prejudged Claimant's guilt and did not provide him a fair and impartial investigation.

On the merits, the Organization argues that the Carrier presented no credible evidence to support its charges, and has therefore failed to meet its burden of proof. Even if the Carrier had proven its charges, the Organization concludes, the discipline assessed is excessive and unwarranted. The Organization urges that the claim be sustained.

Claimant's personal record shows no previous discipline.


We have carefully reviewed the record in its entirety. First, we agree with the Organization that the Hearing Officer conducted the hearing in a manner that denied Claimant his right to a fair and impartial investigation. It is firmly established that the Carrier bears the burden of proving an employee's guilt of disciplinary infractions by substantial evidence. In this case, the Hearing Officer opened the investigation by informing Claimant that he had committed misconduct and asked him to present the case

in his defense, without calling any witnesses or presenting any evidence to establish the Carrier's case. The Hearing Officer did not initially ask the only Carrier witness any questions, simply asking him if he had anything to add. The Hearing Officer questioned Mr. Parish only after the Organization did so in the first instance. This procedural irregularity, putting the onus on Claimant to establish his innocence before the Carrier has presented any evidence of his guilt, is sufficient for us to conclude that the claim must be sustained.

Even on the merits, we would conclude that the Carrier has failed to meet its burden of proving Claimant guilty of the charges alleged. Mr. Parish gave a sketchy and confusing account of the relevant events. He did not state that he had heard, or listened to recordings of, the radio transmissions at issue, nor did he testify how he was aware that the train had repeated Claimant's instructions incorrectly. Essentially, Mr. Parish simply repeated the allegations against Claimant rather than providing evidence to support them. This is wholly insufficient to establish, by substantial evidence, that Claimant was guilty of the serious Rules violations alleged. We sustain the claim and order the discipline removed from Claimant's personal 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.