

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

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

Case No. 447 – Award No. 447 – McLearen
Carrier File No. 14-12-0454
Organization File No. 100-13N1-1285

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing September 18, 2012, when Claimant, Curtis R. McLearen (1752591), was disciplined with a 1-year review period for his alleged failure to perform Heat Run and take necessary precautions to protect the track at MP 225 resulting in a derailment, while working as Track Supervisor on the Fort Worth Subdivision on July 4, 2012. The Carrier alleged violation of EI 2.9.1 Hot Weather, MOWOR 1.1 Safety, MOWOR 1.1.1 Maintaining a Safe Course, MOWOR 1.4 Carrying Out Rules and Reporting Violations, and MOWOR 1.6 Conduct.
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 with seniority, vacation, all rights unimpaired and pay for all wage loss commencing September 18, 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.R. McLearen, has been employed by the Carrier since 2007. On July 23, 2012, the Carrier notified Claimant to attend an investigation to determine his responsibility, if any, in connection with his alleged failure, on July 4, 2012, to perform Heat Run and take necessary precautions to protect the track at Milepost 225, Pendleton, Fort Worth Subdivision, while he was working as a Track Supervisor. The Notice stated that the investigation would determine possible violations of Engineering Instruction (EI) 2.9.1 Hot Weather, and Maintenance of Way Operating Rules (MOWOR) 1.1 Safety; 1.1.1 Maintaining a Safe Course; 1.4 Carrying Out Rules and Reporting Violations; and 1.6 Conduct. Following the investigation, the Carrier found that Claimant had violated these Carrier Rules as alleged, and assessed him a Level S 30-day record suspension with a one year review period.

The Carrier's Engineering Instructions provide, in relevant part:

2.9 Special Inspections

2.9.1 Hot Weather

The Division Engineer (or General Director Maintenance) determines the ambient temperature at which employees will increase their routine track inspections and communicates this requirement to MW employees before the warm season.

When the ambient temperature reaches or exceeds this threshold temperature, inspect . . . track every day between noon and 8:00 pm, or as instructed by the Roadmaster.

* * *

1. When temperatures exceed the heat inspection policy threshold, inspections must progress at a pace that allows the entire affected territory to be inspected within the prescribed time.

* * *

b. If it is determined that . . . other job requirements interfere with progressing the track inspection, the Track Inspector must escalate the situation to the Roadmaster or Division Engineer.

The applicable Maintenance of Way Operating Rules 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.

1.4 Carrying Out Rules and Reporting Violations

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent

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Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Certain underlying facts of this case are not in dispute. At the time of the incident, Claimant was working as a Track Inspector. His assigned territory was from Belco, Milepost 221, to approximately Meridian, Milepost 281, on the Fort Worth, Texas Subdivision. At approximately 5 p.m. on July 4, 2012, there was a 43-car near Milepost 225, within Claimant's territory. Carrier ADMP Michael Watkins was the officer on call for the July 4 holiday, and the Roadmaster reported to him. Mr. Watkins traveled to the scene and, he testified at the investigation, the train crew informed him that there was a track misalignment just south of the switch at the turnout, information later confirmed by the locomotive video camera. The crew had put the train into emergency and the derailment ensued.

It is undisputed that the minimum inspection requirement for this track was four times per week, but, at the time of the incident extremely high temperatures required daily inspection, referred to as a "heat run," which must be performed between noon and 8 p.m. It is undisputed that Claimant did not inspect this section of track on July 3 or 4, 2012.

Mr. Watkins testified that he interviewed Claimant after the derailment and Claimant told him that his then-supervisor, Roadmaster Degano, had instructed Claimant that, on the days at issue, he was responsible for ensuring that all crossings were pulled for the production gang. Mr. Watkins stated that Claimant also told him he had informed Mr. Degano that in light of this assignment he would have difficulty performing his inspections. Mr. Watkins stated that he could not recall what Claimant told him Mr. Degano had responded. Mr. Watkins added that another Track Inspector had by-railed approximately 10 miles of Claimant's territory since Claimant was performing other

duties. However, he stated, he was unaware that anyone other than Claimant was assigned to inspect the particular section of track where the derailment occurred.

Mr. Watkins testified that although he knew Mr. Degano had instructed Claimant to pull crossings, he was not aware that Mr. Degano instructed Claimant not to worry about the heat runs and they would be covered. Mr. Watkins denied that Claimant told him someone else would be assigned to make the heat runs.

Mr. Watkins added that he was present for portions of Mr. Degano's post-derailment interview, and he did not hear Mr. Degano say he told Claimant someone else would cover the heat runs. Mr. Watkins also stated that Mr. Degano did not inform him how he was managing his Track Inspector work forces in light of the extreme heat situation.

Mr. Watkins conceded that the heat run inspection could have been performed by someone other than Claimant, and if Claimant was unavailable another employee could inspect his track. He stated that the responsibility for ensuring the track was inspected in such a situation would have fallen to Mr. Degano, or to the Assistant Division Engineer or the Division Engineer. Mr. Watkins acknowledged that if Claimant had been instructed by his Roadmaster that the heat runs would be covered by another employee, there would have been no violation for him to report pursuant to the empowerment directive of MOWOR 1.4. Mr. Watkins acknowledged that the only two individuals who knew what went on in the critical discussion were Claimant and Mr. Degano.

Claimant acknowledged at the investigation that he did not inspect the track at issue on July 3 or 4, 2012, because, he testified, Mr. Degano directed him to disregard his track inspection duties and give priority to removing grade crossings. Claimant explained that he was overseeing the work of a section and two back hoes, and utilizing the hydraulic system on his truck to assist in pulling the crossings. Claimant stated that his normal work hours are 6 a.m. to 2:30 p.m. but he came in at 3 a.m. on July 4 to work with the super surfacing gang to pull the road crossings.

Claimant maintained he told Mr. Degano he could not pull the crossings and also perform the heat runs, and Mr. Degano told him his inspections would be taken care of. Claimant explained that Mr. Degano told him that the north end Track Supervisor, Chris Schneider, would come down and keep running south, apparently over Claimant's track. Claimant conceded that Mr. Degano never gave him a specific instruction not to inspect track, but instead told him to pull road crossings. Claimant stated that this conversation occurred early in the day on July 4, although he and Mr. Degano had a similar conversation the day before.

Claimant stated that as far as he was aware Mr. Schneider completed the appropriate documentation of his inspection on July 4, up to McGregor, Milepost 243.4, but there was no documentation for an inspection at Milepost 225 on July 4. He maintained that the track had been inspected on July 3 because someone had filled out a track inspection report, as Claimant observed in the Carrier's electronic documentation.

He stated, however, that he did not know who had performed the inspection. Claimant added that at the time of the hearing Mr. Degano was no longer a Roadmaster.

Claimant's personal record shows no previous discipline.

The Carrier asserts that this case is not complicated, as the record, including Claimant's testimony, clearly establishes that Claimant failed to properly inspect track prior to a derailment. The Carrier points to Mr. Watkins' testimony that the track at the derailment location had not been inspected on July 3 or 4, 2012, and, during periods of extreme heat inspection is required at least four times per week. The Carrier notes that although Claimant maintained that his co-worker had inspected the track, he acknowledged that there was no documentation of that supposed inspection. The Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence, and the penalty assessed was appropriate and in line with the Carrier's Policy for Employee Performance Accountability (PEPA). The Carrier urges that the claim be denied.

The Organization states that the evidence supports Claimant's version of events, and the claim should be sustained. The Organization asserts that while Claimant was relieved of his track inspector duties on July 3 and 4, 2012 by Roadmaster Degano, the Carrier chose not to call Mr. Degano, who was also relieved of his duties in connection with the derailment, as a witness at the hearing. The Organization contends that the Carrier was more interested in holding someone accountable for the 42-car derailment than in finding the truth.

The Organization concludes that the Carrier has taken the cited Rules out of context, and the record does not support that Claimant violated any of them. The Organization concludes that the discipline assessed was not warranted or justified, and urges that the claim be sustained.

We have carefully reviewed the record in its entirety. There is no dispute that a Carrier train suffered a derailment at a track location within Claimant's assigned territory as a Track Inspector. There is also no dispute that daily inspection was required at the time, and that Claimant did not inspect that location on July 3 or 4, 2012, the day before and day of the derailment. We find, however, that the Carrier has not met its burden of proving that Claimant committed misconduct by failing to make the track inspections at issue, and we therefore sustain the claim.

The Carrier holds Claimant responsible for failing to make the inspections, but it does not appear to be in dispute that on the days at issue Claimant had been assigned to pull rail crossings, a task which, by his description, required a great deal of his time and attention. The record is also clear that following the derailment Claimant told Mr. Watkins, the Carrier's only witness, that he had informed his supervisor Mr. Degano that in light of the other work assignment he would not be able to perform his inspections. Claimant maintained that Mr. Degano responded that he would have his inspections covered, and he so informed Mr. Watkins.

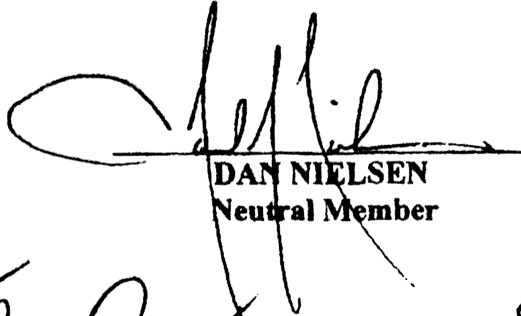
While the Carrier makes much of Mr. Watkins testimony that Claimant did not tell him that Mr. Degano instructed Claimant that his inspections would be covered, as Mr. Watkins conceded, only two people, Claimant and Mr. Degano, knew exactly what transpired during their conversation, and only one of them, Claimant, testified at the hearing. Not only did the Carrier fail to call Mr. Degano to testify as to the instructions he gave Claimant, Mr. Watkins did not provide any specifics concerning his conversation with Mr. Degano following the derailment. Although he testified that he did not hear Mr. Degano state that he had told Claimant his inspections would be covered, he acknowledged that he was only present for a portion of the interview. Thus this does not constitute a credibility dispute, and we are not obligated to defer to the Hearing Officer.

In any event, if, as the Carrier appears to concede, Claimant told Mr. Degano he could not cover both tasks, and Mr. Degano told him to continue pulling crossings anyway, logic dictates that Mr. Degano would have had to find another way to cover the track inspections. At that point, the matter became Mr. Degano's responsibility, not Claimant's. The applicable Engineering Instruction provides that if an employee's other duties interfere with his ability to perform heat run inspections, he must escalate the situation to his Roadmaster. This Claimant apparently did. As Mr. Watkins conceded, if Claimant informed Mr. Degano that he was unable to both pull the road crossings and make the inspections, it was Mr. Degano's responsibility to ensure that someone else inspected the track. There is nothing to support the Carrier's assertion that in this situation Claimant was still responsible for ensuring that someone else inspected the track.

In conclusion, the fact that Claimant admittedly did not inspect the track at issue is not sufficient to carry the charges against him. He testified, and the overall circumstances confirm, that he was assigned other work that interfered with his ability to perform those duties, and his supervisor instructed him to carry on with the other task and the inspections would be covered. Indeed, Claimant's testimony that the inspections were in fact covered on July 3 was not rebutted, nor was his testimony that another inspector covered a section of his track on July 4, and the derailment occurred at about 5 p.m., hours before the 8 p.m. deadline for completing heat run. If the inspections were not appropriately performed, the Carrier has not proven that Claimant was the person responsible for that failure. This case involved a very unfortunate situation, a many-car derailment. The Carrier has, however, failed to meet its burden of proving, by substantial evidence, that Claimant committed any misconduct that might have contributed to the incident. We therefore sustain the claim and order the discipline removed from Claimant's personal record.

AWARD

Claim sustained. The Carrier is directed 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.