PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 450 – Award No. 450 – Claimant: Wullenweber
Carrier File No. 14-13-0265
Organization File No. 190-SF13S1-1312

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 13, 2013, when Claimant, David L. Wullenweber (6554828), was disciplined with a Level S 30-day Record Suspension with a 1-year review period, for his alleged failure to apply proper remedial action to the frog portion of the switch at the west end of Riverbank, California on the Stockton Subdivision on March 18, 2013 after determining that it did not meet the minimum requirements for tread wear per FRA Track Safety Standard 213.137 Frogs. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.13 Reporting and Complying with Instructions and Engineering Instruction (EI) 11.4.3 Ensuring Safe Train Movement.

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, with seniority, vacation, all rights unimpaired and wage loss commencing May 13, 2013, and 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, D.L. Wullenweber, has been employed by the Carrier since 1994. On March 22, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to apply proper remedial action to the frog portion of the switch at the west end of Riverbank on the Stockton Subdivision on Monday, March 18, 2013, in Riverbank, California, after determining that it did not meet the minimum requirements for tread wear per FRA Track Safety Standard 213.137 Frogs. The Notice stated that the investigation would determine possible violation of Maintenance of Way Operating Rule (MOWOR) 1.13 Reporting and Complying with Instructions and Engineering Instruction (EI) 11.4.3 Ensuring Safe Train Movement. Following the investigation, the Carrier determined that Claimant had committed the violations alleged and assessed him a Level S 30-day record suspension with a one-year review period.

The applicable Carrier Rules provide:

MOWOR 1.13 Reporting and Complying with Instructions

> Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

EI 11.4.3 Ensuring Safe Train Movement

> When repairing manganese turnout frogs and crossings in track, protect train movement with a slow order according to FRA Track Safety Standard §213.137.

FRA Track Safety Standard §213.137 Frogs provides:

> (a) The flangeway depth measured from a plane across the wheel-bearing area of a frog on Class 1 track may not be less than 1 3/8 inches, or less than 1½ inches on Classes 2 through 6 track.
> (b) If a frog point is chipped, broken, or worn more than 5/8 inch down and 6 inches back, operating speed over the frog may not be more than 10 miles per hours.
> (c) If the tread portion of a frog casting is worn down more than 3/8 inch below the original contour, operating speed over the frog may not be more than 10 miles per hour.

Carrier Stockton, California Roadmaster Wayne Morris testified at the investigation that he is responsible for all track maintenance and construction from Milepost 10.94, just outside Riverbank, to Richmond, Milepost 11.89. Monday, March 18, 2013, the day of the incident, was Claimant's first day on the territory, working for Mr. Morris as a maintenance welder. Mr. Morris explained that Track Supervisor Finch

told him that morning he needed to send welders to the west end of Riverbank, to the mainline frog. Claimant and his co-worker, Mr. Wilson, came to Mr. Morris' office and he asked them to take care of it, and Mr. Wilson told Mr. Morris he did not believe the situation was that bad and he would prefer to do another task that day, at Mariposa, and the west Riverbank frog work the next day, with a Form B in effect. Mr. Morris stated that a Form B is ideal when there is the time to plan, but the Track Supervisor had been very concerned that the work be done immediately so he told Claimant and his co-worker to go to Riverbank, look at the frog, and weld it if necessary.

However, later in his testimony, Mr. Morris maintained that he had given the employees specific instructions to weld the frog that day. Mr. Morris explained that they had been short of welders for a week or two before this incident, and the Track Supervisor was concerned that this was the worst track on his territory and it needed welders.

Mr. Morris stated that at about 10 a.m. he proceeded to Riverbank to see what was happening, and Claimant and Mr. Wilson were driving away. He waved at them as if to ask what they were doing, and then went to look at the frog. At about the same time, he received a voicemail from Claimant. The voicemail message was played into the hearing record. In it, Claimant states that he intended to return to the site the next day with a Form B and that there was a "pretty bad east drop" and they would call Mr. Morris if they needed him.

Mr. Morris testified that he decided to look at the frog himself, and determined that there was a defect sufficient to require that a 10 mile per hour slow order be put into effect immediately, so he took the necessary steps to get that accomplished. Mr. Morris stated that the employees should have taken the extra steps of placing the speed restriction, putting up flags and addressing the defect when they found it, rather than waiting until the next day.

Mr. Morris stated that after he got the slow order into effect he called the employees and asked who had looked at the frog, and they replied that they both had. He added that the employees maintained they had measured and it "didn't look that bad." He told them he had placed the 10 mile per hour restriction and they needed to come back to Riverbank and weld the frog immediately.

Mr. Morris then took photographs of the frog, which were entered into the investigation record. The measuring tool is referred to as a step gauge, and measures from the bottom up to the straight edge. Anything more than 3/8 inch is considered a defect, in which case the operating speed over the frog cannot exceed 10 miles per hour. Mr. Morris explained that the photograph showed three ties, with the casting on the middle tie severely broken out, chipped and damaged, and obviously defective. One photograph shows a metal straight edge being held across the casting portion of the frog, with a measurement clearly down by more than 3/8 inch. Another photograph, Mr. Morris explained, clearly showed the defect at over one-half inch. He added this frog presented a particular safety issue because Amtrak trains travel 79 miles per hour in the

area, and the Carrier's freight trains travel at 70 miles per hour, so a defect of this nature could cause problems for any of those trains and put persons and property in jeopardy.

Carrier Supervisor of Welding Mark Neufeld was not present at the site on the day of the incident, but, at the hearing, he examined the photographs of the site which had been entered into evidence and stated that underneath the straight edge, going 90 degrees across the frog insert, one photograph certainly showed a one-half inch defect below the tread bearing portion. Mr. Neufeld confirmed that if any portion of the tread bearing portion of the frog casting is worn down below 3/8 inch it is considered a defect and operating speed cannot be more than 10 miles per hour.

Mr. Neufeld also testified that once a welder determines there is a defect, or even if the situation is questionable, the welder must make sure trains run safely. He explained that the welder should contact the dispatcher to run with a speed restriction, or contact the Roadmaster if he needs him to make a decision as to whether welding is necessary or he lacks proper tools. Mr. Neufeld added that did not know when the photos were taken, but it was obvious that the situation depicted in them had existed for some time. The situation shown in the photographs could not be left overnight, he stated, especially as Amtrak trains run in the area, and there should have had speed restriction immediately.

Claimant's co-worker Mr. Wilson testified at the investigation that at the morning conference call he had been instructed to go weld a frog at west Riverbank. He and Claimant went to Mr. Morris' office and told him they had another frog that needed work at Mariposa where it was a slow day, so, without knowledge of the condition of the frog at west Riverbank, Mr. Wilson asked if they could work on the other one that day instead. Mr. Morris testified that he told him to go look at it, and if there was no defect would it be OK for them to wait until the next day. Mr. Morris told them to call and let him know if they were going to work on it.

The two employees saw Mr. Morris in his car at the west Riverbank location, although Mr. Wilson's testimony indicates that they were still looking at the frog rather than driving away. Mr. Wilson stated that Mr. Morris did raise him arms as if to ask what they were doing, and maintained that he motioned to Mr. Morris to come over and look at the frog, but Mr. Morris was driving away. Mr. Wilson asked Claimant to call Mr. Morris but he got his voicemail.

At the investigation, Mr. Wilson acknowledged that the conditions depicted in the photographs were "close" to what they had encountered, but maintained that when they measured it was between one quarter and 3/8 of an inch. Mr. Wilson maintained that the frog would have been good for 24 hours, even with the Amtrak trains running over it. He stated that he and Claimant decided the frog would last and they could get the Form B and repair it the next day, so he and Claimant traveled to the other job. He acknowledged that Mr. Morris left him a voicemail, in which he was very upset, stating that the defect he had discovered was one-half inch and asking whether the employees had even measured. He and Claimant traveled back to the scene, but Mr. Morris was not there when they arrived.

Claimant acknowledged that the conditions depicted in the photographs showed the frog in fair to poor condition, but maintained that their measurements showed a deviation between 1/4 and 3/8 inches. He acknowledged that the metal compression from train traffic could "go either way" with a frog in this condition; it could hold up or it could give. He also acknowledged that there would have been options to protect themselves without the Form B so that they could repair the defect that day. Both he and Mr. Wilson denied that they would ever walk away from a defect.

Claimant testified that at the time he felt comfortable with his decision to leave the frog as it was and come back the next day with a Form B, but at the investigation he was "sorry to say we messed up." Mr. Wilson also stated that this was a "lessons learned" situation and would not be the case again. The two employees maintained that the measurement they took did not justify placing a 10 mile per hour speed restriction on the track, and both believed that the frog would last until they came back the next day, with a Form B in place, to address the situation properly.

The employees acknowledged that when they returned to the scene the frog looked worse by sight, but that was not validated because they did not take additional measurements and Mr. Morris was not there to discuss with them what he had found.

Claimant's personal record shows a 10-day record suspension in 2005 for misuse of rail aligning tools, and a Level S record suspension, with a 12-month review period, issued on January 1, 2007 for failure to properly establish working limits within joint track and time.

The Carrier first asserts that although the Organization made numerous procedural objections, those arguments are moot as it could not demonstrate that Claimant suffered any prejudice. Further, while the Organization stated that the Hearing Officer showed misconduct towards Claimant in 36 separate incidents, the Organization could never specify what any of those incidents actually were, and it cannot be shown that Claimant suffered any prejudice. The Carrier stresses that it provided Claimant a fair and impartial investigation.

On the merits, the Carrier notes Roadmaster Morris' testimony that Track Supervisor Finch had informed him he was concerned with the poor condition of the main line frog at the west end of Riverbank. As a result, the Carrier states, on March 18, 2013, at 9:30 a.m., Mr. Morris instructed Claimant and Mr. Wilson to inspect that frog and weld it if necessary. Indeed, the Carrier notes, Mr. Morris stated that this was the worst frog on his territory and he had been short of welders so the matter needed to be addressed.

The Carrier points to Mr. Morris' further testimony that at approximately 10:15 a.m. that day he went to Riverbank to follow up and observed Claimant and Mr. Wilson driving off in their truck. He lifted his arms as if to ask the employees what was going on, and then decided to inspect the frog himself. At about the same time, Mr. Morris

received a voicemail from Claimant, informing him that "there was a pretty bad east drop" and they would come back the next day with a Form B and call if they needed him.

The Carrier further notes Mr. Morris' testimony that his inspection revealed that, pursuant to FRA Track Safety Standard 213.137, the frog needed a 10 mile per hour slow order speed restriction. Mr. Morris took the steps necessary to place the restriction, then called Claimant and his co-worker, who told him they had inspected and measured the frog but it had not looked that bad. The investigation showed, the Carrier maintains, that Claimant and Mr. Wilson had not followed their supervisor's instructions to weld the frog if necessary, and failed to take the safe course, as the frog was in poor condition. The Carrier notes that the location is high-traffic, including six sets of Amtrak trains.

Most importantly, the Carrier states, Claimant and Mr. Wilson admitted their guilt, acknowledging that they had "messed up," learned lessons, and would do better in the future. It is well-settled, the Carrier asserts, that such admissions are sufficient to meet its burden of proving Claimant's guilt by substantial evidence.

With respect to the penalty, the Carrier notes that Claimant's personal record shows that this incident was his first Level S discipline event within a 12-month review period. Therefore, the Carrier states, in accordance with its Policy for Employee Performance Accountability (PEPA), Claimant was assessed a Level S 30-day record suspension. The Carrier concludes that the penalty was appropriate given the seriousness of the offense and Claimant's personal record, and urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. First, the Organization states that the Hearing Officer failed to treat its representative, as well as Claimant and his co-worker, with appropriate dignity and fairness during the hearing process, and asserts that the Hearing Officer committed 36 acts of misconduct which were not included in the official hearing transcript. In particular, the Organization states, the Hearing Officer interrupted its representative's questioning of Carrier witnesses and failed to give the Organization reasonable time to examine exhibits and prepare for cross examination. In addition, the Organization maintains, the Hearing Officer guided the Carrier's principal witness, Mr. Morris, to give testimony lacking in truthfulness and consistency.

On the merits, the Organization asserts that none of the Rules and Instructions Claimant was found to have violated have any meritorious application to the facts of this case. The Carrier, the Organization states, has chosen to treat Claimant as if he deliberately ignored his professional duty to protect the frog as well as he could, where the record actually demonstrates, when Claimant's conduct is considered in the appropriate context, that he fully and appropriately performed his responsibilities.

The Organization concludes that the Carrier has failed to meet its burden of proof, but, even if it had, the penalty assessed is excessive. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, with respect to the Organization's procedural objections, it does appear that the Hearing Officer failed to conduct the hearing as fairly as he might have, as he limited the Organization's time to review testimony and exhibits for cross-examination, attempted to limit that cross-examination, and suggested on several occasions that once the Carrier witnesses had testified, before cross-examination and Claimant's testimony, that the case against Claimant had been established. The Hearing Officer came close to denying Claimant and his co-worker their right to a fair and impartial hearing. Nevertheless, our review of the record indicates that, through persistence and persuasion, eventually the Organization representative did have the opportunity to fully examine the Carrier's witnesses, and Claimant and his co-worker testified at length. Ultimately, many of the relevant facts were not in dispute. We conclude that the conduct of the Hearing Officer, while clearly inappropriate, did not result in actual prejudice to Claimant.

On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. While the record does not indicate that Mr. Morris instructed Claimant to weld the frog at issue no matter its condition, the record, including the employees' testimony, clearly supports that Mr. Morris had serious concerns about this frog and, when he instructed them to weld it if necessary, the obvious conclusion to be drawn from his instructions was they should err on the side of repairing it if it was necessary. The fact that the employees recognized that the frog's condition was questionable is apparent from Claimant's voice message to Mr. Morris that the frog was "pretty bad."

Moreover, while Claimant and his co-worker maintained that they measured the frog and found the defect insufficient to warrant a slow order, and that they would never walk away from a known defect, the record indicates that, at best, they performed very cursory and apparently inadequate measurements in a situation they had been instructed was a priority. When Mr. Morris measured the frog and took photographs shortly after the two employees left, he found a substantial and readily apparent defect, conditions which, given that only a short period of time had elapsed, almost certainly were present when Claimant performed his inspection. The employees acknowledged that the photographs depicted the scene almost exactly as they had observed it, just that the defects appeared deeper. Given that Mr. Morris performed his inspection and documented the conditions almost immediately after the employees had done their inspections, the only reasonable conclusion is that the conditions were, in fact, the same. The frog was defective, and defective to the point that a 10 mile per hour slow order was mandatory.

While Claimant and his co-worker maintained throughout the investigation that they believed the frog would be good until they could repair it the next day pursuant to a Form B, Claimant's also gave contradictory testimony that a frog in the condition they discovered it "could go either way." Claimant acknowledged at the hearing that he had "messed up" by leaving the frog in that condition. Even if these are not read as admissions, they reinforce the conclusion that the frog was visibly defective, and that immediate action was warranted.

In conclusion, the record convinces us that the defect detected by Mr. Morris had to have been present when Claimant and his co-worker examined the frog. Either they knew that to be the case, or they failed to take proper measurements. In either event, they had been instructed that this frog was a priority, they observed that it was in bad shape, and they chose to leave it rather than following the safer course of implementing the slow order and repairing the frog at that time, leaving a dangerous situation in a high-traffic area. To his credit, Claimant, at the hearing, recognized and acknowledged his mistakes. The Carrier has met its burden of proving, by substantial evidence, that Claimant violated the applicable Engineering Instruction as alleged.

With respect to the penalty, Claimant committed a serious violation which could have led to catastrophic consequences. 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 SCOVILLE
Organization Member

Dated this 31ST day of October, 2014.