

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 455 – Award No. 455 – Lopez
Carrier File No. 14-13-0336
Organization File No. 10-SF13N1-1372

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 6, 2013, when Claimant, Michael R. Lopez (6428130), was dismissed for his alleged failure to protect employees and equipment while acting as the Employee in Charge when he authorized a train to enter the limits of his Form B prior to ensuring employees and equipment were clear of the track on June 6, 2013, at 9:57 a.m., on the West Running Track between mileposts 17.5 and 18.5 on the Chillicothe Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 15.2 Protection by Track Bulletin Form B.

2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime and vacation, commencing June 6, 2013, 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, M.R. Lopez, had been employed by the Carrier since 1995. On June 7, 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, on June 6, 2013, to properly protect employees and equipment while acting as the Employee in Charge when he authorized a train to enter the limits of his Form B prior to ensuring employees and equipment were clear of the track. The Notice stated that the incident had occurred on the West Running Track between MP 17.5 and MP 18.5 on the Chillicothe subdivision. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of MOWOR 15.2 Protection by Track Bulletin Form B, and dismissed him from employment.

MOWOR 15.2 Protection by Track Bulletin Form B provides, in relevant part:

A train must not enter the limits unless instructed by the employee in charge. A train within the limits at the time the track bulletin Form B takes effect must not make further movement until instructed by the employee in charge.

A. Instructions

After communication with the train has been established, the employee in charge will use the following format to grant a train permission to proceed through the Form B limits:

* * *

When men or equipment foul adjacent track(s), add the following:

- Men or equipment fouling (specify track).

Carrier Chicago Roadmaster Nicholas Norman testified at the investigation that he supervised Claimant, who primarily functioned as a Track Inspector on the Main Line. Claimant was also responsible for running track protection, including Form Bs, where red flags are placed at the milepost limits and trains must call the employee in charge to obtain permission to pass the red flags.

Mr. Norman explained that on June 6, 2013 Claimant was the Employee in Charge of a Form B from Mile Post 17.5 to 18.5 on the main tracks and on the west running track, a yard lead. He was protecting contractors who were trimming trees hanging over the tracks. Mr. Norman was present that morning, helping Claimant and the contractors set up the operation. Mr. Norman stated that Claimant received a call from BNSF 7846 and, at the time, the main lift was foul of the west running track, as foul is considered within four feet of the nearest rail and the main lift was at the end of the ties, approximately 18 inches from the rail.

Mr. Norman explained that he did not overhear Claimant's call because he stepped away to take a call of his own, but when Claimant finished speaking with the train crew he told the contractors they needed to move their main lift and get the employees clear of the tracks because he had a train coming through. Mr. Norman testified that he asked Claimant whether he had already cleared the train into the Form B limits and Claimant replied that he had not, the train would stop at the red flag at Milepost 17.5. Mr. Norman told Claimant to make sure he cleared the men and

equipment before he cleared any trains, as Carrier Rules required, and Claimant replied that he knew that.

Mr. Norman stated that he then prepared to leave the area. As he walked back to his truck, approximately five minutes after his conversation with Claimant, he saw the locomotive approximately one-quarter mile past the red flag, inside the Form B limits. At that point, he did not know whether the train had violated Claimant's instructions, or whether Claimant had had another conversation with the train.

Mr. Norman obtained the recording of Claimant's communication with the train crew, and the transcript was entered into the hearing record. It states, in relevant part:

BNSF 7846: Yeah, at this time I'd like permission through your limits on the west runner only. Over.

Claimant: . . . BNSF 7846 west may proceed through my limits at maximum authorized . . . are you going to coming (sic) all the way through on the running track.

BNSF 7846: No. We're just going to pull down part way and then we're going to shove back in the yard again. Over.

Claimant: Okay. Also, have authority to pass red flag posted at Mile Post 17.5 without stopping. All men and equipment are in the clear at this time. Over.

BNSF 7846: Okay. Understand BNSF has permission through (Claimant's) Form B . . . maximum authorized speed, without stopping at the red flag at 17.5 on the west runner. . .

Claimant: That is correct there, 7846 West. When you're ready to come out all the way completely let me know and . . . that way I'll have these guys out of the way too as well.

BNSF 7846: Okay. Let you know what when? Over.

Claimant: When you're ready to depart or make another move.

BNSF 7846: Okay. I'll let you know. Thanks.

Claimant: Thank you. Lopez out.

Mr. Norman testified that Carrier Transportation informed him that this was the recording of the only call at that general time, and the time matched when he stepped away from Claimant to take his phone call. He reiterated that Claimant started to clear the employees and man lift from the track only after he completed his call with the train's crew. He concluded that Claimant had informed the train crew that the tracks were clear, when in fact he did not clear them until after he completed the call giving the train permission to enter the Form B.

Mr. Norman added that protocol is to clear the employees from the tracks before authorizing the train to enter, or to give the train instructions to stop at a specified Mile Post, and inform the train at which Mile Post the employees are working. In this case, he stated, the employees were still fouling the track when Claimant gave the train permission to enter, and he did not give the train a specific location at which it needed to stop.

Mr. Norman explained that this Form B was a mile long, and the contractor employees were working approximately halfway through the limits. He noted that when the BNSF 7846 crew told Claimant they intended to pull in part way and then shove back, they did not specify how far they intended to go. He maintained that Claimant, to be clear, should have informed the train that the employees and equipment were fouling the track at a specific milepost location and instructed the train crew not to pass that milepost.

Mr. Norman further met with Claimant and told him what his investigation had revealed. He asked Claimant what had happened, as he had been involved in another critical incident just 48 hours earlier, and Claimant replied that he knew he had "screwed up" but had a lot of things on his mind and was having trouble focusing and concentrating. Mr. Norman concluded that it was not safe to allow Claimant to continue to perform his duties, and referred him to the Carrier's Employee Assistance Program.

Claimant testified at the investigation that he could not recall if, following his conversation with the train's crew, he told Mr. Norman he had instructed the train to stop at the red flag at Mile Post 197.5. He did recall that he and Mr. Norman discussed a possible Rule violation, but maintained that at the time he let the train through the contractor's equipment was more than four feet from the track, with only a few branches fouling the track. He stated that he let the train in because its crew had stated it was only going to come in partway.

Claimant added that after he spoke to the train, when he told the employees to get completely out of the way, they moved 15 to 20 feet from the track. However, he maintained that they had not been foul of the track, and were probably five to six feet from the nearest rail, when he let the train through. He acknowledged that the men and equipment had been foul of the track, at the end of the ties, at various times during the operation.

Claimant admitted that he cleared the train before he spoke to the employees, but maintained that they were not foul of the track at the time he gave the train permission to enter. He also that he later admitted to Mr. Norman he had "screwed up" because he let the train in before he spoke to the contractor employees, even though he maintained they were in the clear.

Claimant also admitted that although the employees were not in foul at the time he gave the train permission to enter, they could "possibly" have gotten foul of the track thereafter. He added that he knew the employees were going to be in foul for a little bit

and that was why he waited until after to let them know a train was coming so they could move out past being fouled. He insisted that at the particular time he cleared the train the employees and equipment were not fouling the track.

The Carrier's Policy for Employee Performance Accountability (PEPA), Appendix B, lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal. Claimant's discipline record shows a Level S 30-day record suspension, with a 36-month review period, assessed May 17, 2012 for failure to utilize HLCS equipment as required; a formal reprimand assessed February 28, 2012 for failure to comply with engineering instructions concerning track inspections; and a dismissal assessed for an incident on June 4, 2013, two days before the incident at issue in this case, for, while acting as Employee in Charge, failing to protect men and equipment by releasing the authority his was occupying while using the Smart Mobile Client and deactivating the HLCS. That dismissal is before this Board in Case No. 455.

The Carrier states that this case is not complicated. The testimony of both Roadmaster Norman and Claimant establishes that he violated the applicable Carrier rule when, while acting as Employee in Charge, Claimant allowed a train to enter working limits where contractor employees were still performing duties on the track.

The Carrier first urges this Board to reject the Organization's far-fetched allegation that the Carrier charged Claimant with an incorrect Rule violation. The Form B rule clearly provides that the employee in charge of a Form B, in this case Claimant, is responsible for the safety of all employees on the track when he allows a train to enter his limits. There were, the Carrier asserts, no procedural violations which denied Claimant his right to a fair and impartial investigation.

On the merits, Carrier asserts that the record clearly demonstrates that Claimant, while acting as employee in charge, failed to properly protect employees and equipment. The Carrier points to the Roadmaster Norman's testimony that he was on the track with Claimant and the contractor employees when Claimant received a call from BNSF 7846. The Carrier notes that after the call ended Claimant told the employees they needed to move their equipment and clear the area. The Carrier adds that Mr. Norman asked Claimant whether he had already cleared the train to enter his Form B, and Claimant replied no, the train would stop at the red flag at Milepost 17.5. The Carrier points out that although Claimant acknowledged the rules required that he clear the tracks before authorizing any trains to enter the Form B, as he left the area Mr. Norman observed that the train was already one-quarter mile past the red flag.

The Carrier further notes that Mr. Norman obtained the transcript of the call between Claimant and the train, and it clearly shows that Claimant gave the train crew permission to proceed through the Form B before he cleared the tracks of employees and equipment, erroneously informing the train crew that he had already done so.

The Carrier stresses that Claimant admitted he authorized the train into the Form B before notifying the contractor employees. While he attempted to justify his conduct by claiming he knew the employees and equipment were not fouling the track, Claimant admitted at the hearing that he "screwed up" because he did not talk to the employees before he cleared the train into the Form B limits. This admission, the Carrier argues, is sufficient to satisfy its burden of proof.

With respect to the penalty assessed, the Carrier states that Claimant committed an extremely serious violation which could have resulted in a catastrophe. Even Claimant, the Carrier points out, acknowledged that the contractor employees could possibly have fouled the track. The fortunate fact that there was no injury in this situation, the Carrier states, does not relieve Claimant of his responsibility; he knew that he had "screwed up."

The Carrier stresses that dismissal was appropriate given the seriousness of the violation and Claimant's personal record. This incident, the Carrier points out, is Claimant's third Level S serious offense within his 36-month review period and his second, for a similar offense, within 48 hours. The Carrier's PEPA subjects him to dismissal, and, the Carrier argues, that penalty was warranted here and cannot be considered arbitrary or excessive. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. The Organization first asserts that this case presents a clear conflict in testimony between the Carrier's witness, who did not understand the applicable rules, and Claimant, who was on the scene controlling train movement and supervising contractor employees clearing brush and trees.

The Organization points out that Rule 15.2, Protection by Track Bulletin Form B, has four parts. The first section provides general instructions, none of which Claimant violated. The next section, A. Instructions, sets forth the information the Employee in Charge must provide the train preparing to enter his limits; again, the Organization asserts, Claimant violated none of those. The Organization states the only instruction which could possibly be applicable, the last bullet point, requires the Employee in Charge to notify the train of men or equipment fouling the track. However, the Organization contends, the only individual who could accurately make that judgment was Claimant, and he testified that there were no men or equipment fouling the track, as he was the only witness in visual contact with the work groups.

Subsequently, the Organization adds, Claimant took the extra step of making sure everyone on the track knew to stay clear. The other portions of the Rule, the Organization contends, cover the responsibilities of the trains and on-track equipment and have no applicability to Claimant's conduct. The Organization stresses that the Carrier presented no evidence that Claimant violated any portion of the applicable Rule, and has failed to meet its burden of proof. Even if it had, the Organization asserts, the discipline assessed is arbitrary, excessive and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. At the outset, we reject the Organization's argument that the Rule Claimant was found to have violated, Rule 15.2 Protection by Track Bulletin Form B, was not applicable to the instant situation. Claimant's testimony indicates that he was well aware that the Rule required him to ensure that employees and equipment were safely clear of the track before authorizing train movement through the area, and even the Organization concedes that the Rule would require him to notify the train of any location where the employees might be working.

The transcript of Claimant's conversation with the train crew makes it clear that he authorized the train to enter his limits, did not determine exactly how far the train intended to proceed, and did not notify the train of the location where employees might be working. Claimant does not dispute that he did not speak to the employees until after he spoke to the train.

Further, while Claimant disputed Mr. Norman's testimony that the equipment and employees were indeed foul of the track at the time Claimant authorized the train through, the resolution of that credibility conflict is for the Hearing Officer, not this Board. Even if Claimant were correct, however, his conduct still would have fallen far short of what was required to protect the employees. Claimant admitted that the contractor employees had been foul of the track several times during their work and, as Claimant also admitted, could possibly have become foul again. This is especially true as Claimant did not instruct them to keep clear of the track until after he authorized the train to proceed through with no restrictions.

Claimant admitted that he had "screwed up," and the fact that he did so is obvious. The rule at issue is a serious one, intended to safeguard the safety of employees working on tracks by ensuring that trains do not enter the work area except under specified conditions. Claimant literally put these workers' lives at risk, by authorizing a train to proceed through, to an unspecified location, before he ensured the employees knew that they needed to remain clear of the track. Even if they were not foul of the track at the specific moment Claimant authorized the train through, having been given no instruction they well could have been foul as the train approached. Claimant's guilt has been proven.

As the Carrier asserts, Claimant committed a very serious violation. It was his third Level S in 36 months, and he committed another critical violation just 48 hours before. In Case No. 455 before this Board, we upheld his dismissal for that offense, which was his second Level S within a very short period and, in accordance with the PEPA, subjected him to dismissal. The Carrier's decision that it was not safe for Claimant to function in his position is not only warranted, but fairly obvious. There is no reason to disturb the penalty assessed in this case.

AWARD

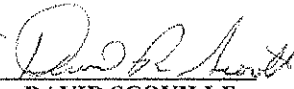
Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 31st day of October, 2014.