

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 463 – Award No. 463 – Claimant: Seagroves and Small
Carrier File No. 14-13-0383
Organization File No. 210-SF13Nl-13102

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 28, 2013, when Claimants, James Seagroves (1517788) and Kenneth M. Small (1752419) were both disciplined with a Level S 30-day Record Suspension with a 1-year review period. Discipline was for their allegedly released (sic) a temporary slow order and failed to complete repairs to FRA and BNSF standards between milepost 27-28.6 on August 28, 2013 on the Galveston Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.3.1 Rules, Regulations, and Instructions, MOWOR 1.6 Conduct, and Engineering Instructions (EI) 4.5 Placing Temporary Speed Restrictions on Track Not Meeting BNSF or FRA Standards.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimants' record this discipline and they be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing August 28, 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 James E. Seagroves has been employed by the Carrier since 2001; Claimant Small has been employed by the Carrier since 2007. On September 5, 2013, the Carrier notified Claimants to attend an investigation for the purpose of ascertaining the facts and determining their responsibility, if any, in connection with the release of a temporary slow order and failure to complete repairs to FRA and BNSF standards between MP 27 - 28.6 on August 28, 2013 on the Galveston Sub-division while assigned as a Track Supervisor (Claimant Seagroves) on TINS1692 and Lead Welder on TRWX1386 (Claimant Small). The Notice stated that the investigation would determine possible violation of Maintenance of Way Operating Rules (MOWOR) 1.3.1 Rules, Regulations, and Instructions and 1.6 Conduct, and Engineering Instructions (EI) 4.5 Placing Temporary Speed Restrictions on Track Not Meeting BNSF or FRA Standards. Following the investigation, the Carrier found Claimants guilty of the misconduct alleged and assessed them each a Level S 30-day record suspension with a one-year review period.

The record includes two FRA Inspection Reports on the Galveston Subdivision that apparently led to the charges against Claimants. One, dated August 27, 2013, apparently has 13 findings, although the copy in the hearing record begins with #4. Another, dated the next day, lists five items, with indications that the defective conditions had been noted the day before and had neither been corrected nor subjected to appropriate slow orders.

Carrier Assistant Roadmaster Ray Woodside testified at the investigation that on August 28, 2013, FRA inspector James Madison came into his office and told him that there were several unprotected defects, that is, defects without proper slow orders, on the track. Mr. Woodside said that the unrepaired defects were at mileposts 27.1, 28.5, 28.52, 28.65. He explained that on August 27 he put slow orders on milepost 24.4 to 25.5 on main track 1 at 1047; the slow orders were voided by Claimant Seagroves at 0155. On August 28, he issued a 10 mile per hour slow order on milepost 27 to milepost 28.7 main 2 at 1128, which Claimant Seagroves voided at 1518 on August 29.

Mr. Woodside stated that one defect was on main track 2 at the Alvin south crossover, behind a museum, at milepost 28.6. He traveled to that location, and met with the FRA inspector. Mr. Woodside stated that he and the FRA inspector measured and found cross level defects on the frog at QDC, mileposts 27.1, and 28.65. There was a slow order in effect at the time he measured. Both he and the inspector measured together.

Carrier Foreman/Flagman Donnie Vinson testified at the investigation that he received a call from the FRA inspector on the morning of August 28, 2013, wanting to know whether the defects had been repaired and/or whether the slow orders was still on them. Mr. Vinson explained that he had been running a forklift and did not know whether the repairs had been made. He traveled to the Alvin crossovers and joined the inspector and Mr. Woodside.

Mr. Vinson stated that he had corrected a defect at Manifold, and put a 10 mile per hour slow order on two defects. He also repaired a guard check gauge that evening, at about milepost 33.7 to 33.8, and removed the slow order.

Mr. Vinson recited that he had assigned an employee named James to a defect at the north milepost 27 crossover, and Claimant Small to the Alvin crossover main 2, which he also referred to as QDC, at milepost 28.5. The record is not clear when he made those assignments, but he testified that the work had not been finished. Mr. Vinson testified that he was not sure, but believed the milepost limits of the slow orders were 25 to 28.6.

Mr. Vinson stated that he told the FRA inspector that he had not instructed Claimant Small to work on that particular frog, because he needed him to work on the south middle crossover which had broken out, at milepost 28.67. That, he explained, was the middle crossover onto the south lead. The guard check gauge was at the south crossover at Alvin main 2, and he did not assign Claimant Small to that task; he fixed it himself.

Mr. Vinson testified that he had explained to the FRA inspector that it was his fault because he believed he was talking about the south crossover middle crossover because the wings were stretched out. Therefore, he had Claimant work the middle crossover to the south main, milepost 28.67, the switch going into the south leg of the wye. That frog had a defect in the wing.

Claimant Seagroves testified at the investigation that he was working as a Track Supervisor on the Galveston Subdivision at the time of the incident. He stated that on August 27, 2013 he received a call that the FRA inspector was writing up defects, and he went out to meet Mr. Vinson at Algoa. Mr. Vinson had a partial list of the FRA defects, and Claimant Seagroves was told to get the full list. He attempted to do so but was told Mr. Vinson already had the list, so he came back to Algoa and just went over everything.

From the list, he stated, Mr. Vinson was telling the employees where to go to make repairs. Roadmaster McAleese called and told him to put a 10 mile per hour slow order at milepost 27 and at the QDC, approximately milepost 28.5 to 28.7, so he did so. He believed it was 26.89 to 27.2, and 28.4 to 28.7, about a tenth of a mile. He was told to put on the slow orders because the frogs had tread wear that was below standards, and he put the orders out to protect Claimant Small and Mr. James. Claimant Seagroves testified that it was his understanding that the work needed within the slow orders was to weld the frogs at milepost 27 and repair the cross level at QDC, and weld the frog on the north side of Gordon Street.

Claimant Seagroves stated that he never learned how many defects there were; Mr. Vinson simply told him he had assigned welders, several in addition to Claimants, to fix the frogs. Claimant Seagroves testified that he voided both slow orders at about 0200

hours on August 28, 2013, because the welders told him they had completed their work. He did not inspect the track before removing the slow orders.

To the best of his knowledge, those repairs were made, as he did take his level board out there and go across the cross level and it was good. He testified that the welders are FRA qualified so they can determine whether the repairs have been made properly. No Carrier witness disputed this testimony.

Claimant Small was working as a lead welder at the time of the incident. He testified that Mr. Vinson called him with a list of defects on August 27, 2013, and told him to go to Gordon Street. He took welder trainee helper Bo Henry with him. When he arrived, several employees were working on various defects. Claimant Small stated that Mr. Vinson told him to start welding the QDC frog first, and when they got there the point in the left wing needed work so they began there. When they were finished, he measured for FRA compliance and instructed the trainee on how to do so.

At about 5 p.m., Claimant Small called Mr. Vinson, who instructed him to work on the south leg of the wye because the FRA inspector had seen a broken wing there. He pulled up to milepost 28.7 and saw that the right wing on the frog had cracked, so he assumed that was the frog Mr. Vinson had referred to. They finished repairs at about 8:45 p.m., and again he and the trainee measured that it met FRA standards. Therefore, at that point, he had repaired two frogs, one at QDC and the other at the south leg of the wye, and he informed Mr. Vinson that he had completed the repairs.

Claimant Small added that both of these defects had been covered by 10 mile per hour slow orders, and he did not void those orders. He stated that he and Mr. Vinson had not discussed the slow orders.

Claimant Small testified that Mr. Vinson then told him to go to milepost 27 to the switches on main track 2 and replace three switch plates. He completed that task as well and reported to Claimant Seagroves that he had done so.

The Carrier asserts that this case is not complicated. While the Organization alleges that Claimants could not have been at fault and Foreman Vinson was responsible for the incident, it is clear from the testimony of Mr. Vinson, Mr. Woodside, and Claimants themselves that Claimants failed to make needed repairs and put slow orders on track which did not meet FRA standards. The Carrier notes that Mr. Vinson stated that when he spoke to the FRA inspector he did not know if the defects were unprotected, and Mr. Woodside stated the locations Claimants were responsible for were not protected by slow orders and had not been repaired. Indeed, the Carrier points out, Claimant Seagroves admitted that he did not inspect the supposed repairs prior to removing the slow orders. The Carrier stresses that the Hearing Officer found that Claimants' version of events was not credible, and it is well settled that credibility determinations are the province of the Hearing Officer, not this Board. The Carrier maintains that it has met its burden of proving Claimants' guilt by substantial evidence. As for the penalty, the

Carrier states, it was assessed in accordance with its Policy for Employee Performance Accountability (PEPA), and Claimants' personal records. The Carrier urges that the claim be denied.

The Organization asserts that the Carrier disciplined Claimants for another employee's negligence. The Organization notes that Carrier witness Mr. Vinson testified that he informed FRA Inspector Madison that it was his fault that the needed repairs had not been made, as he assigned the welders to the wrong frogs. Indeed, the Organization argues, Mr. Vinson had the list of FRA defects and made all the welding assignments on the day at issue, but gave several employees, including Claimants, the wrong assignments. Moreover, the Organization notes, he did not provide the employees with the list of defects so that they could determine on their own what was necessary.

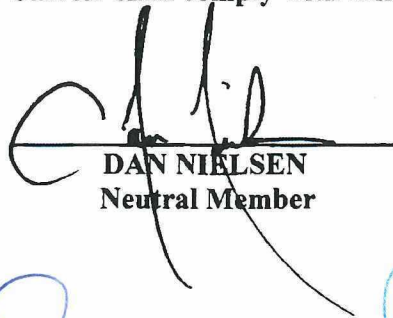
The Organization contends that Claimants made the repairs assigned to them and then removed the slow orders. They, the Organization argues, were not responsible for the incident, and the Carrier has failed to meet its burden of proof. In addition, the Organization maintains that the discipline assessed is arbitrary, excessive and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The Carrier has found Claimants guilty of Rules violations for allegedly failing to make needed track repairs and/or improperly releasing slow orders. The Carrier has produced FRA inspection reports which note certain violations on August 27, 2013, and that they had not been repaired by the time of a re-inspection on August 28, 2013. Beyond that, the record is confusing and disjointed as to what Claimants did or did not do. The Carrier witnesses referenced various defects at various locations, but, as for Claimant Small, Mr. Vinson stated only that he assigned him to fix the wrong defect. Other employees were apparently also involved in repairing defects, but their roles relative to Claimants' are not established. Mr. Vinson did not appear to have a clear idea as to what tasks his employees had or had not done, or who was specifically responsible for any alleged failings. Claimant Seagroves is accused of improperly releasing slow orders, and apparently failing to inspect the track before doing so, but no Carrier witness testified clearly as to his responsibilities in this matter and why, if the welders were FRA qualified as he stated, he violated Carrier Rules by allowing them to verify the repairs.

It may be that these Claimants failed to perform their jobs properly and were guilty of misconduct. But the Carrier has the burden of proving their guilt by substantial evidence, which includes the responsibility to provide this Board with a clear, understandable account of their alleged misconduct. Even after several careful readings, this record does not meet that standard. The Carrier has failed to carry its burden of proof, and thus the claim will be sustained, with the discipline assessed against Claimants rescinded and their personal records corrected accordingly.

AWARD

Claim sustained. The Carrier shall comply with this Award within 45 days.

A black ink signature of Dan Nielsen, consisting of a large 'D' and 'N' followed by a horizontal line.

DAN NIELSEN
Neutral Member

A blue ink signature of Joy Mendez, written in a cursive style.

JOY MENDEZ
Carrier Member

A blue ink signature of David Scoville, written in a cursive style.

DAVID SCOVILLE
Organization Member

Dated this 9th day of June, 2016.