

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 469 – Award No. 469 – Claimant: Ben
Carrier File No. 14-14-0037
Organization File No. I70-SF13SI-1344

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 18, 2013, when Claimant, Martinez Ben (6589758), was disciplined with a Level S 30-day Record Suspension with a 3-year review period for his alleged failure to properly provide protection on other than main track at Milepost 101.6 while tamping track on October 22, 2013 while working on Phoenix Subdivision as a Foreman on TCSX03075. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 6.3.2 Protection on Other Than Main Track.
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 pay for all wage loss including overtime commencing December 18, 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, Martinez Ben, has been employed by the Carrier since 1991. On October 25, 2013, 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 failure to provide protection on other than main track at MP 101.6, while tamping track, when working as a

machine operator on TSCX0375 on the Phoenix Subdivision on October 22, 2013. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rule (MOWOR) 6.3.2, Protection on Other Than Main Track, and assessed him a 30-day Record Suspension with a one-year review period.

Maintenance of Way Operating Rule (MOWOR) 6.3.2, provides, in relevant part:

To establish protection on a track other than a main track, controlled siding or any track where CTC is in effect, use one or a combination of the following:

All switches that provide direct access to the track must be:

- Lined against movement.
- Properly tagged.
- Effectively spiked, clamped or locked with an effective locking device.

A red flag or light must be placed as outlined in Rule 5.4.7 (Display of Red Flag or Light). A derail capable of restricting access to the track where work will occur must be locked in derailing position near the red flag or light with an effective locking device. The red flag or light must be placed at least 150 feet from the work location when the track speed is greater than 5 MPH or at least 50 feet from the work location when the track speed is 5 MPH or less.

When remote control switches, including those in a hump yard, are operated by a control operator or other designated employee, employees must establish protection as outlined below:

- The employee requesting protection must notify the employee controlling the switches that provide access from the hump to the track where the work will occur.
- After being notified, the switch controller must line any remote control switch against movement to the affected bowl track and apply a locking or blocking device to the control for that switch.
- The switch controller must then notify the employee that protection is provided. Protection will be maintained until the switch controller is advised that work is complete and protection is no longer required.
- Place a flagman to hold all trains and on-track equipment clear of the working limits.
- Establish discontinuity in the rail to prevent movement into the working limits. Place red flags 150 feet in advance of the working limits.
- Establish working limits on main track or controlled siding to prevent movement to other than main tracks.

When establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established. The employee assigned the responsibility of yard movements must be notified of the work to be done.

At the time of the relevant events, Claimant was working as a tamper operator. Stewart Sloan was the Foreman of Claimant's Surfacing Gang, and Foreman Fred Garcia's gang was working in the area, on the main track. Mr. Garcia had Track Authority Detail 895-25, which gave him main track authority between MP 101 and 103 beginning at 8:57 on October 22, 2013. That authority was reported clear at 11:15 a.m. Track Authority 895-34 gave Mr. Garcia authority in the same area from 11:56 a.m. to 1:45 p.m. The record also includes Track Authority Forms for both details, and the form language "Multiple Work Groups Using the Same Authority" is crossed out on both forms.

Structures Supervisor Patrick Senf testified at the investigation that he was on an Operations Testing Team that day and arrived at Claimant's location, at Hillside, at approximately noon. Mr. Sloan had left the area to pick up a piece of equipment. Mr. Senf and Roadmaster Marc Ramirez went to Mr. Garcia's area and briefed concerning their tasks and Mr. Garcia's protection. Mr. Senf stated that Mr. Garcia told him he had just released his track authority. He stated that Mr. Garcia told him Mr. Sloan had talked to the dispatcher, who had put blocks on either end of the siding to block the switches. Mr. Senf testified he told Mr. Garcia that was not a proper form of protection. Mr. Senf stated that he asked Mr. Garcia if he was protecting the surface gang, which included Claimant, and he replied that he was not as they had their own protection. Mr. Senf stated that Claimant and Mr. Sloan could have asked Mr. Garcia to put them on his authority, but had not done so.

Mr. Senf then went to see Claimant, who was working alone, tamping track on the siding. Claimant told him he was not sure if they had put locks on the switches. Mr. Senf asked Claimant to step away from the track until they determined whether he had proper protection. He noted that MOWOR 6.3.2 lists six types of protection, but he and Mr. Ramirez determined the employees were not using any of those approved methods. Mr. Senf stated that Claimant was not associated with any other work groups, including Mr. Garcia's.

In addition, Mr. Senf explained, while Mr. Garcia had two track warrants which encompassed both ends of the siding where Claimant was working, there was also a time when Mr. Garcia released his authority and, while Claimant was still working on the siding, a train went through. Claimant had no protection.

Mr. Senf testified that he then went to check the switches, and saw there was no Maintenance of Way lock or tag on the west siding switch. The switches on either side of the siding were lined against movement into the track where Claimant was working, but it was, Mr. Senf stated, not tagged properly. There were switch locks on, but proper protection requires a Maintenance of Way lock, and there were none there.

Roadmaster Marc Ramirez testified at the investigation that he participated in the Operations Testing with Mr. Senf at the time of the incident. He confirmed that they briefed with Mr. Garcia, who was the employee in charge (EIC) of his work group. At some point they were notified that Mr. Garcia needed to give up his track warrant so they cleared the track. However, they observed that Claimant was still operating his tamper on the siding, and it was not properly protected. Mr. Ramirez confirmed that Mr. Garcia stated he was not protecting the tamper, as that was Mr. Sloan's project. Mr. Ramirez traveled to the Hillside west switch and found that it was unprotected, as it was not tagged or properly locked out of service, nor did it have a proper derail.

Mr. Ramirez explained that Mr. Garcia's work group was separate from Claimant's, and Claimant was operating under Mr. Sloan's direction. Mr. Sloan had failed to protect his work group because he did not establish proper protection on the Hillside siding. He repeated that Mr. Garcia told them he was not engaged in the same work activities and they were not operating as one work group. Mr. Garcia was the EIC of his men working on the main track, and his authority, between Milepost 101 and 103, was for his group only.

Mr. Ramirez stated that he did not recall seeing Claimant's and Mr. Sloan's names penciled onto Mr. Garcia's track warrant, in the section noting multiple work groups, nor did he recall any conversation where Mr. Garcia stated that they were all working as one work group. Mr. Senf also stated that he never saw their names written on Mr. Garcia's track authority.

In addition, Mr. Ramirez stressed, he and Mr. Senf observed Claimant tamping during the time that Mr. Garcia's track warrant was no longer in effect. Had Claimant and Mr. Sloan contacted Mr. Garcia and been included as part of his work group, they would have been covered except for the time that Mr. Garcia released his authority. However, as they were not on Mr. Garcia's authority, Claimant worked without protection the entire time. Mr. Ramirez stressed that every employee is required to know his protection.

Mr. Sloan gave a written statement at the time of the incident, which was read into the investigation record. It recited:

[A]bout 8 a.m. Had briefing in the truck. Talk about the Rule of the Day and Rule of the Week. Talk about the task we are going to be doing . . . 1. Tamp the siding. 2. Get the tamper from Wickenburg and call the dispatcher. I let her know that we'll be working their (*sic*) at Hillside siding and put blocks on that, put blocks on that we'll be in the siding. I talk to Foreman Fred Garcia that we will leave the tamper on the siding to do work (surface) and me and another Operator go to Wickenburg and pick up the Regulator. That is what we did. Ran Regulation to Hillside. On the way . . . up there, that's when I got the call from my Operator . . . on the way up to Hillside I parked the truck on the road and I got picked up by the Roadmaster.

Mr. Sloan's statement recites a question from Mr. Senf about the protection on the siding at Hillside for the tamper Claimant was operating, and Mr. Sloan's written response is that the only protection was from the dispatcher on Mr. Garcia's track warrant, although he believed that

had been released at the time he was away from the site bringing his regulator from Wickenburg to Hillside. When asked by Mr. Senf if he had briefed with Mr. Garcia and asked him to provide protection, the statement indicates that Mr. Sloan only told Mr. Garcia the tamper would be right there when he needed Claimant to tamp the road crossing. The statement recited that Mr. Sloan told Mr. Garcia he was leaving for Wickenburg and had permission to occupy the siding, and Mr. Garcia had track warrant from Milepost 101 to Milepost 103.

Mr. Senf stated that it is good to notify a dispatcher of authority, so far as opening or putting blocks on switches, or if she needs, for example, to put a train in the siding. Mr. Senf also explained that if Mr. Sloan stated his protection was from the dispatcher, he in fact had no protection, because that was not one of the approved methods listed in MOWOR 6.3.2. He added that just because Mr. Garcia had a track warrant at this location it did not mean that Mr. Sloan's group was protected.

At the hearing, Mr. Sloan maintained that at the beginning of the job he and Claimant remained in the pocket track, doing maintenance on their machine, and then he called Mr. Garcia and told him he had copied Mr. Garcia's track warrant. He also maintained that Mr. Garcia replied that they would all be one work group. He stated that Mr. Garcia's track warrant was the protection for his work group. He acknowledged that the authority was on main track, from Milepost 101 to 103, but asserted that it protected them because the siding was within those limits. He also maintained that he never received a release time on the warrant because they were all one work group and he was away when the authority was released.

Mr. Sloan explained that he was not at the work location when Mr. Senf and Mr. Ramirez arrived. He stated that he did not know what his protection was when Mr. Garcia released his authority. He repeated that he did not know the nature of the protection in the siding, but before he left he briefed with Mr. Garcia and left him the responsibility for the tamper, so, as EIC, he should have notified Claimant when he released his authority. He acknowledged that he had to comply with the bullet points in 6.3.2, such as locking the switch, in order to occupy the siding. However, he did not do any of these things.

Mr. Sloan testified that he told Claimant he had a track warrant, but Claimant did not copy it. He also stated that Claimant was not aware of his briefing with Mr. Garcia, and was not aware that he was part of Mr. Garcia's work group. He maintained that Mr. Garcia had left Claimant "hanging out there," and he and Claimant were not responsible.

At the investigation, Claimant acknowledged the written statement he had provided at the time of the incident. It read:

First thing . . . we show up at Hillside brief that I was going to work on the siding. So my foreman called the dispatcher and asked for permission to occupy the siding. Then my foreman opened the back track to go out onto the siding. Got on the siding and headed east on the siding and started to work the siding. I never asked if my foreman had put maintenance locks on both switches . . . so continued working.

Claimant maintained at the investigation that Mr. Sloan copied Mr. Garcia's track warrant over the radio and made a copy for him. He maintained that Mr. Sloan told him he was going to get the regulator and Mr. Garcia would be protecting him. He stated that with authority from the dispatcher one can put equipment on the siding, but a track warrant is necessary for the employee perform work. He acknowledged that he did not say anything to Mr. Senf about the warrant, just that there was authority from the dispatcher. He admitted he did not have protection on the siding, and contended that he did not learn that the warrant had been released until he got back to hotel

Claimant admitted it is his responsibility to establish protection before fouling track. He acknowledged that even if Mr. Sloan had a track warrant he still needed to copy it because he had to know his protection. He did not know one authority had been released and there was another one; he only knew Mr. Sloan said he was under Mr. Garcia's protection.

The Carrier states that this case is not complicated. The Organization's allegation that Fred Garcia, the Foreman of another gang, had Claimant protected, is inaccurate and without merit. The Carrier notes the testimony of Mr. Senf that he was performing Operations Testing and, prior to approaching Claimant, checked Mr. Garcia's protection. The record is clear that Mr. Garcia told Mr. Senf he was not protecting Claimant, who was working on the Surfacing Gang.

Rather, the Carrier points out, Claimant was working alone and unprotected. Claimant's own testimony confirms this, as he realized later that Mr. Garcia's track warrant had been released, leaving him unprotected. The Carrier also notes that Claimant, believing himself somehow protected, did not feel the need for locks on the track to prevent oncoming trains or vehicles from entering his work area.

The transcript, the Carrier argues, clearly establishes that Claimant made a critical error which led to a very grave situation. He was responsible for ensuring that he had protection, and he did not. While fortunately there was no injury or damage, Claimant still bears heavy responsibility for what could have been a catastrophe. The Carrier argues that Claimant's guilt has been proven by substantial evidence.

As for the penalty, the Carrier stresses that it was appropriate given Claimant's violation and its Policy for Employee Performance Accountability (PEPA). The Carrier urges that the claim be denied.

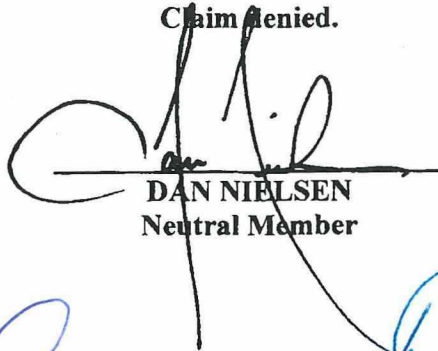
The Organization states that the local Section forces, supervised by Foreman Garcia, were replacing ties in and around a crossing. After replacing ties the track must be surfaced or tamped, which requires a speed restriction. The Organization states that Mr. Garcia had authority covering both ends of the siding, and was the employee in charge of the authority. Foreman Sloan, the Organization explains, was surfacing the track Mr. Garcia's gang had worked on; he was the employee in charge of his surfacing crew. Claimant, the Organization states, was simply the tamper operator. Foreman Sloan instructed him to go out and begin tamping the siding. The Organization contends that Foremen Garcia and Sloan briefed, and Mr. Garcia placed Mr. Sloan's gang on his authority as a single work group.

The Organization adds that Mr. Sloan then requested permission from the dispatcher to occupy the siding. Because both ends of the siding were covered by Mr. Garcia's authority there was no need to lock the switches at either end. At about the time that the audit team arrived, the Organization explains, the dispatcher requested that Foreman Garcia release his authority. He did so, forgetting to contact Claimant and Mr. Sloan. Neither can be held accountable for Mr. Garcia's failure to notify them that he was going to release his authority. Therefore, the Organization argues, the Carrier has failed to meet its burden of proof. In any event, the Organization adds, the discipline is excessive. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, we find that the Carrier met its burden of proving Claimant's guilt by substantial evidence. While he was certainly not the only one at fault in this matter, he acknowledged that he was ultimately responsible for ensuring his own protection. He gave conflicting testimony as to whether he had copied Mr. Garcia's protection, whether he knew his protection, and/or whether Mr. Sloan told him he was protected, and it appears that he simply relied upon those individuals rather than taking responsibility for himself, even after Mr. Sloan left the work location. The fact that he did not even know that Mr. Garcia had released his authority, leaving him completely unprotected, is strong evidence that Claimant committed a serious safety violation would could, as the Carrier asserts, 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 9th day of June, 2016.