

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 470 – Award No. 470 – Claimant: Sloan
Carrier File No. 14-14-0038
Organization File No. 170-SF13SI-1343

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

The Carrier violated the Agreement commencing December 18, 2013, when Claimant, Stewart Sloan (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.

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, Stewart Sloan, has been employed by the Carrier since 1984. On December 18, 2013, following an investigation, the Carrier assessed Claimant a Level S 30 Day Record Suspension, with a three-year review period, for his failure to provide protection on other than main track at MP 101.6, while tamping track at 12:25 PM on

Tuesday, October 22, 2013, while working on the Phoenix Subdivision as Foreman on TSCX03075. The Carrier found that Claimant had failed to comply with Maintenance of Way Operating Rule (MOWOR) 6.3.2, Protection On Other than Main Track.

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 the Foreman of a Surfacing Gang which included his tamper operator, Martinez Ben. Mr. Ben was tamping on a siding, while Foreman Fred Garcia's gang was working in the same 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. Claimant 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. Ben 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 Mr. Ben, and he replied that he was not as they had their own protection. Mr. Senf stated that Mr. Ben and Claimant could have asked Mr. Garcia to put them on his authority, but had not done so.

Mr. Senf then went to see Mr. Ben, who was working alone, tamping track on the siding; Mr. Ben told him he was not sure if they had put locks on the switches. Mr. Senf asked Mr. Ben 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 Surfacing Gang was not using any of those approved methods. Mr. Senf stated that Mr. Ben 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 Mr. Ben was working, there was also a time

when Mr. Garcia released his authority. While Mr. Ben was still working on the siding, a train went through. Mr. Ben 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 Mr. Ben 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 Mr. Ben 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 Claimant'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 Mr. Ben's, and that Mr. Ben was operating under Claimant's direction. Claimant 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 Mr. Ben's and Claimant'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 Mr. Ben tamping during the time that Mr. Garcia's track warrant was no longer in effect. Had Mr. Ben and Claimant 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, Mr. Ben worked without protection the entire time.

Claimant 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 Regulator 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.

Claimant's statement recites a question from Mr. Senf about the protection on the siding at Hillside for the tamper Mr. Ben was operating, and Claimant'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 Claimant only told Mr. Garcia the tamper would be right there when he needed Mr. Ben to tamp the road crossing. The statement recited that Claimant 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. However, he explained that if Claimant 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 Claimant's group was protected.

At the hearing, Claimant maintained that at the beginning of the job he and Mr. Ben 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.

Claimant 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 Gang's protection was when Mr. Garcia released his authority. He repeated that he did not know 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 Mr. Ben 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, and he did not do any of these things.

Claimant testified that he told Mr. Ben he had a track warrant, but Mr. Ben did not copy it. He also stated that Mr. Ben 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 Mr. Ben "hanging out there," and that he and Mr. Ben were not responsible for the lapse in protection.

At the investigation, Mr. Ben 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.

Mr. Ben maintained at the investigation that Claimant copied Mr. Garcia's track warrant over the radio and made a copy for him. He maintained that Claimant 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 the warrant had been released until he got back to hotel.

The Carrier asserts that this case is not complicated, as the record clearly establishes that there is no merit to the Organization's contention that Foreman Garcia had Claimant's co-worker Mr. Ben protected. The testimony of the Carrier's witnesses is clear that Mr. Garcia denied covering Claimant's gang with his authority, as Claimant was working on an entirely different Surfacing Gang.

Claimant's assertion that he left Mr. Ben in Mr. Garcia's care is equally unavailing. Claimant was the employee in charge of his gang, and neither he nor Mr. Ben ensured that Mr. Ben had adequate protection. Indeed, he worked completely unprotected for a considerable period of time. This was a very serious situation, the Carrier stresses, which could have led to a catastrophe. That it did not is very fortunate but does not excuse Claimant's actions. The discipline was appropriate to the offense, the Carrier states, and the claim should be denied.

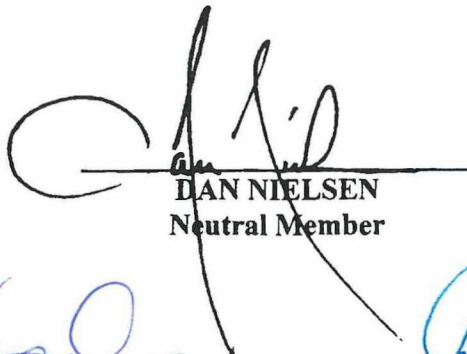
The Organization asserts that Claimant briefed with Mr. Garcia, who then put Claimant's gang on his track authority as a single work group. He also requested permission from the dispatcher to occupy the siding. Because both ends of the siding were covered by Mr. Garcia's authority, there was no need, contrary to the Carrier's arguments, to lock the switches at both ends.

The Organization notes that when Claimant needed to leave the area, he briefed with Mr. Garcia again, but Mr. Garcia, clearly distracted, released his authority without notifying Mr. Ben. Ultimately, Claimant and Mr. Ben were put in a situation beyond their control. The Organization argues that Mr. Garcia failed in his responsibility as employee in charge. Claimant is guilty of no misconduct, and the Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The issue in this case is whether Claimant violated MOWOR 6.3.2 by failing to establish proper protection for his gang, in particular, Martinez Ben, who was operating a tamper on the siding. Claimant maintained that he was covered by the authority of another Foreman, Fred Garcia, who was working on the main track, but his testimony on that matter is contradictory, unconvincing and contradicted by the other witnesses and the track authority documents themselves. Indeed, he acknowledged in the written statement he gave at the time of the incident that he left the work area without ensuring protection for Mr. Ben, although he later testified to the contrary. While he attempts to blame Mr. Garcia for the incident, the blame is clearly Claimant's. Claimant committed a serious safety violation which could have had catastrophic consequences. The claim will be denied.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 9th day of June, 2016.