PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 483 – Award No. 483 – Peterson
Carrier File No. 10-15-0029
Organization File No. 10-SF14N1-1464

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 3, 2014, when Claimant Brandon Peterson was dismissed. Discipline alleged Claimant allowed men and equipment to foul the main track at MP 110.26 on the Mendota Subdivision on April 25, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 6.3.1 Main Track Authorization.

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, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing June 3, 2014 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, Brandon Peterson, had been employed by the Carrier since August, 2013. On April 30, 2014, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged allowing men and equipment to foul the main track at MP 110.26 on April 25, 2014 at approximately 6:25 p.m., after having cleared a train though a Form B, while he was working as a Flagman on gang TFLX1765 on the Mendota Subdivision. Following the

investigation, on June 3, 2014, the Carrier found that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rules (MOWOR) 6.3.1 Main Track Authorization, and dismissed him from employment.

The notice of investigation in this matter was placed in the mail to the Claimant on April 29, 2014, setting the investigation for May 5. That evening the Carrier's representatives realized that the Organization's notice has been sent to the General Chairman of the wrong federation. A corrected notice was mailed on April 30. Claimant's copy was sent by certified mail. USPS records showed an attempted delivery and a notice left on May 1, although nothing in the record indicates any successful delivery. Nothing in the record indicates that the address used for Claimant was incorrect, or otherwise explains his failure to receive or claim the letter.

At the opening of the investigation, Corey Willbanks, Vice General Chairman, Secretary/Treasurer, ATSFF Union, stated that he was present to represent Claimant. Claimant stated that he had received a hand-delivered copy of the Investigation Notice that day, and was ready to proceed with the investigation.

Carrier Structures Supervisor Trevor Atwood testified at the investigation that he was the Project Manager for two bridge replacement projects at the time of the incident, with responsibility for coordinating Carrier assistance and managing safety for Carrier and contractor employees. He stated that Claimant was the employee in charge of a Form B at Bridge 110.26 on April 25, 2014, when, at approximately 4:20 p.m., Claimant talked a westbound Norfolk Southern train through his Form B, without stopping, past the red flag at milepost 106.4. Mr. Atwood stated that he was standing near the flagman's vehicle and heard some, but not all, of Claimant's conversation with the train's crew.

Mr. Atwood stated that before the train entered the Form B, all men and equipment were in the clear and had been told to stay clear so the train could pass. He added that there was some radio conversation indicating that the train might stop within the limits, at milepost 108.2, and Claimant stated that he would then send the men and equipment back to work.

Mr. Atwood explained that he left the immediate area to take a phone call, and then heard Claimant yell on the radio that the train was coming into the limits without contacting him. Mr. Atwood looked up and saw the train at the bridge, traveling at a slow speed. He heard Claimant, on the radio, tell the train crew that they were supposed to call him when they began moving again, and he heard the crew respond that they never stopped, but kept moving slowly through the limits. He also heard Claimant state that he anticipated they would stop and that was why he sent the men back to work.

Mr. Atwood stated that when the train went through, adjacent to the bridge, there was a worker within 10 feet of the tracks. He added that he asked Claimant whether anyone was foul of the tracks and he answered "no".

Mr. Atwood explained that he also listened to the radio recording of the incident, and the train crew stated that it *might* stop, not that it *would* stop. He stated that Claimant just assumed the train would stop and therefore sent the men back to work.

Mr. Atwood explained that when the train came through the contractors had the crane pick up a piece of steel and bring it towards the track, and they moved the sheeting into position, swinging towards the track, getting within 10 feet of the track. He stated that the crane was parked about 30 to 40 feet from the track itself. Mr. Atwood added, however, that the crane could have fouled the track when the workers swung the sheet pile toward the track and positioned to drive.

Mr. Atwood acknowledged that if the employees were driving the sheet metal, they were not going to foul the track. He explained that whether the sheet metal is in the ground or whether it is laced onto another sheet, it is safe to clear trains through and continue working while the employee is vibrating the sheet vertically into the ground. He stated that at the time the train came through, the crane and man lift operators were still working.

Mr. Atwood maintained that there was potential to foul the track as the train traveled toward the bridge, because although when the train arrived the employees had the sheet metal in the ground and were vibrating it, 15 minutes earlier, when Claimant initially allowed the train through, there was the potential to foul, because the crane was not laced to the other piece of equipment.

The recording of the incident was played into the investigation record. Although much of it is inaudible, an individual identified as "Speaker 1" states, "[Y]ou didn't call me when you were going to proceed, and "Speaker 2" responds, "But we never stopped." Speaker 1 replied that he anticipated the train would stop, so had left work in process, but they would immediately stop work and recede.

Claimant testified at the investigation that before the train called, Mr. Atwood instructed him to allow the contractors to continue working so long as they had the sheet metal laced and were driving it into the ground, and to make sure they swung away from, not towards, the track. Claimant maintained that he told the employees not to swing towards the track and to make sure they did not foul it. Therefore, Claimant explained, he allowed the contractor employees to keep working. Claimant maintained that by the time the train came through the employees were almost done working and the only employee still there was the crane operator driving the sheet metal.

Claimant acknowledged that the train crew told him they might stop within his limits, but that they would contact him before restarting. Claimant explained that he expected a call from the train crew if anything was going to change, but, regardless of whether the train was in his limits, he would have stopped all work but for the fact that the employees were not fouling the track. He maintained that he told the employees they needed to be clear, but he allowed them to continue only because they had the sheet metal laced and were already driving it in. Since his supervisor had informed him the employees were not fouling the track, and the work was almost finished, he allowed it to continue.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. 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 personal record shows a Level S 30-day record suspension, with a 36-month probation period, issued June 3, 2014, for failure to establish proper protection for a work crew using a Form B.

The Carrier begins by rejecting the procedural complaints of the Organization concerning proper notice. The original notice was sent on April 29 and set the investigation for May 5. That notice was directed to Claimant and the Burlington System Federation, when it should have gone to the Santa Fe Federation. That error was discovered on the night of 29, and a corrected notice was mailed on the 30. Claimant was well aware of the date and the purpose of the investigation, and Organization had ample time to prepare. Indeed, the Organization discussed the process of the amended notice and the scheduling for May 5 when the error was discovered on April 29. Both notices were, in fact, timely and in any event, no one was prejudiced.

On the merits, the Carrier points out that Claimant was a flagman on the Mendota Subdivision at the time of this incident. While acting as employee in charge, the Carrier states, he talked a train through a portion of his Form B while a contractor's employees and equipment were in the clear. The Carrier notes that the train crew notified Claimant they might stop within the Form B limits, and Claimant allowed the employees to return to work. However, the Carrier stresses, the train never stopped moving, and there were men and equipment, who were not aware the train had been cleared through, within 10 feet of the track as it went by.

The Carrier points to Mr. Atwood's testimony that he listened to the radio recording and the train crew had stated that they *might* stop, not that they *would*, and Claimant confirmed the information on the recording. However, Claimant assumed the

train would stop and sent men and equipment back to work without verifying the situation, putting them in obvious danger.

The Carrier urges the Board to discount Claimant's defense that his supervisor had informed him that the contractors would not be fouling the track because they were driving sheet metal into the ground. It points to the supervisor's testimony that he specifically denied making this statement to Claimant, and that the contractor's employees still had the potential to foul the track when the train came through.

The Carrier states that the record as a whole provides substantial evidence of Claimant's guilt. Indeed, the Carrier states, Claimant admitted his guilt, and it is well-established that such an admission is sufficient to satisfy the Carrier's burden of proof. The Carrier concludes that Claimant's dismissal was warranted and assessed in accordance with the PEPA. For all of these reasons, the Carrier urges that the claim be denied.

The Organization challenges Claimant's dismissal on procedural and substantive grounds. In particular, the Organization claims that Claimant did not receive the required five-days' notice of investigation, as specified by the agreement. Rule 40C states:

> At least (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire.

The revised notice was not mailed until April 30, 2014, and delivery was not even attempted until May 1. That clearly in less than five days in advance of the hearing, and thus does not constitute proper notice. In fact, the Organization points out, Claimant never received notice of the investigation from the Carrier, and only appeared because the Organization advised him to be there.

On the merits, the Organization notes that Mr. Atwood conceded no one was foul of the track when the train went through. The taped conversation between Claimant and the train crew, the Organization adds, is mostly inaudible. The Organization states that there was testimony concerning the taped conversation, establishing that Claimant told the train crew to stop at milepost 108 and make sure employees and equipment were not foul of the track, and they responded that they would contact Claimant before starting up again. The fact that the train never stopped was not Claimant's fault, the Organization asserts, but, most importantly, no one was foul of the track at any time when the train went through. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The Organization raises questions concerning the adequacy of the written notice of the investigation. Rule 40C requires 5 days advance written notice to the Organization and Claimant "in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire." The initial notice on April 29 was sent to Claimant, but notice to the Organization was sent to the General Chairman of a different Federation. The error was discovered that evening and an amended notice was sent on April 30 to Claimant and the correct Federation. The Carrier asserts that the Organization knew on April 29 of the error and that the investigation was scheduled for May 5. Claimant maintains that he never received the notice. The record shows an unsuccessful attempt by USPS to deliver the notice on May 1, with a pickup notice being left at Claimant's address. The Organization avers that May 1 is not 5 days before the date of the investigation and thus the investigation was fatally flawed. On this record, we cannot agree. The rule specifies that the purpose of 5 days advance notice is to allow Claimant and the Organization to mount an adequate defense. A violation of the rule would logically entitle the Organization to demand a postponement of the hearing. Here, no request for a postponement was made, and there was no apparent impact on Claimant's defense. Thus, even if the notice was deemed less than timely, we find no procedural defect which denied Claimant his right to a fair and impartial investigation.

Turning to the merits, at the time of this incident, Claimant was the employee in charge of a Form B, charged with ensuring the safety of employees working on the tracks. Claimant does not dispute that he authorized a train through his limits, on the assumption that it would stop before the location at which the employees were working, and that he let the employees return to work based upon that assumption. However, the record indicates that the train crew never definitively stated that the train would stop. They plainly left open the possibility that they would continue through the limits of the Form B, which indeed they did, passing very close to the employees' work area. While Claimant maintains that the employees were never in danger because their work did not put them foul of the track, Mr. Atwood's testimony establishes that this was not the case.

The record demonstrates that Claimant acted on an assumption that the train would stop, rather than making certain it would do so before he authorized employees to work in the area. It also shows that he made further assumptions that their work would not put them foul of the track, while Mr. Atwood explained why that might not be the case. In all, Claimant did not take the steps required to run his Form B with all necessary precautions, and he thereby exposed the employees working in the area to the risk of serious harm. His guilt has been proven by substantial evidence.

As for the penalty, Claimant was a short-term employee with two authority violations within a very short period of time. We cannot say that dismissal was an excessive measure of discipline for this misconduct.

AWARD

Claim denied.

DAN NIELSEN
Neutral Member

ALEX STADHEIM
Carrier Member

DAVID SCOVILLE
Organization Member

Dated this 16 **day of** November **, 2016.**