

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 485 – Award No. 485 – Peterson
Carrier File No. 10-15-0030
Organization File No. 10-SF13N1-1485

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 issued a Level S Record Suspension with a three-year review period. Discipline alleged Claimant failed to establish proper protection for the work crew when red flags were not displayed while the crew was fouling the main track on the Mendota Subdivision on April 17, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 5.4.7 Display of Red Flag or Red Light and 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 the Claimant's record this discipline and be paid for lost time, including overtime.

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, has been employed by the Carrier since 2013. On April 22, 2014, 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) failure to establish proper protection for the work crew utilizing Form B #8291 when the red flags were not displayed while the crew was fouling the main track near MP

109-111 on April 17, 2014. . . while working as a Flagman on gang TFLW1765 on the Mendota Sub.” The investigation was scheduled for April 30, 2014, and postponed on that date by mutual agreement until May 5, 2014. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged, in violation of Maintenance of Way Operating Rules (MOWOR) 5.4.7 Display of Red Flag or Red Light and 15.2 Protection by Track Bulletin Form B. The Carrier assessed Claimant a Level S 30-day record suspension with a three year review period.

The applicable MOWOR provide, in relevant part:

5.4 Flags for Temporary Track Conditions

5.4.7 Display of Red Flag or Red Light

A red flag or red light is displayed where on-track equipment or trains must stop. When approaching a red flag or red light, the train or on-track equipment must stop short of the red flag or red light and not proceed unless the employee in charge gives verbal permission. If permission to proceed is received before the train or on-track equipment stops, the train or on-track equipment may pass the red flag or red light without stopping. If track bulletin Form B is not in effect, permission must include speed and distance. This speed must not be exceeded until the rear of the train has passed the specified distance from the red flag or red light, unless otherwise instructed by the employee in charge.

15.0 Track Bulletin Rules

15.2 Protection by Track Bulletin Form B

C. Stop Column

A red flag must be displayed at the beginning of the limits and at main track junctions within the limits.

On-track equipment authorized under the provisions of Rule 15.2.1 (Authorization for On-Track Equipment) is not required to display red flags when traveling. When establishing working limits, red flags must be displayed at the location of the working limits.

On-track equipment or a train within the limits at the time the track bulletin Form B takes effect, must not make further movement until instructed by employee in charge.

Corey Willbanks, Vice General Chairman, Secretary-Treasurer, ATSF stated at the opening of the hearing on May 5, 2014 that he was present to represent Claimant. He stated that the investigation had originally been scheduled for April 30, 2014, but the Organization did not receive the Investigation Notice until that date, in violation of the applicable agreement language requiring five days' notice of an investigation. The Hearing Officer noted that he had waited until 10:26 a.m. to begin the investigation but Claimant was not present.

Carrier Project Engineer Trevor Atwood testified at the investigation that at the time of the incident he was coordinating all work for a bridge replacement project. On April 17, 2014, he stated, Claimant was working as the flagman right after the bridge location at MP 110.26. There was a Form B, restriction 8291, between MP 109.0 and 111.0 from 6:30 a.m. to 4 p.m. and Main Tracks 1 and 2.

Mr. Atwood stated that Claimant called and texted him that day, explaining that he wanted to discuss something, and Mr. Atwood arrived at the jobsite at about 1 p.m. He stated that there were no red flags displayed as required at the Form B limits, MP 109. There were contractors working, moving toward the tracks, and the lack of flags concerned him.

Mr. Atwood testified that Claimant was parked on the south side of the bridge and he stopped and asked if flags were displayed at MP 109, and Claimant replied that they were not but the Form B was still good because the trains were calling him. Mr. Atwood replied that the red flags were the protection for the Form B, and he stopped all movement and briefed with those on site that there was no protection in effect.

Mr. Atwood continued that Claimant told him that was why he had wanted to speak to him, as he had been pulled over by the police that morning so it took him extra time to get to the jobsite, and he wanted to attend the contractor briefing at 7 a.m.

Mr. Atwood voided the Form B and looked at the other locations where flags should have been displayed. There were no red flags as required at MP 111.0, and the yellow-red flags which should have been at 113 for eastbound movement were not displayed. The only flags displayed were yellow-red at MP 107.

The investigation record also includes statements employees of the contractor that at the 7 a.m. contractor briefing Claimant informed everyone that Form B protection was in effect from MP 109 to MP 111 and generally confirming Mr. Atwood's version of events.

Claimant's personal record shows no previous discipline.

The Carrier first asserts that the investigation was conducted in a fair and impartial manner and the Organization's procedural objections lack merit. In particular, the Carrier notes the Organization's contention that Claimant was not present at the investigation because he believed it was going to be cancelled based upon the Organization's argument that the Investigation Notice was untimely. However, the Carrier stresses, the absence was not the Carrier's fault.

The Carrier notes that the original notice was timely sent to Claimant, his local representative, his Vice-General Chairman and the Burlington Federation, on April 29, 2014, and the Carrier mailed an amended notice as a courtesy to the ATSFF Federation on April 30, 2014 to give the Organization sufficient time to prepare. The Carrier points out that the record includes the US Postal Service certified return receipt, showing attempted delivery to Claimant on May 1, 2014. More importantly, at no time during the progression of this case did the Organization or Claimant deny that they had received the Investigation Notice. The Carrier adds that Claimant appeared at another investigation at 1 p.m. the same day as this investigation, and acknowledged on that record that the notice had been hand delivered.

The Carrier asserts that Claimant made a conscious decision not to appear at this investigation, at his own peril. Numerous Boards have held, the Carrier notes, that absence of the principal and/or organization representative is not, in and of itself, cause to negate an investigation. Moreover, an Organization representative was present and afforded every opportunity to question witnesses and present evidence. There was, the Carrier concludes, no procedural defect which denied Claimant his right to a fair and impartial investigation.

On the merits, the Carrier points to Mr. Atwood's statement that in response to a call from Claimant he drove to MP 109, where red flags were supposed to be displayed because contractors were working at the job site. Claimant, the Carrier states, was parked observing the work, and stated that his Form B was still valid, which according to Mr. Atwood, was incorrect. The Carrier notes that Mr. Atwood stopped the crane movements at the jobsite and notified everyone there were no flags up at MP 109. The Carrier adds that Claimant stated that he was pulled over by the police at about 6 a.m., before he got to the flag location, and to avoid being late to the 7 a.m. contractor briefing he simply did not display the flags. The Carrier further points to Mr. Atwood's testimony that he looked for the other set of red flags which should have been displayed at MP 111.0, but they were not there, nor were the yellow flags which should have been at MP 113. The other flags displayed, the Carrier states, were at MP 107.0. The Carrier notes that Mr. Atwood's testimony was confirmed by the contractors.

The Carrier asserts it is clear that Claimant violated MOWOR 5.4.7 Display of Red Flag or Red Light, and 15.2, as alleged. Indeed, the Carrier maintains, Claimant

admitted that he did not place the flags, and it is well settled that an admission is sufficient to satisfy the Carrier's burden of proof.

As for the penalty, the Carrier asserts that it was assessed in accordance with its Policy for Employee Performance Accountability (PEPA). The PEPA recognizes Claimant's violations as serious, and the discipline assessed is consistent with the policy, the Carrier stresses. The Carrier urges that the claim be denied.

The Organization challenges Claimant's dismissal on procedural and substantive grounds. In particular, the Organization asserts that Claimant did not receive the required five-day notice of the investigation, as required by the applicable agreement, which requires that, "At least five days advance written notice of the investigation shall be given the employee and the appropriate local organization representative . . ." The Organization asserts that it did not receive the notice until April 30, 2014, the day of the investigation. In order for Claimant to have representation, the Organization adds, the hearing had to be postponed until May 5, 2014. The Organization continues that Claimant was not present at the investigation because he was under the impression it would be canceled due to these errors, but the Hearing Officer elected to proceed without him. The Carrier denied Claimant his procedural rights, the Organization concludes, and the discipline should be overturned on that basis alone.

On the merits, the Organization asserts that the Carrier did not produce evidence to support its charges, but, even if it had, the discipline assessed is extreme, unwarranted, and unjustified. The Organization urges that the claim be sustained.

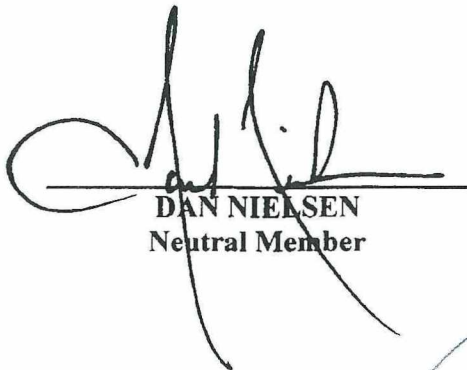
We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which deprived Claimant of his right to a fair and impartial investigation. In particular, the record includes an Investigation Notice dated April 22, 2014, setting the investigation for April 30, 2014, and there is no assertion that Claimant did not receive the notice. There is no explanation for why, as the Organization representative asserted at the hearing, he did not receive the notice until April 30, nor is there any assertion that it was not timely provided to any other Organization representatives. In any event, the Carrier postponed the investigation, giving the Organization the required five days, so it is not clear how Claimant was prejudiced.

As for Claimant's failure to attend the investigation, there is nothing in the record to support the Organization's contention that he believed the hearing would be canceled, or to explain why such a belief should be treated as reasonable. If he believed this, it appears to be solely his own opinion, not based on anything in the rules or anything he was told. We note that the investigation was attended by his Organization representative who had the opportunity to participate fully in the hearing. Given all of this, we agree with the Carrier that Claimant was provided a fair investigation.

On the merits, Mr. Atwood's un rebutted testimony clearly establishes that Claimant violated Carrier Rules as alleged. He committed a serious violation, and we see no reason to disturb the penalty deemed appropriate by the Carrier.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



ALEX STADHEIM
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 16 day of November, 2016.