

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 486 – Award No. 486 – Foss, Waldrop, Anderson and Schulte
Carrier File No. 14-15-0020
Organization File No. 170-SF13S1-1428

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing September 17, 2014, when four Claimants were disciplined Claimants Charles I. Foss (0107243) and Tanner Waldrop (0107490) each receiving a Formal Reprimand with a 1-year review period and Claimants Robert Todd Anderson (0107318) and Michael Schulte (0107292) receiving Level S 30-Day Record Suspensions with 3-year review periods. Discipline alleged they were careless of the safety of themselves and others when their work group failed to clear the track prior to a train passing on adjacent track while working on the Seligman Subdivision on August 6, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 12.0 Adjacent Track Operations, MOWOR 12.2 Special Operating Guidelines/Adjacent Track Protection and MOWOR 1.6 Conduct.

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 September 17, 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.

On August 19, 2014, the Carrier notified Claimants to attend an investigation to ascertain the facts and determine their responsibility, if any, in connection with their alleged carelessness for the safety of themselves and others when they failed to clear the track prior to a train passing on adjacent track while working on the Seligman Subdivision at approximately MP 405.5, East Eagles Nest on August 6, 2014. The Carrier claimed first knowledge on August 13, 2014. The Investigation Notice stated that the investigation would determine possible violation of (MOWOR) 12.0 Adjacent Track Operations, MOWOR 12.2 Special Operating Guidelines/Adjacent Track Protection and MOWOR 1.6 Conduct. Following the investigation, the Carrier found that Claimants had committed the misconduct alleged, and assessed Claimants Foss and Waldrop standard formal reprimands and Anderson and Schulte Level S 30-day record suspensions.

MOWOR 12.0, Adjacent Track Operations, provides, in relevant part:

12.2 Adjacent Controlled Track Protection

Work on a track must cease and roadway workers on the ground must move to a designated place of safety while a train or on-track equipment is passing on an adjacent controlled track . . .

No part of a roadway worker's body may extend beyond the rail of the occupied track nearest the movement on the adjacent controlled track when roadway workers on the ground are permitted to continue working while a train or on-track equipment is passing on an adjacent controlled track.

Do not occupy the space between a track and adjacent controlled track when a train is passing on the adjacent controlled track. . .

Division Engineer Sheri Ellis testified at the investigation that on or about August 6, 2014, she received an e-mail about a "near-miss" involving Claimants, at East Eagle's Nest where they were tamping frog and shoveling rock. She stated that Assistant Roadmaster Blake Allison went to the scene, verified that the employees were safe, and took statements from Claimants.

Claimant Anderson was Foreman of the gang. The employees were working on Main Track One, and had been wearing PPE, including earplug protection, so they had to rely on visual detection of trains on Track Two. Carrier Rules did not require a lookout, and they were working without one. At the time in question, they observed a train approaching close by on Track Two. Claimant Schulte's statement indicated that he first observed the train from about 60 feet away. The initial statements indicated that none of

the employees had fouled Main Track Two, and none were between Main Track One and Main Track Two as the train went by. Although the situation was a little too close for comfort, based upon the statements, Ms. Ellis believed they had complied with the adjacent track rule.

After obtaining the employees' versions, Ms. Ellis obtained video taken at the front of the train, which was played during the investigation. The train had been traveling at 70 miles per hour at the time of the incident. Two still shots taken from the video were entered into the investigation record. Ms. Ellis testified that it was her perception, from the video, that Claimant Schulte, who had been working between Main Track One and Main Track Two, had not cleared before the train went by. She stated that she requested the investigation because she did not have him "actually visibly seen clear."

Ms. Ellis explained that the screenshots showed the work group, with two men standing on the field side of Main Track One, one in between the rails of Main Track One, and one on the crossover track between Main Track One and Main Track Two. She stated that from her view of the video she did not believe Claimant Schulte was clear of the adjacent track before the train came by. She added that in the still it appeared that Claimant Schulte's body was within the crossover. She also stated that the train had been put into emergency, but the only evidence of that was the vocal heard on the tape's audio.

Ms. Ellis acknowledged that the video was taken from a forward-facing camera and there was no side view to show exactly where he was when the train passed.

Assistant Roadmaster Allison testified at the investigation that he did not believe, based on the video, that Claimant Schulte cleared the track before the train came by. He stated that if the train had been 60 feet away when Claimant Schulte first observed it, the train would have been upon him in 0.58 seconds. To be clear, he could not be breaking the plane of the rail between the two mains, and Mr. Allison did not believe, from what he observed in the video, that it was possible. He conceded that the applicable Rule did not require a minimum time or distance that the employee had to be clear, simply that he be clear when the train passed. He acknowledged that the train had not passed Claimant Schulte at the time the still shots were taken. However, he stated, the photo demonstrated to him that Claimant Schulte was, based upon his body language, still in between the two Main Tracks, and, with the train moving 70 miles per hour, he would have 3/10 of a second or less to clear. Mr. Allison explained that Claimant Schulte would not have been able to clear every portion of his body over the plane of the rail in time.

Claimant Anderson testified at the investigation that some of the work on the day at issue was to be performed between the two main tracks. He stated that they planned to use hot rail to determine that a train was approaching, and all four employees would share responsibility for watching for trains. He stated that he was in the middle of Main Track

One, in between its rails, as the train came by. He noticed the train when it was about 100 yards away, and yelled hot rail. His back was to the train, but, he stated, Claimant Schulte was in the clear before the train came by.

Claimant Foss testified that he heard Claimant Anderson yell hot rail, and when he turned around the train was about 100 to 200 feet away; he was practically in its headlights. He stated that he did not see Claimant Schulte's position when the train actually started by, and did not know exactly where he was at the moment the train passed.

Claimant Waldrop testified that at the time of the incident he was tamping the north rail of Main Track One. He stated that when he first saw the train Claimant Anderson was between the rails on Main Track One, and Claimant Schulte was moving off the tracks. He stated that Claimant Schulte was already stepping across and was between the rails on Main Track One before the train passed him.

Claimant Schulte testified that at the time of the incident he was working in between Main Track One and Main Track Two. He became aware of the approaching train when Claimant Anderson tapped him on the shoulder and yelled hot rail. He stated that he believed the train was about 60 feet away, but he did not turn around to look at it, just grabbed his tools and turned, and could see the lights out of the corner of his eye. He stated that the train was not yet at his location as he cleared onto Main Track One.

Claimant Schulte stated that it was difficult to tell, from what he observed of his position on the still photos, the distance of the train. However, he stated, he was over the frog, between the rails of Main Track One, before the train went by.

The Carrier first asserts that this case is not complicated, as Division Engineer Ellis testified that Claimants were working on an adjoining track without a lookout when a train came upon them at 70 miles per hour and they barely got out of the way, experiencing a "near miss." The Carrier states that the near miss was established by video taken from the front of the locomotive, which was entered as still shots into the hearing record. They show, the Carrier contends, that Claimant Schulte was not in the clear as the Rules require, and it was all four employees' responsibility to ensure that they were all safe and in the clear. This, the Carrier argues, was not done.

While the Organization contends that the Carrier predetermined Claimants' guilt because the incident was discussed prior to the hearing, Ms. Ellis explained that she initially believed Claimants' account that they were well out of the way of the oncoming train. However, the Carrier states, the video clearly shows Claimants still working on the track as the train approached, and any denials are not credible. Moreover, the Carrier notes, Claimant Anderson admitted it was a poor decision not to have a lookout, Claimant Waldrop acknowledged that it was not the safest way to proceed, and Claimant Schulte

stated that he would not act the same way again. There can be no doubt, the Carrier argues, that Claimants violated Carrier Rules as alleged.

As for the Organization's objection to the varying levels of discipline assessed, the Carrier responds that the differences are easily explained. Claimant Schulte was not in the clear when the train went by. Claimant Anderson was a Foreman and the employee in charge, who had a responsibility to protect the gang and was held to a higher standard. Claimants Foss and Waldrop shared responsibility, but they were operating machinery at the time of the incident and did get into the clear. Therefore, they received reprimands. The Carrier concludes that this was an incident which could have had catastrophic consequences, and the discipline assessed was appropriate. The Carrier urges that the claim be denied.

On the merits, the Organization asserts that there is no testimony whatever establishing that Claimants violated any Rules. What the Carrier characterizes as evidence consists of grainy, out of focus photographs from which it is impossible to ascertain with any certainty where Claimants were located at the time the train passed them. The Organization stresses that these photographs are the Carrier's only evidence in support of its case, and they are simply insufficient for it to meet its burden of proof.

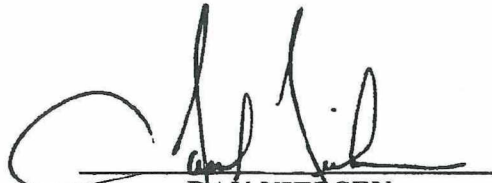
Even if there was some culpability, the Organization continues, it is difficult to see how the Carrier decided to assess the several employees different levels of discipline. Two employees received formal reprimands, the Organization notes, and two received Level S 30-day record suspensions. This type of disparate treatment clearly establishes the arbitrary nature of the entire process, the Organization states. There is no support for the penalties assessed against Claimants, the Organization concludes, and the claim should be sustained.

We have carefully reviewed the record in its entirety. The rule at issue is a serious one, intended to insure the safety of employees working on tracks. The employees charged in this matter did not violate any Rules by working without a lookout, but the decision to do so imposed on all of them a higher responsibility to make sure they were all clear of adjacent track before the train passed. It is apparent from all of the testimony that the train was quite close before they observed it, and it was, as all acknowledged, a near miss. While Claimant Schulte and his co-workers may well have believed he cleared to Main Track One before the train passed, this incident occurred in a matter of split seconds. The second photograph shows the rails behind his torso as the train – traveling 70 mph – is nearly upon him. Given Claimant Schulte's position on the track, as demonstrated by the still photos taken from the video, we must agree with the Carrier's witnesses that he could not, given the very small amount of time, have completely cleared the area between Main Track One and Main Track Two before the train went by. The Carrier has met its burden of proving guilt by substantial evidence, and all Claimants are culpable, as they were all responsible for ensuring the safety of the

group as a whole. As for the penalties assessed, the Carrier has explained the reasons for the different levels of discipline and we see no reason to overturn them.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member
ALEX STADHEIM
Carrier Member
DAVID SCOVILLE
Organization Member

Dated this 16 day of November, 2016.