

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 520 – Award No. 520 – G. Mack
Carrier File No. 14-19-0274
Organization File No. 2417-SL13D2-195

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Gregory Mack (6597694), for the removal of the Claimant's Dismissal for the violation of MWOR 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions, EI 2.8.1 Hot Weather. In addition, we request all record of discipline be removed from the Claimants record. The Claimant shall be made whole as a result of the Carrier's actions.

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, G. Mack, had been employed by the Carrier since 1995. On July 25, 2019, following an investigation, the Carrier found Claimant guilty of failing to comply with instructions and failing to perform required heat runs on June 9 and June 17, 2019. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.13 Reporting and Complying with Instructions and 1.6 Conduct, as well as Engineering Instruction (EI) 2.8.1 Hot Weather, and dismissed him from service.

At all times relevant, Claimant was working as a Track Supervisor on gang TINS3087 out of Kingman, Arizona. On June 9 and June 17, 2019, Claimant was required to complete a hot weather inspection, or a heat run, on the whole territory.

Sherri Ellis, Carrier Division Engineer for the Southwest West Division, testified at the investigation that there had been a thermal derailment on another division in early June 2019

because the rail was not properly inspected and protected behind a tie gang, which prompted her to run audits of all Track Supervisors' time. She found that on June 9, 2019, Claimant had only completed a heat run on half the territory despite previous instructions from the Roadmaster to do so on the entire territory. On June 17, 2019, Claimant's heat inspection was staggered, due in part to a service interruption, and he failed to properly escalate the matter after not obtaining track and time authority to complete the heat run.

Mike Espey, Kingston Roadmaster, testified that prior to June 9, 2019, he had confirmed via text message with Track Supervisor Frank Barrera and Claimant, who were responsible for adjoining territories, that each was required to cover the heat run on the other's territory on the other's off days. The text message was entered into evidence and, Mr. Espey testified, Mr. Barrera covered Claimant's territory on his off days. Claimant performed the heat inspection on his territory on June 9, 2019, but did not perform it on Mr. Barrera's, even though it was his off day. Claimant had not contacted Mr. Espey for further clarification, nor did he tell him he had failed to perform the inspection.

Mr. Espey stated that on June 10, he asked Claimant about his failure to run the entire territory the day before and Claimant told him he could not get enough track and time and did not know he was supposed to run the entire territory.

Mr. Espey further testified at the investigation that at about 3:30 p.m. on June 17, 2019, after Claimant started his heat run, Mr. Espey instructed him to address a track indication even though it would delay the heat inspection. He stated that Claimant argued with him and asked him to put the instruction in writing, and Mr. Espey did put it in text because the malfunctioning track indication was a priority.

Claimant notified Mr. Espey that the track indication was resolved at 5:35 p.m. It was not until 7:10 p.m. that Claimant notified Mr. Espey he had not obtained track and time since he was unable to reach the train he was waiting on, and that Espey learned Claimant had not completed the heat inspection. He stated that Claimant had apparently "been sitting there waiting" throughout this lengthy time period, making no inspections at all, and that had Claimant escalated the matter to him as required by the heat inspection rules he would have been able to help with obtaining track authority.

Carrier Engineering Instruction 2.8.1, provides, "When temperatures exceed the heat inspection policy threshold, inspections must progress at a pace that allows the entire affected territory to be inspected within the prescribed time. If the Track Inspector determines this might not be possible, for whatever reason, escalate to the Roadmaster and Division Engineer. . ."

Claimant testified at the investigation that on June 9, 2019, he and coworker Monte Kelly began their shift at 1100 hours. At 1155 hours, they set on to the track at Milepost 528.7 for their inspection. Claimant explained they backed up to the control point at West Griffith to complete an inspection on the controlled siding there, then continued eastward taking temperature readings. They had to wait just short of Peach Springs before they could set off the track, then returned to Kingman. Claimant stated that they eventually set off the track at 1835 hours. Claimant confirmed that the territory from Milepost 528.8 to 566.2, in Mr. Barrera's territory, was not traversed, but

maintained that the track was below the temperature which required the heat inspection, although he acknowledged that he and Mr. Espey had discussed that Claimant should contact him in that situation. He also maintained that it was not possible for one Track Inspector to cover the entire territory. He did not contact anyone about not completing the heat run.

Claimant also testified that on June 17, 2019, he attempted to set on the track at Kingman but was advised by two welders not to, as they were removing rail from critical locations. Claimant instead decided to set on at Milepost 485.5. While he was traveling there, Mr. Espey contacted Claimant and instructed him to take care of a track light service interruption at Milepost 477. Claimant stated that he told Mr. Espey this would make him late for his heat run, but Mr. Espey told him to do it anyway. After resolving the service interruption, Claimant stated, he continued his heat run and received track and time behind two trains at 1829 hour. However, he was unable to contact the second train, so he was unable to continue the heat run.

Text messages entered into evidence show the following exchange:

Claimant to Mr. Espey, June 17, 2019 at 5:34 p.m.: I have rail temp of 115 at mp 477.5 right now (which would require inspection)

Claimant to Mr. Espey, June 17, 2019 at 7:10 PM: I still haven't been able to get on track. Had time but couldn't contact both trains in the block.

When asked at the investigation what he had been doing during the time between the two text messages, Claimant stated that he had been driving.

Claimant's personal record shows a Level S record suspension in 2010 for failure to establish direct radio contact with a crew member after copying track and time behind a train; a formal reprimand in 2016 for failure to activate the HLCS system in equipment before occupying track; a formal reprimand in 2018 for dishonesty in connection with a transfer request; and a Level S 30 day record suspension with a three year review period on July 25, 2019, for an incident on May 19, 2019, for failure to activate the HLCS equipment while operating a vehicle.

The Carrier asserts that Claimant not only failed to comply with instructions and complete his heat runs on the days at issue, but also admitted that he did not attempt to contact a supervisor about any difficulty completing his assignments or obtaining track and time authority to do so. The evidence, Carrier argues, clearly demonstrates Claimant's negligence and careless behavior.

The Carrier states that Claimant's attempts to explain away every question as to why he did not comply with instructions and fully and properly perform his heat runs are less than credible. Equally unbelievable were his excuses concerning his clear decision not to comply with instructions and escalate the situation to his supervisor. Claimant admits, the Carrier stresses, that he failed to make any attempt to contact his supervisor, or any supervisor for that matter, to inform him of his difficulty obtaining track and time and ultimately not completing his assigned work.

The Carrier urges that when Claimant made the decision not to comply with his supervisor's instructions, he put his own safety at risk, as well as the safety of his coworkers and the public. These inspections are crucial to protecting the public and others from harm resulting from derailments caused by rail kinks and thermal misalignments. It is extremely fortunate that no accidents or derailments occurred from Claimant's negligence on the dates in question, but that does not excuse Claimant's carelessness.

With respect to the penalty, the Carrier maintains that even if Claimant's actions had not occurred during an active review period for a previous violation, Claimant's violations are stand-alone dismissible offense, and the discipline assessed was appropriate.

The Organization argues that the Carrier has not met its burden of proving that Claimant violated the cited rules. In support, the Organization cites Ms. Ellis's testimony that Claimant completed his territory and argues that she was not present for any conversation between Mr. Barrera, Claimant, and Mr. Espy. The Organization further contends that Claimant performed his inspections in accordance with his Roadmaster's instructions on both June 9 and June 17, 2019, including a detour to resolve a service interruption on the latter date. The Organization maintains that Claimant's dismissal was extreme and unwarranted, and the claim should be sustained.

We have carefully reviewed the record in its entirety and find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The record is clear that Mr. Espey instructed Claimant to perform heat runs on both his and Mr. Barrera's territories on June 9, 2019, and that he completed only his territory. His explanations for failing to do so are unconvincing, but more troubling is his failure to notify Mr. Espey of that fact so that he could issue further instructions or otherwise address the situation.

The record is also clear that Claimant did not complete the heat run on June 17, 2019 and, although the ordered detour to address the service interruption obviously interfered with that effort, the record shows no reasonable explanation for his failure to notify Mr. Espey that he did not have complete track and time authority, which prevented him from inspecting at all, for approximately one hour and forty minutes.

As the Carrier states, inspecting track in high heat situations is critical to prevent track failures and possible consequences, including derailments. EI 2.8.1 provides clear instructions for handling such situations, and Claimant just as clearly violated them. He did not complete the assigned inspections, and he did not so notify his supervisor so that the situation could be addressed. His guilt has been proven by substantial evidence,

With respect to the penalty, Claimant is a long-tenured employee and dismissal is obviously a harsh sanction. However, this record shows that Claimant not only failed to perform critical safety-related functions, he also deliberately compounded the violation by ignoring clear rules, and his supervisor's instructions, to escalate if the heat runs could not be completed. In addition to the seriousness of these violations, which the Carrier's Policy for Employee Performance and Accountability (PEPA) classify as stand-alone dismissible because they could have resulted in serious injury or derailment, Claimant was also under a review period for a previous serious violation approximately one month before those at issue which, under the PEPA,

subjected him to dismissal. Under these circumstances, we cannot say that the Carrier's decision to dismiss Claimant represents an unfair, arbitrary or discriminatory exercise of its discretion to determine the appropriate disciplinary sanction.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



LOGAN McKENNA
Carrier Member



JEFFERY L. FRY
Organization Member

Dated this 7 day of June, 2023.