

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 536 – Award No. 536 – R. Fairbanks
Carrier File No. 14-20-0078
Organization File No. 2403-SL13N1-216

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Robert Fairbanks (3032190) Seniority date April 2, 2018, for the reinstatement, with seniority, vacation, all rights unimpaired and pay for all wage loss including any overtime hours commencing on February 24, 2020, 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, R. Fairbanks, had been employed by the Carrier since April 4, 2018. On February 24, 2020, following an investigation, the Carrier found Claimant guilty of negligence and indifference to duty when, on January 27, 2020, he filled track machines with the wrong fuel, resulting in damage to three machines and production gang delays near Milepost 598.441 on the Hereford Subdivision. The Carrier determined that Claimant had violated Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and dismissed him from service.

At all times relevant, Claimant was working as a Fuel Truck Driver on production gang TP47 in Hereford, Texas. Assistant Roadmaster Chad Daily testified at the investigation that on the morning of January 27, 2020, at the gang's morning job briefing, he instructed Claimant to fill the fuel tank on the tool truck at the Goodin Fuel bulk location, located behind another gas station south of the jobsite. He stated that he pointed the station out of Claimant, and told him to use the red WEX Carrier credit card. Mr. Daily explained that the gang's fuel truck was in the shop, so

Claimant was driving the tool truck instead, which had a portable tank for fuel, or a fuel cell. The gang had used this tank to fill the machines with diesel fuel before January 27, 2020, but another employee fueled them.

Later that day, Claimant left the jobsite to get fuel, and around 1430 hours, Mr. Daily asked Claimant to fill the rail lifter, also known as a plater, with fuel. Mr. Daily explained that about 45 minutes later, he noticed that the front machines were not moving. When he walked to the front of the gang, Claimant informed him that he had put regular gasoline into the machine tanks. Mr. Dailey testified that he had the machines shut down and told the crew to call a mechanic for assistance. Mr. Dailey did not obtain a written statement from Claimant.

At the investigation, Mr. Daily provided several documents, including a copy of the receipt from Claimant's fuel purchase, which he found in Claimant's truck. It showed the date and time of the purchase, the fuel location and pump used, the last four digits of the credit card used, and that the purchase was for unleaded gasoline. The driver number shown on the receipt is Claimant's employee number. Mr. Daily then presented photographs of an orange credit card Claimant used and the red credit card that he had instructed Claimant to use. He stated that the orange card is for fueling vehicles, whereas the red card is for fueling the machines. The last four digits of the orange credit card correspond to the last four digits of the card noted on the receipt.

Mr. Daily also provided two photographs showing both sides of the gasoline pump Claimant used, which is the only pump at the station Claimant visited. The pump in the photograph reads "100 percent pure gasoline" and "86 Octane" and has a red hose and red nozzle. Mr. Daily explained that the location listed on Claimant's receipt was not the location to which he directed him. He testified that Claimant might have asked him to repeat where to go, and Mr. Daily explained to him where Goodin Fuels was located. He also pointed to the location, as it was visible from the jobsite.

Mr. Daily testified that this was not Claimant's first time fueling equipment, nor was there any reason to put gasoline into the portable tank. He stated that Claimant knew the diesel machines needed diesel fuel, and it is very clear that all three of the machines that were refueled that day—the rail lifter or plater, the spike puller, and the trip machine—required diesel fuel.

Roadway Equipment Supervisor Matt Zimmer testified at the investigation that Travel Mechanic Gerald Wright notified him that three pieces of equipment were filled with gasoline on the day at issue. He met Mr. Wright in Hereford, Texas, the following day to remove the gasoline and drain the fuel tanks on the machines. Starting with the spike puller, they drained the fuel tanks, removed the fuel filters, flushed the systems, refueled, and checked operation on the three machines. Mr. Zimmer further testified that while the spike puller and trip machine started and ran normally, the rail lifter was difficult to start, had reduced power, and was smoking a little. He explained he was told that machine was fueled first and ran the longest of the three.

Mr. Zimmer further explained that the rail lifter has a Hatz German air-cool engine. The internal injection pump on its diesel engine requires lubrication, and diesel fuel acts as a lubricant. Gasoline acts as a solvent because it has no oil, as diesel does, so the Carrier will have to replace the engine on that machine. He further testified that he called the nearest Hatz dealer, in Granbury,

Texas, and after providing the model number and serial number of the engine on the rail lifter, he received a \$10,580.23 estimate for a replacement. The product lead time is six to eight weeks, he added, and once the engine is available, it will replace the one currently on the machine. As of the hearing, the machine was being used, but Mr. Zimmer stated that it is very hard to start, has reduced power, and operates with a slight knock.

Mr. Zimmer also provided a document titled Diesel Fuels for Use in Roadway Work Equipment, a copy of which, he explained, is in each machine's logbook, in which Fuel Truck Drivers must record oil and filter changes. It states that "under no circumstances should any amount of gasoline be added to any diesel fuel, regardless of weather conditions, as violent explosions could occur." He further testified that the fuel tanks on the equipment are green if they burn diesel fuel.

At the investigation, Claimant testified that on January 27, 2020, his fuel truck was in the shop, so he was using a tool truck equipped with a portable fuel tank. That morning, Mr. Daily instructed him to get fuel from Goodin Fuel to fill up the machines. Claimant was unable to recall whether the Goodin Fuel location was visible from the jobsite, and explained that he had never worked in Hereford, Texas, before.

Claimant explained that when he went to get fuel, he saw the red-handled pump and believed it was the red dye diesel needed for the machines. He acknowledged at the hearing that the pump had a label indicating it was gasoline, but he did not notice it at the time he pumped the fuel. He further testified that he had never seen the red fuel card before, and this was his first time purchasing fuel for these machines.

Claimant testified that after filling the portable tank, he returned to the jobsite to top off the three machines, starting with the rail lifter, then the spike puller, then the trip machine. Claimant explained that after he filled the trip machine, he noticed that the fuel did not have the typical red coloring of red dye diesel, and he returned to the fuel station to double-check the label on the pump. He then realized that he had pumped gasoline instead of red dye diesel, and returned to the worksite, where he told the gang to shut down the machines and notified Mr. Daily of his mistake.

Claimant previously received a Level S 30-day suspension with a three-year review period, on November 30, 2018, for his failure to fill out a statement of on-track safety before using visual detection as a form of protection while working on the main track.

The Carrier asserts that it has provided substantial evidence of Claimant's guilt. Claimant admitted to improperly using gasoline to fill the portable fuel tank and three machines, when he knew how to determine proper fuel type and was aware of the damage that using gasoline in the machines could cause. Claimant's admission was corroborated by Mr. Daily's testimony and Mr. Zimmer's damage report. Claimant's negligence could have had serious consequences for Claimant and the other workers at the jobsite. Despite the Organization's argument to the contrary, the repairs needed on the rail lifter are not standard maintenance, and the crew was delayed due to the unscheduled maintenance and machines in faulty condition following Claimant's actions.

With respect to the penalty, the Carrier argues that the Organization's comparison of Claimant's situation to that of employee Robert Quinones is misguided, as the two instances are not identical. Mr. Quinones received a waiver after filling his diesel-only truck with gasoline. This was Claimant's second serious violation within an active review period and, under the Carrier's Policy for Employee Performance Accountability (PEPA), he was subject to dismissal. The other employee was not within an active review period when his incident occurred, and since there was no investigation, there is no way to compare damages. Claimant, however, was within an active review period when he filled the three machines with unleaded gasoline and the Carrier has provided evidence showing the extent of the damage caused. Therefore, dismissal is justified. The Carrier urges that the claim be denied.

The Organization argues that Claimant made an innocent mistake which merely caused down time on the day of the incident. He was in an unfamiliar location, working with an unfamiliar truck, received vague instructions from Mr. Daily, and he went to the only Goodin Fuel of which he was aware. Photos provided at the hearing showed that the sign on the fuel pump was faded and Claimant later learned that diesel fuel is represented by a green handle, not the red handle like the one at the pump he used. As this was also the first time Claimant had to fill the portable tank, he did not know to use the red card, which was tucked away inside the truck.

The Organization further argues that the Carrier failed to produce any evidence verifying that the damage done to the machines in question was a result of Claimant's mistake. Indeed, all three machines were still in use at the time of the hearing. Once Claimant realized the error, he immediately admitted his mistake and ordered the machines to be shut down to try to prevent any issues.

Lastly, the Organization notes an investigation waiver dated February 21, 2020 for another employee who put unleaded gas instead of diesel fuel into his work truck, causing damage and requiring repairs. There, the employee merely received a Standard Formal Reprimand rather than a dismissal. The Organization argues that situation is almost identical to Claimant's, yet Claimant faced much harsher discipline. For those reasons, the Organization requests that Claimant's discipline be removed from his record, and he be made whole.

We have carefully reviewed the record in its entirety. Claimant admitted that he went to the wrong fuel location, that he filled the portable tank with the wrong fuel, and that he used that tank to fuel three more machines. Claimant and the Organization urge that Claimant simply made an understandable mistake, as he was new to this location and had not used this fuel location or the red card for diesel fuel before. Claimant admitted that the pump was labeled as showing gasoline rather than diesel fuel, although he contended the instruction was faded and difficult to see, but the label is clearly visible in the photos submitted into evidence. He also acknowledged that the two types of fuel are different colors, although he did not notice that until he filled the last machine.

However, Mr. Daily testified that he pointed Claimant to the correct location and showed him the red card, which is only used for diesel fuel. Claimant was well aware that the machines needed diesel fuel and that it could result in damage and possibly dangerous consequences if they were instead filled with gasoline. If this was a new location for him, he should have been

especially careful to pay attention and obtain the correct fuel. It is obvious that Claimant's admitted mistake was inadvertent, but his conduct was, as the Carrier alleges, negligent. The Carrier has met its burden of proving Claimant's guilt by substantial evidence.

With respect to the penalty, this was, as the Carrier states, Claimant's second serious violation within an active review period and, according to the Carrier's PEPA, he was subject to dismissal. His mistake caused delays in the Carrier's operations, put employee safety at risk, and cost the Carrier a significant amount of money. Significantly, at the time of this incident Claimant had less than two years' service with the Carrier, and this was his second violation for serious negligent conduct. Under these circumstances, we cannot say that the Carrier's determination that dismissal was warranted represents an unfair, arbitrary or discriminatory exercise of the Carrier's 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 31 day of August, 2023.