

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 537 – Award No. 537 – S. Brown
Carrier File No. 14-20-0084
Organization File No. 2401-BN40N1-1985

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Shannon Brown EMP id 1108042 Seniority Date, 08-12-1996 for the removal of the Claimant's Dismissal, in addition, we request all record of discipline removed from the Claimant's record. The Claimant shall be made whole as defined by the following compensation(s):

1. All wages straight time and overtime, any wage increases adjustments at the ballast regulator rate of pay for all time lost starting when the Claimant was removed from service November 7, 2019.
2. Direct Carrier reimbursement to Railroad Retirement Board for any unemployment benefits incurred. No Railroad Retirement payments will be taken out of any back pay due the Claimant for wrongful termination.
3. Any 401k contributions with market adjustments.
4. Any out of pocket medical expenses and any additional premiums incurred as a result of this Dismissal.
5. All reimbursements to be made whole as defined within 30 days of authorized signature.

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, S. Brown, had been employed by the Carrier since 1996. On December 17, 2019, following an investigation, the Carrier found Claimant guilty of failing to follow adjacent track protection rules while operating a ballast regulator near Milepost 210.9 on the Chillicothe Subdivision on October 11, 2019. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 12.2 Adjacent Controlled Track Protection and 12.1.2 Fouling Adjacent Tracks, and dismissed him from service.

At all times relevant, Claimant was working as a Machine Operator on gang TSCX0363 out of Williamsfield, Illinois. Chillicothe Subdivision Roadmaster Zach Poteet testified at the investigation that on October 11, 2019, he and two other employees were checking on multiple workgroups in the area. Upon arrival, he stated, it was apparent there was disturbed ballast between the main lines, outside any Form B protection. While looking at the working area of the ballast regulator, which was being operated by Claimant, it appeared, Mr. Poteet explained, that he had used the regulator's wing between the rails without adjacent track protection. He stated that if the track centers are closer than 19 feet and an employee planned to occupy the space between the tracks, the employee would need to establish Form B or working limits on the adjacent track. His measurements showed approximately 14 feet between the track centers.

Mr. Poteet added that they questioned Claimant, who first stated that the recently disturbed ballast was from his plow and broom, but then admitted he used the wing in between the rails. Claimant explained that he was listening on the radio for trains approaching and felt safe to use his wing. Mr. Poteet further testified that he went over the applicable Rules with Claimant and told him he was not allowed to do that without adjacent track protection. He stated that Claimant admitted he knew that and apologized for initially lying.

When questioned, during the investigation, about previous comments to Claimant about his work product, Mr. Poteet explained that he never said Claimant or his work "sucked." He acknowledged that he told Claimant he needed to tighten up his work.

Claimant testified that on the date in question, the employees did not have track and time or a Form B on the other track and he knew the space between the tracks was close but he did not have any way to measure it. Claimant asserted that he asked Foreman Jason Mynatt twice if there was time available on the opposite track, to which Mr. Mynatt responded that he was not near his computer to check for authority and instructed Claimant to just do the best job he could. Claimant explained that he did put his wing down very briefly to pull rock in.

Claimant also testified that the adjacent track rule had always been a little confusing to him, and he made a judgment call that day but was not entirely certain that he broke a rule. He stated that he texted Mr. Poteet's supervisor, Adam Moe, that day, who responded that he did not think Claimant broke a rule. Claimant further testified that based on his text exchange with Mr. Moe, he felt that he had not done anything wrong.

Claimant further explained that when Mr. Poteet and his colleagues first approached him, he was on the defensive because he was not sure if he had done the right thing, so he told them he used his plow and broom. He further testified that he never felt as though he was going to be fouling, or within four feet of, the track next to him.

Claimant added that he had been receiving assistance through the Carrier's Employee Assistance Program for several mental health issues which impacted his work. He had been attending therapy and trying medication for his conditions for approximately a year. Claimant stated that he took Mr. Poteet's earlier comments about the caliber of his work very personally and had dealt with very disturbing situations at work that he simply could not shake. He stated that when he starts something, he cannot simply stop and always wants to do a good job, which was why he continued here without protection even though he was not sure there was enough distance between the tracks.

From 1997 through 2011, Claimant received one Formal Reprimand, one Censure, 12 Record Suspensions, three Actual Suspensions, two Dismissals, and one Reinstatement. Claimant thereafter received a Level-S 30-day Record Suspension with a one-year review period on September 7, 2016, related to his conduct during an incident near Brimfield, Illinois. On February 22, 2017, Claimant received a Formal Reprimand with a one-year review period for operating a motor vehicle without using a seatbelt, and, on April 8, 2019, Claimant received a Level-S 30-day Record Suspension with a three-year review period for dishonesty.

The Carrier contends that the applicable Rules clearly required Claimant to have protection before using the wing on the ballast regulator between adjacent tracks, as the track center was less than 19 feet. Claimant admitted that he knew the track center was "close," and that he did not have any protection on the adjacent track. It is well known, the Carrier stresses, that failing to follow these Rules could result in injury or fatality.

The Carrier also argues that despite Claimant's testimony that he was unsure of the Rules about working on adjacent tracks, Claimant is an experienced employee who is fully aware of the requirement to know and understand all applicable Rules and procedures. The Carrier asserts that taken in conjunction with the fact that, as Claimant put it, he did not provide the "whole truth" when he was first questioned, the record shows that Claimant chose to violate the Rules because he wanted to get to the ballast between the main lines in to fill the holes left by the tamper. The Carrier also notes that Claimant testified that he could see for miles and he "felt" he was safe to simply foul the other track for a minute or so even though the Rules expressly prohibit it.

The Carrier adds that the Organization's assertion that surfacing gangs regularly work without adjacent track protection, excusing Claimant's action, is a misleading claim. The Carrier notes that surfacing gangs do not always work in areas where other tracks run parallel to the track upon which they are working, and, consequently, no adjacent track protection would be required. Also, even when they do work near other parallel tracks, there may be more than 19 feet between the track centers so adjacent track protection would not be required. Here, protection was required, and Claimant knew it. He simply chose to work without it.

As for Claimant's concerns that several months prior to the incident, Mr. Poteet expressed dissatisfaction with his work, this has no relevance to Claimant's failure to obtain the required protection. Claimant could have called the anonymous Carrier hotline to report his concerns, and his decision not to do so does not excuse him from following Carrier rules and procedures. Similarly, the fact that he is receiving assistance with his personal issues does not excuse his actions. This was a serious violation and Claimant has a lengthy disciplinary history. The claim should be denied.

The Organization argues that the Carrier's determination of the adjacent track's center was inaccurate and asserts that Mr. Poteet acknowledged the measurements were "eyeballed." In addition, the Organization notes, Claimant's foreman instructed him to do what he could without track authority. The Organization also contends that the surfacing crew regularly works without adjacent track protection, as Mr. Poteet acknowledged, leading employees to believe it is either not required or merely a matter of convenience.

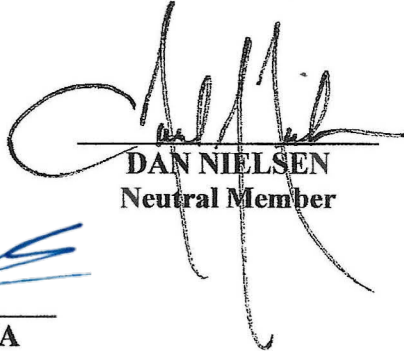
Lastly, the Organization notes that Claimant is being treated for PTSD, insomnia, and other issues that are the root causes and mitigating circumstances surrounding Claimant's fears, his recovery from which the Carrier should support. The Organization also notes Claimant's perception that Mr. Poteet believed that Claimant or his work "sucked." While Mr. Poteet denied any such statement, his perception impacted Claimant in a negative way and, coupled with Claimant's desire to do the best work he could, influenced Claimant's decision to proceed with using his wing between tracks for a short period on straight track without track authority. As such, the Organization requests that Claimant be reinstated and made whole.

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 establishes that Claimant was required to have track protection in the instant situation and was aware of that fact yet, by his own admission, chose to proceed without it. The fact that a supervisor might have told Claimant to do the best he could without protection was not an invitation to violate the Rules. It is well established that such an admission such as Claimant's is sufficient to satisfy the Carrier's burden of proof.

With respect to the level of discipline assessed, Claimant committed a serious safety violation and has a lengthy disciplinary record, including previous dismissal. While we are sympathetic to his mental health issues and appreciate his efforts to address them, that does not mean that the Carrier must accommodate an employee who claims that such issues interfere with, and excuse noncompliance with, the requirement to work safely for his own health and that of other employees. 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.