

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 542 – Award No. 542 – A. Lemon
Carrier File No. 14-19-0340
Organization File No. 0493-BN4011-191

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following discipline appeal on behalf of Adam Lemon (0376533) for the removal of the Claimant's Level S, 30-day record suspension and 1-year review, in addition, we request all record of discipline removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's violation, including the following compensations):

1. Straight time for any time lost, for participation of this investigation.
2. Removal the Level S and One Year Review and removal of any and all record of discipline concerning this investigation.

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, A. Lemon, had been employed by the Carrier since 2015. On September 24, 2019, following an investigation, the Carrier found Claimant guilty of failing to protect his assignment, leaving his assignment without proper authority, and indifference to duty on August 2, 2019. The Carrier determined that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.15 Duty-Reporting and 1.6 Conduct and assessed him a Level-S 30-day Record Suspension with a three-year review period.

This is the first of two cases before this Board regarding two employees on the same gang allegedly leaving their assignment early without express permission. At all times relevant, Claimant was working as a Group 2 Machine Operator on mobile gang TUCX-0001.

Assistant Roadmaster Anderson Garcia testified at the hearing that he was the supervisor present on the morning of August 2, 2019. At the time, the gang was attempting to move the undercutter from Track 4 to Track 3 in the Gold Bar, Washington, Yard. The Assistant Foreman for the gang, Chris Washington, tried to contact Claimant and fellow Machine Operator Thomas Mills because two machine operators were needed to move the undercutter. Neither Mr. Washington nor Mr. Garcia could locate them on-site. It was only after Mr. Washington phoned them that they determine that Claimant and Mr. Mills had left for the day without permission. Gang Foreman Cal Clement was not present on that day.

Mr. Garcia introduced two written statements from Mr. Washington dated August 25, 2019, one regarding Claimant and one regarding Mr. Mills. Mr. Washington's written statement regarding Claimant provided as follows:

On the date of August 2nd, 2019 we were loading machines to get them to the next job location. That morning we had our job safety briefing [at 0900 and] we covered all exposures, workplace, as well as me stating that no one is to leave until job is done. I made it clear that no one is to leave work until I had all machines on the flats and chained/blocked, also, I stated that everyone must stay until the undercutter was knuckled into the scorpion car. The undercutter was on Track 4 in Gold Bar, WA, we had to move it to Track 3 where the flats were located. When it was time to start moving the undercutter, Plasser was ready, however, my front and rear point operators were missing. I called on the radio for Tom [Mills] and [Claimant], but no response. I called for about 15 mins. I then leave the east switch and go by the undercutter, I am then told that [Claimant] went to get his windshield on his personal vehicle fixed. I had zero knowledge of this. I tried calling [Claimant] on his phone, no response. I then texted him and he stated he left at 1315. I did get guys to fill in to the positions I was short handed on, I did explain the current situation to Roadmaster Garcia.

Mr. Garcia also testified that only a roadmaster or a foreman could give an employee permission to leave, and Claimant did not have authority to leave from any of the foremen present that day, including himself or Mr. Washington. He explained that Claimant was insubordinate when he dismissed himself even though a foreman had instructed him to remain until specific work was completed. He further explained that Claimant was indifferent to duty because he did not have permission to be unavailable during normal working hours to perform his assigned duties. Mr. Garcia testified that he did not know of any prior agreement allowing operators to leave, and the gang was specifically instructed not to leave that day until everyone was done.

Stanley Foster, UC01 Roadway Equipment Supervisor, testified that he was present at the job safety briefing on August 2, 2019, as was Claimant, yet Claimant was not present at the end of the shift. He explained that it has been past practice that, whenever the gang gets ready to move, the foreman has let the Group 2 operators leave when they have their machine secured and ready

to move. He further explained that this instance was likely different because they were preparing to knuckle in and it would not be that long to wait. He stated that there was no discussion between him and Mr. Garcia or with any of the mechanics concerning any operators leaving and having the other Group 2 Operators serving as the front and rear point operators on the machine. However, in the past, Group 2 Operators have been able to leave at different times.

Claimant testified that he reported to the job briefing on time on the morning of August 2, 2019. He did not recall Mr. Washington telling them not to leave. He further testified that he had only joined the undercutter to the flat cars once; every other time it was done by a mechanic once it was parked next to the flats.

Claimant explained that that morning on his way to the jobsite, he travelled over a washboard section of road and his windshield, which had a small crack in it already, cracked completely across and down. After the morning briefing, he realized that he could barely see out of his windshield and he still had a 10-to-12-hour drive from Gold Bar, Washington, to Kalispell, Montana, for his next assignment. Claimant stated that he did not know when Mr. Washington would be back, as he had left to finish surfacing, so he told fellow Group 2 Operator Travis Allen to let Mr. Washington know that Claimant had to leave and try to find a new windshield for his car. Claimant provided a statement from Mr. Allen, which stated, "Adam did tell me he was going to leave early so he could go get a windshield put in his car on the day he was wrote up for leaving early." Claimant did not know whether Mr. Allen informed Mr. Washington of this before or after Mr. Washington started to look for Claimant.

Claimant also provided a statement from Kip Ahner, Traveling Mechanic for UC01, which explained that:

It's a very normal practice to have the mechanics operate the front and rear points. On the day before the move I had a briefing with [A]nderson Garcia and Stanley [F]oster that we [were] going to have to have to move the undercutter onto the flat cars after the machinery got loaded.

On the day of the move it was several hours after the gangs briefing that they where (sic) ready to move the undercutter. There was two qualified group 2 operators waiting there and willing to help with the move. Anderson Garcia got mad and threatened to right (sic) them up as well.

I believe it is a safe practice to let the front and rear point operators leave. It can be several hours or it can be the next day before we can bring the undercutter and flat cars together.

Claimant denied being insubordinate or inattentive to duty and denied having any phone contact with Mr. Washington that day.

Claimant had no prior discipline on his record at the time of the investigation.

The Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence. Mr. Washington advised Claimant during the morning job briefing to not leave but Claimant did so anyway, without Mr. Garcia's or Mr. Washington's knowledge or permission.

Mr. Foster's testimony confirmed that Claimant was instructed not to leave. Even though the Organization claims there is a prior practice of letting the operators leave early, this is superseded by the clear instructions given at the morning briefing.

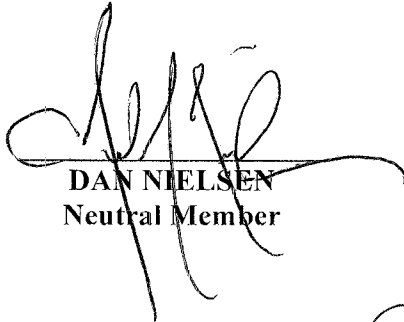
The Carrier further argues that neither the statement from Mr. Ahner, stating that it is normal practice to have the mechanics operate the front and rear points of the undercutter instead of the Group 2 operators, nor the statement from Mr. Allen, stating that Claimant advised him that he was leaving early for the day, suffices as a defense. As such, Claimant's discipline was warranted, and his claim should be denied.

The Organization contends that Claimant was forthcoming about leaving early on the day in question, and he was merely following a past practice wherein operators are allowed to leave. Despite the Carrier's contention that there was no prior discussion of leaving early, evidence provided by Claimant demonstrates that the mechanics, the roadmaster, and the mechanic supervisor discussed letting the Group 2 operators leave early the previous day. Claimant only left early to get a necessary repair done on his vehicle which otherwise would have made driving more dangerous. Further, Mr. Washington provided a written statement but was not in attendance at the hearing. The Organization maintains that Claimant did not violate any company rules and his claim should be sustained.

We have reviewed the record in its entirety, and we find that the Carrier has failed to satisfy its burden of proving Claimant's guilt. While it is undisputed that Claimant left the jobsite without advance explicit permission, testimony from Mr. Foster and Claimant suggest that it is common practice for Group 2 operators to leave at various times, even before the machines are hooked up to the flat cars. Additionally, statements provided by Claimant confirm that he notified a fellow operator when and why he was leaving since his supervisor was not present, and that other qualified operators were standing by to assist with the move. Between Claimant's testimony that he did not hear Mr. Washington tell them not to leave and Mr. Washington's statement that he indeed told them not to leave, it is at least as likely as not that this was a simple misunderstanding rather than insubordination or indifference to duty. As a result, the claim is sustained.

AWARD

Claim sustained. The Carrier is to comply with this Award within 30 days.



DAN NIELSEN
Neutral Member



LOGAN MCKENNA
Carrier Member



JEFFERY L. FRY 03/24/2025
Organization Member

Dated this 24 day of March , 2025.