

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 544 – Award No. 544 – T. Mills
Carrier File No. 14-20-0016
Organization File No. 4104-BN4011-192

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following discipline appeal on behalf of Thomas Mills (1014471) 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 compensation(s): Straight time for any time lost, for participation of this investigation.

1. Straight time for any time lost, for participation of this Investigation
2. Removal of 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, T. Mills, has been employed by the Carrier since 1995. 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 one-year review period.

This is the second 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 when the incident occurred 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 Adam Lemon 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. Lemon 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. Lemon. Regarding Claimant, Mr. Washington's written statement provided as follows:

On the date of August 2nd, 2019, we were loading machines to get them to the next location. So, that morning, we had our job safety briefing. In this briefing I let everyone know that no one is to leave work until I had all machines on the flats and chained and blocked. Also, I stated that everyone must stay until the undercutter knuckled in to 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, Plasser was ready to start moving, I then called on the radio for my front point ([Claimant]), and called for my rear point (Adam Lemon), no response. I tried calling for approx. 15 mins or so and still nothing. I then called [Claimant] on the phone to ask where he was, and I said "I need you here on the front point, where are you?" [Claimant] then stated, "Well, I am still in Washington, but too far to turn around." Keep in mind, [Claimant] was at my JSB that morning, our JSB was at 0900 and Mills took off at 1000. I did get some guys to fill in for me on those positions. I spoke with Roadmaster Garcia about the situation. It was kind of like a smack in the face that he totally disregarded my instructions. I had no idea he left until I needed him. I had been busy with the support equipment and helping surface crew, getting switched, and running my track and time. I did notice that morning prior to the briefing that his wife was in their personal vehicle by the briefing area. So I'm sure that had to play a role in him dismissing himself.

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.

At the investigation, Claimant testified that he did not hear Mr. Washington tell them at the briefing not to leave, and he left around 1000. He explained that he received a call from Mr. Washington asking where he was at, but nothing else. He further testified that it was common practice for at least the last year and a half for the mechanics to move the machines if the operators had a long way to travel to their next assignment. Indeed, the evidence at hearing included 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 further testified that Mr. Ahner told him that Mr. Ahner and Mr. Foster had discussed letting the operators leave early as they had a long drive ahead and let the mechanics take care of the moving the machines. Mr. Foster had agreed, and after they relayed the conversation to Mr. Garcia, he also agreed. Claimant also stated that he talked to the other operators that morning and they said they would be more than happy to take care of the move. If there were no other qualified operators present, he would have stayed.

Claimant previously received a Formal Reprimand on June 11, 1998, for causing damage to a Company vehicle while backing up. On February 18, 2004, Claimant received a 10-day Record Suspension for failing to lock out the remote for the boom on a Company vehicle. He also received a Level-S 30-day Record Suspension with a one-year review period on September 3, 2015, for failing to authorize a train crew on the correct track.

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.

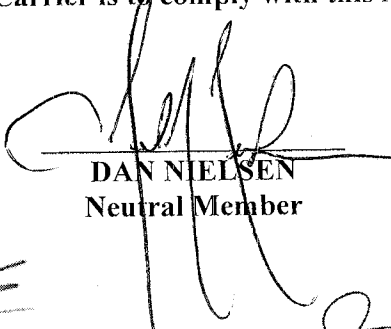
The Carrier further argues that the statement from Mr. Ahner, stating that it is normal practice to have the mechanics operate the front and rear points of the undercutter instead of the Group 2 operators, does not suffice as a defense, as Mr. Ahner is not a supervisor and Claimant failed to follow his supervisor's instructions. As such, Claimant's discipline was warranted, and his claim should be denied.

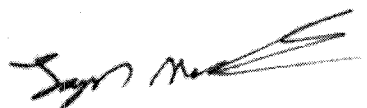
The Organization asserts that Claimant was forthcoming about leaving early on the day in question, and he was merely following a past practice wherein operators are allowed to leave. Despite the Carrier's contention that there was no prior discussion of leaving early, evidence provided by Claimant demonstrates that the mechanics, the roadmaster, and the mechanic supervisor discussed letting the Group 2 operators leave early the previous day. 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. 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.