PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 545 – Award No. 545 – B. Flood
Carrier File No. 14-20-0133
Organization File No. 2409-SL13N1-208

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Carrier file # RDV-MOW-2020-00178, Bobby Flood (013 8263) Seniority date August 06, 2012 for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service. 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended. 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed from service commencing March 16, 2020, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

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, B. Flood, had been employed by the Carrier since 2012. On March 16, 2020, following an investigation, the Carrier determined that Claimant exceeded the limits of his authority while fouling the main track near Milepost 288.7 on the Fort Worth Subdivision on January 21, 2020. The Carrier found that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 6.3.1 Track Authorization and 11.3 Fouling the Track, and dismissed him from service.

The underlying facts of this case are not in dispute. At all times relevant, Claimant was working as a Welder and Employee in Charge on mobile gang TRWX2541. On January 21, 2020, he was traveling in a hy-rail equipped Carrier vehicle; his crew consisted of employees Byron Dartez, Phealbrick Hill, Robert Quinones and Kendrick Stevenson.

Claimant had main track authority between Milepost 288.8 and Milepost 292.8 on the Fort Worth Subdivision. The gang approached a crossing, which Carrier track charts entered into the investigation record show located at Milepost 288—eight-tenths of a mile from the nearest limits of their authority—and prepared to set on the track.

Paul Clayborn, Roadmaster for Fort Worth South, testified at the investigation that on the day in question he was notified that Claimant's vehicle received an exceeds alarm at that location on its HLCS. Mr. Clayborn contacted Operations Manager Rush Williams, who investigated the incident and determined that the HLCS functioned as intended by preventing Claimant and his fellow employees from hy-railing the vehicle onto the tracks. Mr. Clayborn introduced an HLCS Report showing an exceeds alarm for Claimant's vehicle from 6:02:13 to 6:02:28.

Mr. Clayborn stated that under Maintenance of Way Operating Rule (MOWOR) 6.3.1, Claimant should have briefed with the dispatcher and identified where he planned to set on, but likely did not know or notice he was setting on outside his limits.

Shane Pendergraft, Manager of Engineering Certification for the Red River Division, was at the jobsite after the incident for a facility assessment. He testified that Claimant told him they had been on the track for 42 seconds, that they were physically on the track, that he had beenlowering the hy-rail gear to traverse the rail, and that he received the exceeds alarm. All five employees gave identical handwritten statements indicating that they had received authority, pulled up to the crossing and realized they had the wrong authority, and pulled off.

`Claimant and employees Quinones and Stevenson testified at the investigation. Mr. Quinones stated that they had just moved into position to set on the rails, but the truck did go on the crossing so, by definition, was foul of the tracks. Mr. Stevenson stated that they were just on the crossing, getting in position, but that they were foul of the track. Both acknowledged that they were attempting to set on at a location that was outside their limits.

Claimant denied telling Mr. Pendergraft that the vehicle had been on the track, and maintained that the hy-rails never touched the track. He testified that they pulled up to the crossing, the alarm went off, and he told Mr. Quinones to pull off the track and get out of the way. He pointed out that the HLCS Report showed the vehicle was only on the track for 15 seconds, which represented when they received the HLCS alarm and immediately pulled off the track.

Claimant acknowledged that the location at which they attempted to set on was not within his limits that day; he did not explain how or why he attempted to set on track there. He also acknowledged that they were foul of the track, but stated that he never set on or put the hy-rails down on the track.

Claimant stated that the HLCS was a "safety overlay," which worked as intended and prevented him from making a mistake that day.

Claimant previously received a Formal Reprimand on August 5, 2014 for failing to take proper remedial measures after Class 1 defects were found on the railroad. On February 23, 2018, Claimant received a Level-S 30-day Record Suspension with a one-year review period for leaving a safety briefing after being instructed to stay until the end. On June 27, 2019, Claimant received a Level-S 30-day Record Suspension with a three-year review period for handling an electronic device while operating a company vehicle.

The Carrier asserts that it has met its burden of proving, by substantial evidence, that Claimant violated MOWOR 6.3.1 and 11.3 when he and his fellow employees, all of whom were in safety-critical roles, attempted to occupy the track outside of their authorized limits, as they all acknowledged. The Organization's justification that they did not lower the hy-rails so did not make contact with the track does not excuse this action; the employees did foul the track in preparation to operate in unauthorized territory, a clear violation of Carrier Rules.

The Carrier points out that Claimant was the employee in charge and it was his responsibility to ensure a job briefing was conducted prior to operating on track. The Carrier notes Mr. Clayborn's testimony that Claimant "should've had [a job safety] briefing with the dispatcher and should've identified where he was . . . going to . . . set on[.]" His failure could have led to catastrophic results.

The Carrier further asserts that Claimant admitted guilt when he acknowledged operating the vehicle up to the crossing, outside of the gang's authority. This admission alone, the Carrier states, is sufficient to satisfy its burden of proof.

With respect to the penalty, the Carrier maintains that Claimant's violation was extremely serious and occurred during the active review period for an earlier serious violation. Under the Carrier's Policy for Employee Performance Accountability (PEPA), he was subject to discharge. The Carrier's decision was not arbitrary, excessive or extreme, as the Organization argues, and should not be disturbed by the Board.

The Organization argues that the evidence and testimony does not support the Carrier's argument that Claimant committed serious Rules violations. The Organization notes that the Carrier failed to produce any witnesses with firsthand information about the incident, and Mr. Williams' email simply confirmed that Claimant and his crew were simply preparing to set onto the track, but never occupied it or lowered the hy-rails, and therefore did not violate any Rules. Moreover, the Carrier's own records showed that the employees only fouled the track for 15 seconds at a crossing, where any vehicle that enters technically fouls the tracks. Further, the

Organization asserts that the employees were only fouling the track for 15 seconds while they were at the road crossing, which does not violate any Rules.

The Organization states that the HLCS system is designed as a safety overlay and worked as intended in this situation to prevent a safety violation. It is not, the Organization maintains, a discipline device. There is no basis for discipline, the Organization urges, and the claim should be sustained.

This is one of four claims before this Board regarding the same incident. We have reviewed the record in its entirety, and find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. It is not disputed that Claimant, who was the employee in charge, attempted to set his vehicle and crew on track at a spot where they had no authority to do so. Neither Claimant nor any of the other employees gave any explanation for this. There is no evidence that Claimant conducted a job briefing with the dispatcher or his crew members, who were apparently unaware of the location of their track authority that day.

Claimant indeed fouled the track, even if briefly. He was preparing to set on the track, and pulled off immediately only because the HLCS sounded the alarm. HLCS worked as intended, but the existence of that safety feature does not absolve employees of their responsibility to work safely. While perhaps not so egregious as the Carrier portrays it, he at least technically fouled the track and his guilt has been proven by substantial evidence.

As for the penalty, Claimant was an eight-year employee with a relatively minor disciplinary record at the time of the incident. It is true that he was within the review period for an earlier violation. Notwithstanding that, the Carrier's Policy for Employee Performance (PEPA), does not automatically require dismissal for one who violates limits, even if they are in a review period. Dismissal is the most extreme penalty available and the question is whether it is warranted.

Claimant was in charge of a crew, yet he failed to conduct any safety briefing with them or with the dispatcher. The great weight of the evidence is that he was intending to set on the track roughly a mile outside of his authority. He offered no explanation for why he would attempt such a plainly dangerous action. Claimant's conduct is completely inexplicable, but it is not up to the Carrier to explain what was going through his mind.

In the absence of any plausible alternate version of events, the Board cannot find any basis for concluding that the Carrier exceeded its discretion in decide to dismiss Claimant from service.

AWARD

Claim Denied

DAN NIELSEN
Neutral Member

JOE HEENAN
Carrier Member

JEFFERY L. FRY
Organization Member

Dated this 29th day of March 2025.