

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 548 – Award No. 548 – M. Wilson
Carrier File No. 14-20-0042
Organization File No. 2417-SL13S1-1933

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We Present the following claim on behalf of Mark Wilson (0371054), Seniority Date May 07, 2015, for the removal of the Claimant's Standard Formal Reprimand and 1 Year Review Period and was Disqualified from working on any surfacing equipment Group 7 Class 1 and Group 7 Class 2 for a period of 12 months. In addition, we request all record of discipline and disqualification be 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).

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, M. Wilson, has been employed by the Carrier since 2015. On November 1, 2019, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged failure to remain alert and attentive to avoid Jackson 6700 Tamper X5400425 striking a derail, resulting in derailing the tamper on October 30, 2019 at approximately 11:30 a.m. at Milepost 534.1 on the Seligman Subdivision, while assigned to surfacing gang TSCX1095. On December 13, 2019, following the investigation, the Carrier determined that Claimant had committed the violations alleged, in violation of Maintenance of Way Operating Rules (MOWOR) 1.1.2 Alert and Attentive¹ and

¹ The Standard Formal Reprimand dated December 13, 2019, indicates that Claimant was found to have violated MOWOR 1.1.2 Alert and Attentive; however, the exhibit provided by the Carrier at the investigation shows the relevant Alert and Attentive rule as MOWOR 1.2.3.

assessed him a Standard Formal Reprimand with a one-year review period. The Carrier also disqualified Claimant from working on surfacing equipment for 12 months, and required him to undergo Tamper Training.

At all times relevant, Claimant worked as a Machine Operator on surfacing gang TSCX1095 on the Seligman Subdivision. On the day at issue, he was operating a tamper. Craig Cole, Southwest Division Assistant Roadmaster, testified at the investigation that on October 30, 2019, he was in Kingman, Arizona when he received a call from Frank Barrera, the Foreman of surfacing gang TSCX1095. Mr. Barrera notified Mr. Cole that the tamper went on the ground but was not fouling the main track, and they needed his assistance. Mr. Cole confirmed that no one was injured, then told Mr. Barrera to try jacking up the front end of the tamper to re-rail it. Mr. Cole arrived at the site of the derail about 25 minutes later and observed everyone on the crew working to get the tamper re-railed, which they did.

Mr. Cole further testified that he observed minor damage to the machine and the track. The tamper had a dent in the spare battery box, the light bar mount was broken, and the battery in the battery box was damaged. The front wheels of the tamper had lifted the derail at the point of impact and broke up the ties underneath. After the tamper was re-railed, he debriefed with the gang and discussed looking out for derails, switches, and other equipment, and workers, when traveling track. While they were debriefing, Claimant told Mr. Cole that the air compressor on the tamper obscured his field of vision. Mr. Cole had only been supervising the crew for about a week or two before the incident, but Claimant had not previously raised this concern.

Mr. Cole also obtained a signed statement from Claimant, which was consistent with his subsequent testimony at the investigation. Claimant explained that Mr. Barrera notified him that everything was lined up to move the tamper into the "hole," where machines are kept when they are not working on the main track.

Claimant added that he was watching the switch points on his right side when the machine went off the track. Claimant acknowledged that he ran over a derail, but stated that he was moving the tamper at a crawling speed. Claimant stated that he told Mr. Cole about the compressor immediately after the incident, but had raised the issue with his previous supervisor several times and assumed he had escalated it, but nothing had been done, and the supervisor had berated him in front of his co-workers so did not pursue it. Apparently no other employees had raised similar concerns about the compressor, but it was removed from this machine following the incident.

Claimant admitted at the investigation that he ran over the derail at issue, causing the derailment. He acknowledged that it was ultimately up to the operator to make sure derails and switches were properly lined for his movement. He apologized for any "complacency" on his part, but stated that there was a "giant hunk of inoperable equipment" right in front of him which interfered with his vision. He acknowledged that he had the ability to remove the machine from service if it was unsafe.

Claimant was not removed from service following the incident, nor was he subjected to urinalysis. There were no train delays, and the gang's track and time was released on time. Claimant continued his usual duties thereafter.

Claimant previously received a Level-S 30-day Record Suspension with a three-year review period on June 2, 2017 for failing to yield the right of way while operating a tamper on May 10, 2017.

The Carrier asserts that it has presented substantial evidence of Claimant's Rules violation, as he admitted traveling over the derail at issue and took responsibility for his complacency in his signed statement and testimony, thereby acknowledging that he failed to stay alert and attentive. Despite the Organization's assertions that there were mitigating circumstances, none of the excuses absolve Claimant of responsibility for the incident. The Carrier points out that Claimant is an experienced tamper operator and should have been able to make appropriate decisions for the safety of himself and his crew, including removing an unsafe machine from service. His guilt has been proven by substantial evidence. The low level penalty was appropriate, given the nature of the incident, and should not be disturbed by this Board.

As for the disqualification, the Carrier states that it is consistent with the Carrier's handling of equipment and machine-related incidents. The Carrier asserts that this is a matter of its discretion and it is not covered by the parties' Agreement. The Carrier states that its action was appropriate and urges that the claim be denied.

The Organization argues that the Carrier failed to meet its burden of proving that Claimant violated MOWOR 1.1.2. The Organization points out that Foreman Frank Barrera was in charge when the incident occurred, had instructed Claimant to move the machine forward, and took responsibility for the incident when he signed a Risk Reduction Education form. The Organization further asserts that witness statements corroborate that Claimant had repeatedly raised the issue of the air compressor obstructing his field of vision with the previous Roadmaster, yet his concern was ignored. The air compressor on the tamper has since been removed, proving it obstructed the operator's vision. The Organization argues that the Carrier did not meet its burden of proving Claimant's violation.


The Organization adds that the level of discipline assessed against Claimant was extreme, unwarranted and unproven. The Organization asserts that the Carrier acted outside its own Policy for Employee Performance Accountability (PEPA) by adding the additional penalty of disqualification to Claimant's discipline. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety, and conclude that the Carrier has met its burden of proving Claimant's guilt of the Rules violation by substantial evidence. While Claimant was not solely responsible for the incident, he was, as he admitted, ultimately at fault because he was operating the machine. He also admitted to complacency, which, on its own, demonstrates that he was not alert and attentive as required and violated the applicable Carrier Rule. As for the compressor, he had not raised the issue with his current Roadmaster prior to the incident and, as the Carrier argues, bore responsibility for removing his machine from service if it could not be operated safely. His guilt has been proven by substantial evidence. We see no reason to overturn the Carrier's decision to assess Claimant a Standard Formal Reprimand. He was responsible for a derailment, and it is a very minor penalty.

However, the Carrier also chose to assess Claimant a disqualification as the result of the disciplinary hearing. While the Carrier is correct that disqualification is generally handled in a different manner, here the Carrier chose to specifically treat it as discipline, clearly setting it forth in the discipline letter, although not in the notice of investigation. Claimant and the Organization were given no notice that disqualification was at issue, and there was no evidence presented at the hearing going to such a question. We therefore find that under these particular circumstances we have the authority to remove the disciplinary disqualification, and hereby do so. The claim will be sustained to that extent.

AWARD

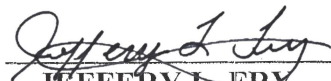
Claim denied in part, sustained in part. The Carrier had just cause to issue Claimant a Standard Formal Reprimand in connection with his conduct on October 30, 2019 but cannot support the disqualification issued as additional discipline for this incident. All notice of the disqualification shall be removed from Claimant's personal record, and he shall be made whole for his losses, if any. The Carrier shall comply with this Award within 45 days.



JOE HEENAN
Carrier Member



DAN NIELSEN
Neutral Member



JEFFERY L. FRY
Organization Member

Dated this 29th day of March 2025.