

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 552 – Award No. 552 – S. Schupbach
Carrier File No. 14-20-0130
Organization File No. 2417-SL13D3-201

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Shawn Schupbach (0368860), Seniority Date 05-07-2015 for the removal of the Claimant's Disqualification. In addition, we request all record of this 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, S. Schupbach, has been employed by the Carrier since 2015. On December 23, 2019, the Carrier disqualified Claimant as a Foreman due to indifference to duty when he failed to perform job duties of a Foreman as outlined in the Engineering Instructions, and his failure to report to a call out. The Organization requested a hearing on January 9, 2020; it was held on February 7, 2020. On March 4, 2020, the Carrier upheld the disqualification.

At the relevant time, Claimant had been working as a foreman for about eight months. He was assigned to Section Gang TSEC0600, on the Williams Section at the relevant time. Williams, Arizona Roadmaster Kevin Self, testified at the investigation that he was Claimant's immediate supervisor and made the decision to disqualify him. He stated that the duties of a foreman are clearly set out in Carrier Engineering Instructions, and include, among others, ensuring that tools, are used and maintained properly and economically; supervising, training, and ensuring the safety of employees under his charge; ensuring job safety briefings are conducted as required; submitting

time, material and other necessary reports; ensuring the area of responsibility is inspected as may be necessary; and in the case of an emergency callout, leave a qualified employee in charge and notify the supervisor as soon as possible.

Mr. Self explained that Claimant was called for a main track broken rail emergency, which delayed trains, on a Sunday morning and Mr. Self was informed that three or four hours into the incident Claimant had not appeared. Mr. Self testified that the Track Supervisor had called him and said they had called Claimant, but he had not returned the call or shown up at the site. So, Mr. Self traveled to the location to get the truck ready. He also personally called Claimant several times that day to make sure nothing had happened to him, but Claimant never called back. Claimant testified that he did not recall receiving any calls that evening, but when he woke up he saw he had missed calls which he knew meant his supervisors wanted him to come in to work. His phone records showed that he did answer one call but he maintained he did not recall it.

Mr. Self explained that as he was warming the truck up he started going through the truck bed. It was in disarray, and there were no angle bars or bolts on the truck. He stated that it was not acceptable to leave the truck overnight without checking that it was properly stocked and ready to go. He added that the garage was a mess, with mud all over the floor, and had not been properly maintained.

Mr. Self also explained that in November and December 2019, Claimant reported time for himself late 32 times, including two days late on one occasion. Mr. Self also described that the rail detector had been run on December 20, 2019, and showed two defects. He pulled the report on December 27, 2019, but there had been no remedial action.

Mr. Self stated that he had spoken repeatedly with Claimant about late reporting, closing out defects, job briefings, lining level board, and the like. He acknowledged that there was no written record of a formal coach and counseling.

Claimant testified at the investigation that he did not recall receiving any calls on the evening in question, but when he woke up he saw he had missed calls which he knew meant his supervisors wanted him to come in to work. However, he had personal issues going on so he did not call back. He acknowledged that the call was for an emergency. He also admitted that his phone showed he had answered one call, but said he did not recall doing so.

Claimant also stated that he had difficulties with a new payroll system and he so informed Mr. Self, who told him time was not that important, fixing rail was. He had no formal training on the new system, which had been in place for about 10 months at the relevant time. He explained that he eventually had to call the help desk to have his problem fixed manually.

Claimant's personal record shows a record suspension issued on December 12, 2019 for occupying main line track with hyrail equipment outside of working authority limits.

The Organization asserts that Claimant was unjustly disqualified for unproven allegations and opinions related to his Foreman duties and responsibilities. In his closing statement at hearing, the Organization representative stated that the Carrier had failed to prove its case for disqualifying

Claimant, and made several references to the Carrier's actions allegedly violating its Policy for Employee Performance Accountability (PEPA). The Organization notes that Carrier Roadmaster Kevin Self alleged that Claimant did not report for work for a callout, but Mr. Self did not make the call himself and could not recall the day on which it allegedly occurred. The Carrier maintains Rules governing callouts, but they were not even mentioned in the Notice or during the hearing itself. The Organization adds that Claimant did not recall answering any call at the time at issue.

The Organization also states that the Carrier did not specify the criteria for disqualification as opposed to Rules violations, or who makes those determinations. At the hearing, the only indifference to duty, as set forth in the Carrier's Engineering Instructions, was Claimant's submission of time to PARS, but Claimant testified that he never used PARS to submit time, as it has been replaced by a new system, EAM, on which he has had no formal training.

The Organization urges that the unjust and unwarranted disqualification be overturned.

The Carrier first contends that the claim is procedurally defective, primarily because the proper route to contest a disqualification is by requesting an unjust treatment hearing pursuant to Rule 13(l) of the parties' Agreement. The Carrier asserts that the Organization never requested such a hearing, instead requesting a disciplinary hearing pursuant to Rule 8(c). Because no unjust treatment hearing was conducted, the instant claim is procedurally defective.

In any event, the Carrier maintains, Rule 8 gives it the right to disqualify employees. The Organization's assertion that it must apply its discipline policy instead of disqualifying an employee who has demonstrated his inability to perform the required duties of the assignment is simply incorrect.

On the merits, the Carrier asserts that the record clearly proves that Claimant failed his foreman responsibilities in several significant ways. First, on or about December 21, 2019, the Track Supervisor called Claimant, the Foreman of the appropriate section gang, late at night, about a broken rail emergency which was causing a service interruption. The Carrier asserts that Claimant answered the phone, and stated that he would respond. However, he never appeared at work, nor did he return any of Mr. Self's subsequent calls throughout that weekend.

The Carrier also notes that when he arrived at the location, Mr. Self found the Section truck in disarray, missing basic tools and equipment the gang needed to perform its duties. The garage where the truck was stored was also a mess. Further, the record shows that Claimant failed, in December 2019, to timely have rail defects addressed.

The Carrier states that these matters, along with Claimant's habitual failure to submit time reports in a timely manner, demonstrates that he was not qualified to perform a foreman's duties and responsibilities. As Mr. Self testified, he coached and counseled Claimant several times regarding his concerns, to no avail.

The Carrier stresses that foreman is a very responsible position. It must be able to rely on the foreman, the first person called in an emergency, to respond. Claimant clearly did not, and his insufficient performance of his other duties further demonstrates that he is not qualified to continue

in the foreman position. The Organization has not met its burden of proving that he was treated unjustly.

We have carefully reviewed the record in its entirety. First, we agree with the Carrier that challenges to disqualification should technically be requested pursuant to Rule 13(l), the unjust treatment provision, rather than 8(c), which provides for challenges to discipline. In disqualifications, the Carrier has the discretion to determine whether an employee meets a position's requirements, subject only to a finding that the employee was unjustly treated. The Organization has the burden of proving unjust treatment.

However, the Carrier never raised an objection at any time prior to, or during, the hearing. The Carrier fully participated in the hearing, and both sides presented extensive evidence as to whether the disqualification was justified. Therefore, we find that this matter is properly before this Board.

Whichever party held the burden of proof, here the result would be the same. Mr. Self fully explained the reasons for his decision to disqualify Claimant. Indeed, Claimant did not deny Mr. Self's allegations about his conduct. He admitted that he refused to respond to an emergency call or make any arrangements for the assignment to be covered. He did not dispute that the truck and garage were in poor repair. He did not deny that he failed to have identified track defects corrected. He did not deny that he failed to timely submit time reports. His explanation that he did not understand the timekeeping system, and that it did not operate properly, rings hollow after many months' experience. Further, Mr. Self testified that he repeatedly spoke to Claimant about deficiencies in his duties.

Claimant held a supervisory position and the Carrier had the right to insist that he perform in accordance with its expectations. This record shows deliberate, flat-out refusal to perform one essential function, and negligent performance of several others. We cannot conclude that the Carrier's decision to disqualify him was unjust.

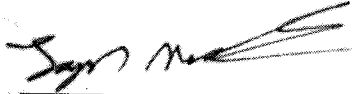
AWARD

Claim denied.



3/24/25

DAN NIELSEN
Neutral Member



LOGAN MCKENNA
Carrier Member



JEFFERY L. FRY 03/24/2025
Organization Member

Dated this 24 day of _____, 2025.

March