

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 555 – Award No. 555 – M. Urioste
Carrier File No. 14-21-0030
Organization File No. 2416-SL13N1-20107

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Carrier file # RDV-MOW-2020-01335, Michael Urioste (0068239) Seniority date June 20, 2011 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 November 19, 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, M. Urioste, had been employed by the Carrier since 2011. On November 19, 2020, following an investigation, the Carrier determined that Claimant had failed to verify a safe path, failed to line derail for movement and failed to ensure the position of switches and derails on September 15, 2020 at approximately 1300 hours near MP 45.2 on the Slaton Subdivision. The Carrier found that Claimant had violated MOWOR 8.2 Position of Switches, and dismissed him from service.

At all times relevant, Claimant was working as a Foreman assigned to TSCX1065, the Lubbock Red River Surfacing Gang. He and his co-worker, Tamper Machine Operator T. Hernandez, were working on the Staton Subdivision near MP 45.2 on September 15, 2020.

Carrier Lubbock, Texas Roadmaster Corey Kirk testified at the investigation that at the time at issue Claimant contacted him and told him the tamper had derailed as they were going to clear the track, and he did not know what had happened. Mr. Kirk stated that he had Track Supervisor Robert Henley go to the site to take photographs, and Mr. Kirk visited the site the next day.

Mr. Kirk explained at the hearing that the photos, which were entered into the investigation record, were taken at the location of the derailment, and showed that the derail was located directly under the machine when it derailed. One photo showed the tamper's wheel, with paint marks from the derail. Mr. Kirk also showed the derail after it had been removed from the track, showing impact marks on the left side, and another photo, apparently taken before the incident, with the derail in its correct position. Mr. Kirk acknowledged that he had not been present at the time of the incident and did not take the photographs.

Mr. Kirk read into evidence a written statement given by Claimant at the time of the incident. It read, "Was at Amherst set out unlocked and through derail. Walked to switch. Waited for guys to get past switch. Gave them okay to get into set out and locked switch and was notified by tamper, he was stopped and derailed." He also read a statement from Claimant's co-worker Mr. Hernandez. It stated, "We were working at Mile Post 46.7, going East, and the Foreman said clean up for a train clear up going to the switch at Amherst. Then, the train derailed."

Track Supervisor Robert Henley testified at the investigation that on the day at issue Claimant called and told him the gang had derailed a tamper. He traveled to the location. Mr. Henley acknowledged that he did not arrive at the site until after the incident was over, but stated that he took the photos right after the incident happened. He then saw Machine Operator Hernandez remove the derail from beneath the derailed machine to move it out of the way. Mr. Henley stated he could see that the derail had been struck and ripped from the ties, the spikes were gone, and there was yellow paint on the rail where the tamper hit it. He also stated that the photographs demonstrated that the derail had been thrown because all of the orange paint was chipped off the point of the derail. He stated that he believed he took additional photos which were not presented at the investigation.

Mr. Henley stated that there was "no way" the machine could have derailed before reaching the derail and torn the derail out of the track the way it did. He testified that the manner in which this derail was damaged could only happen when it is on the track and hit, not when it is on the

ground. He added that one could see the damaged point of the derail, and that would only happen if it was still on the track.

Claimant testified at the investigation that he was at the switch at the time of the derailment. He stated that he walked to the switch and waited for the operators to get past the switch before he could line it. He maintained that he had unlocked the derail and put it in the safe position where it would not derail. He explained that he took the lock off the derail and flopped it over with the lock inside the derail and this meant it was not in the derail position. He stated that he told Mr. Hernandez that the derail "was in the dirt," and the switch was lined for his movement.

He stated that he looked back at the derail before he gave this information to Mr. Hernandez. It was on the ground, not on the track. Mr. Hernandez was the first machine through, and his machine stopped and derailed. He did not see the actual derailment or what had derailed the tamper. He stated that it could not have been the derail that caused the derailment, because he knew it was in the safe position.

Claimant insisted that all he knew was that he threw the derail, but the machine derailed anyway. It could have been loose bars or different sized rails on a joint that caused the machine to derail. He stated that in looking at the photographs, it appeared that there were different sized rails on a nearby joint. He explained that a rail joint is where two pieces of rail join together, but are bolted, not welded. He stated that it was possible the tamper derailed on the joint, then traveled over the derail that was lying in the dirt. He added that the orange paint shown on the tamper wheel in the photographs could have come from running over the derail while it was lying in the dirt. Claimant also stated that if the tamper had derailed before reaching the cleared derail, its wheel still would have ripped the derail out of the ties.

Claimant's disciplinary record shows a 36-month record suspension in 2015 for occupying track without proper authority and failing to engage the required HLCS in his vehicle; a 36-month record suspension in 2018 for failure to obtain proper authorization prior to entering main track; and a formal reprimand (pursuant to waiver) for, on September 1, 2020, leaving an "unsecure/open derail."

Machine Operator T. Hernandez, who was also charged in this matter, testified at the investigation that he and Claimant discussed the movement coming into the back track before the incident, and Claimant told him that the derail "was in the dirt," which meant his path was clear to proceed forward. He stated that he traveled past and cleared the switch, and Claimant lined the switch, gave him a briefing, and informed him that the derail was in the dirt, meaning it was safe to travel over.

Mr. Hernandez stated that he did not know what happened; his machine just derailed and was on the ground. He added that the derailment could have been caused by a number of things, like a joint or bad frog. He also stated that a nearby joint had different sized rails, and if that caused the derailment the machine would still have ripped the derail from the ties and put orange paint on the wheel, because the derail was painted orange. He maintained that there was no way to tell what caused the derailment.

Mr. Hernandez stated that he had looked at the switch points as the machine's front end went through, and he could tell the switch was lined for his movement. By the time he looked back at the derail, however, he could not see its position due to the length of his machine. He stated, however, that he did not believe the derail was on top of the rail when he traveled over it because he had been told that it was unlocked and flopped onto the dirt. He also noted that in the picture of the derail allegedly in the proper position it was not securely fastened because some of the spikes were sticking up.

The Carrier states that it has proven Claimant's misconduct by substantial evidence. The evidence showed that the derail was located directly under the machine when it derailed, and photographs taken at the scene showed damage and impact marks to the derail after it was removed from the track. The photos also showed paint transfer between the machine and the derail. The location and condition of the derail show that Claimant committed the violation alleged. The Carrier urges that it has met its burden of proving Claimant's guilt by substantial evidence.

With respect to the penalty, the Carrier states that dismissal was appropriate and assessed in accordance with its discipline policy, the PEPA. In addition to the serious nature of this incident, the Carrier notes, this was Claimant's third serious violation in five years and his third rule violation within an active review period for a previous Level S offense. The Carrier states that it has already shown Claimant leniency when it did not dismiss him for his second offense within that review period. The Carrier urges that the penalty was not excessive, and was a reasonable exercise of its right to determine penalties. The claim should be denied.

The Organization states that the Carrier has failed to prove that Claimant is guilty of any misconduct. It asserts that the Carrier witnesses provided nothing other than opinion or assumptions, and there is nothing to show that the incident occurred due to a Rules violation by Claimant. The Organization notes that the Carrier witnesses were not present during the incident and had no first hand knowledge of how the derailment happened.

The Organization stresses that the Carrier had no facts other than a derailment occurred, and this information was provided by Claimant. Mr. Henley went to the scene and took photographs but again, they showed nothing other than that a derailment took place. Mr. Henley simply assumed that Claimant ran over the derail, causing the machine to derail.

The Organization points out that Claimant and his co-worker were the only ones present at the time of the incident, and the only ones with first-hand knowledge. Claimant provided detailed testimony that after traveling to the clear up location, he placed the derail in the non-derailing position, then walked to the switch and waited for the machines to clear it, then lined the switch for movement onto the tie-up track. He then informed his crew that the derail was "in the dirt" and the switch was lined for their movement.

The Organization asserts that the machine did not derail on the actual derail and no one knows why it derailed. The Organization argues that there could have been several reasons for the derailment, including joints ahead of the derail with different sized rails. The Organization explains that when the machine derailed, it would have rolled over the derail in the dirt, pulling it out of the ties, and causing the damage seen in the photographs. The Organization notes that

another photograph of the derail supposedly in the correct position showed that it was not secured, as the spikes were lifted and not securely holding the derail to the ties. Given this, the derail could easily have been knocked from the ties in the non-derailing position.

The Organization stresses that the Carrier cannot dismiss an employee based on assumptions; there must be facts to prove the violation. There were none here, and the claim should be sustained.


We have carefully reviewed the record in its entirety. There is no question that the tamper operated by Mr. Hernandez derailed; the issue is whether, as the Carrier alleges, Claimant failed to properly unlock the derail, causing the incident. While Claimant and his co-worker testified that there was no way to tell what actually caused the derailment, and speculated as to possible causes other than the derail, the Carrier's witnesses gave detailed, compelling testimony explaining that the location of the machine and condition of the derail demonstrated that this incident could only have happened if the derail was on the track, not on the ground as Claimant asserted. We also note while that both Claimant and his co-worker testified at the investigation that Claimant told Mr. Hernandez the derail "was in the dirt" and he could proceed, neither mentioned that specific instruction in the written statements they gave right after the incident. We also note that although Claimant testified that he could see the derail in the dirt, Mr. Hernandez stated that he could see only the lined switch, not the derail, before he traveled through.

The substantial evidence in the record shows Claimant's guilt. The Carrier has met its burden of proof. With respect to the penalty, this was a serious violation which caused the derailment of a machine. As the Carrier stated, this was Claimant's third serious violation within a review period, and we note that he accepted a waiver, just two months before this incident, for leaving a derail in an open, insecure position. We cannot say that the Carrier's determination that dismissal was warranted represents an unfair, arbitrary or discriminatory exercise of its discretion to determine disciplinary penalties.

AWARD

Claim Denied


DAN NIELSEN
Neutral Member


JOE HEENAN
Carrier Member


JEFFERY L. FRY
Organization Member

Dated this 30th day of March 2025.