

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 562

Carrier File No.: 14-21-0161

Organization File No.: 2417-SL13S1-2113

Claimant: M. Benally

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION- IBT)

STATEMENT OF CLAIM:

“We Present the following claim on behalf of Marvin Benally (1409358}, Seniority Date 07-20-2006 for the removal of the Claimant's Standard Formal Reprimand and 1 Year Review Period. In addition, we request all record of discipline 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).”

CARRIER POSITION:

Signal Supervisor Paul Weidle was assisting a manager-led test team on February 24, 2021 when welders Skaggs and Claimant were seen working on a side track near control point West Pica, with their truck parked near the tracks. Because the track was classified as other than main track, the following safety measures are required per MWOR 6.3.2:

- Line facing point switches to prevent access to the track. Switches must be effectively spiked, clamped or locked with an effective locking device. Apply a unique tag to the operating handle or hasp of hand operated switches to prevent access.**
- Place a red flag as outlined in Rule 5.4.7 (Display of Red Flag). Lock a derail capable of preventing access to the track where work will occur in derailing position near the red flag with an effective locking device. Apply a unique tag**

to the derail to prevent access. The red flag must be placed at least 150 feet from the work location when the track speed is greater than 5 MPH or at least 50 feet from the work location when the track speed is 5 MPH or less.

- Establish working limits on a Main Track, controlled siding or other track where CTC is in effect to prevent access to the track where inaccessible track protection is required.

Based on Track Authority 85-67 issued February 24, 2021 at 10:33 a.m. and released at 1:46 p.m., it was evident that both welders were working outside of their authority without meeting the conditions listed above.

The test team instructed Benally and Skaggs to pack up everything and move their truck to continue working from the other side of main two. Supervision watched them finish welding the frog, then held a debrief and informed both employees that they were in violation of MWOR 6.3.2 Protection on other than main track.

Following Investigation, the Carrier concluded Claimant operated out of assigned authority, a serious offense. BNSF contends it showed leniency and assessed the least serious discipline, a Formal Reprimand.

ORGANIZATION POSITION:

The Organization points out that Benally was not the employee in charge of providing protection on other than the main track. Though the Carrier determined the employees' truck was too close to the tracks, there was no proof to support this conclusion since no measurements were taken. The test team did not look at the switch leading to the affected area, nor did they check the track condition messages. Had they done so, they would have seen that Restriction Number 63334, East Pica Track 4461 siding at Pica was out of service. When asked whether he thought Benally was in violation of 6.3.2 Protection of other than main track, Weidle replied "No." The Carrier concludes that no rule was violated and the discipline must be overturned.

DECISION:

There are two issues in this case: the location of the employees' parked truck and compliance with MWOR 6.3.2. Though a photograph was referenced in the transcript of the Investigation, no foundation for the photograph was established and it was not included in the on-property record. As a result, the testimony establishes that management was not happy with the location of the truck, but nothing more.

The other question involves violation of MOWOR 6.3.2. The following testimony enlightens this subject:

NICHOLAS HAISTON: So, you believe that Mr. Benally's in violation of 6.3.2 Protection on Other Than Main Track?

PAUL WEIDLE: Uh based off of the track that it was in service, uh no.

NICHOLAS HAISTON: So, there was an effective locking device on the switch and he's no he's not in violation of the rule?

PAUL WEIDLE: I do not know if there was an effective locking device, but per the TCM, the track was out of service. TR 12

The Carrier emphasizes that Claimant did not know the track was out of service and did not report this fact when he was approached by supervision.

Violation of a rule is not established based on thoughts and beliefs. In order for there to be an actionable failure of protection, the protection must be required. The Carrier is correct that it is hardly to Claimant's credit that he was working on an unprotected track without knowing it was out of service. However, his failure to set out protection has not been shown to be required on a track that was in fact out of service. Likewise, the employees' failure to be on top of the extent and duration of their track authority does not rise to the level of a rules violation unless the Carrier can show that such authority was required on the track in question. The evidence does not establish that such authority was required.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident, including any pay lost for the Investigation.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

Dated: May 4, 2023



Patricia T. Bittel, Neutral Member



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member