

PUBLIC LAW BOARD NO. 5850

**Case No. /Award No. 564
Carrier File No.: 14-21-0262
Organization File No.: 2417-SL13C5-2124
Claimant: W. Gonzales**

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

“We Present the following claim on behalf of William Gonzales, (6542831), Seniority Date 01-13-1996, 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:

On July 21, 2021, Claimant Gonzales was issued a Formal Written Reprimand with a One-Year review period for dishonesty regarding his statement on the question of employees fouling the track on May 26, 2021.

The Notice of Investigation was first issued on June 14, 2021 for an Investigation on Friday June 18 at the BNSF Conference Room in Flagstaff, AZ. A second Notice was issued on June 15, changing the date of Investigation to June 25, and a third Notice dated June 23 changed the location of the Investigation to the Doubletree Hilton.

The Carrier asserts that the date of first knowledge was June 10 when it finally had statements from all the employees who were involved. As Roadmaster Baiamonte

testified, the first date that all of the statements were available for review was June 10, not June 2 or 3 as alleged.

JASON BAIAMONTE: Okay. So on for uh Mr. Gonzales, on the 2nd I received his so that would be June 2nd. I received another one from Jeff Gentry on the 3rd of June. Edward Montoya the 3rd of June. Uh Art Baca the uh the June June 3rd. Uh Matt Ramirez June 2nd. And then I know I received uh Mr. Johnson's on June 10th. I do not have a date for Mr. Hardy's, but I know it was between the 3rd and Mr. Hardy was between the 3rd it was actually between the 3rd and and the 10th I received Mr. Hardy's, but it wasn't after the 10th. TR 27-28.

JASON BAIAMONTE: on June 10th when I received uh Mr. Johnson's uh statement uh there was one statement that uh was really conflicting with what his statement had on there. So that's when I knew that there was something going on uh when when this uh conflicted with other on the statements. TR 28

According to Baiamonte, once all of the individual statements were presented, it became evident that an Investigation into the situation would be necessary because the statements contained conflicting assertions. The Carrier concludes that first knowledge of the case was June 10, when the final statement was provided, and there was no breach of procedural deadlines in the case.

As the Carrier sees it, the conducting officer is the person responsible for determining credibility, and therefore his finding of dishonesty should stand undisturbed.

The Carrier further disputes the Organization's contention that Claimant should be compensated for his time spent in the Investigation. It contends Claimants were not withheld from service nor dismissed. Because Claimant was not pulled from service, he did not suffer a loss in wages, and the Carrier reasons no compensation for the day of Investigation is due.

ORGANIZATION POSITION:

The Organization references Rule 13 of the Agreement, which addresses disciplinary investigations and states as follows in pertinent part:

13(a) – Investigations. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial

investigation has been held. Such investigation shall be set promptly to be held no later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

The Organization maintains that multiple Carrier officials knew about the track being fouled well in advance of the 15-day time limit, yet they failed to meet the time limitation on Investigation. It references J. Baiamonte's testimony that both he and Division Engineer S. Miller knew a Safety Hotline Call was made on May 28, 2021. Nonetheless, the Investigation was not held until June 25, 2021, twenty-two days from the date information was obtained.

The Organization does not agree with the level of discipline levied against Claimant and argues that a Standard Formal Reprimand with a One (1) Year Review Period is both extreme and abusive.

DECISION:

The first indication of a problem was when the Safety Hotline Call came in. However, a single call is inadequate to prompt the Carrier to take action; it is obliged to look into the facts of a situation before implementing measures. The Carrier did just this, and requested statements from the employees involved.

On June 2, W. Gonzales provided a statement that he heard "yelling to get off the track." This statement is consistent with a finding of close call with an eastbound train. That same day, M. Ramirez provided a statement describing a "close call." His statement was particularly graphic:

And all of a sudden Edward was standing across from myself as I had my back away from the train and Edward was facing the train and Edward yelled at me Hot rail! Get off the track! I looked back and I had to literally run off the track barely [sic] missing this train by at least [sic] 1.5-2 seconds to where if I had tripped on the rails it would have ended really badly.

On June 3, Baca provided a statement that said Johnson was "yelling at us to get off the track repeatedly [sic]." That same day J. Gentry submitted a statement saying people "scrambled" to get off the tracks. Also on June 3, E. Montoya turned in his statement that people were "yelling" to get off the track as an east bound train was coming.

All of these statements were submitted after the May 28 Safety Hotline Call. A video showing two employees fouling the track was obtained on May 28, though the identity of the employees could not be determined from it. As of June 3, the Carrier had enough information to determine that there was an incident, though it still had not heard from the foreman.

Baiamonte testified that he trusted Foreman Johnson and intended to rely on him to describe what really happened. He reasoned that he could not consider himself to be “informed” until Johnson’s statement was submitted. But Johnson’s statement did not come in until June 10. It said “I informed the section guys and Jeff Gentry on the backhoe that there was going to be a [sic] eastbound. Once the train showed up it was not at 25. We cleared the tracks and had a job briefing with Gonzales.” According to Baiamonte, Johnson told him there had been no close call.

As the foreman, Johnson was the individual most responsible for the safety and welfare of the employees involved. According to Baiamonte, “I did not personally know of the incident May 26th because when I asked the Foreman, he told me it never happened, there was no close call. He said there was no close call. That’s what he told me, that never happened. There was no close call.” TR 48

Under Rule 13, the Carrier had 15 days after acquiring “information” regarding an incident in which to hold the Investigation. As of June 3, the Carrier had enough “information” to make charging decisions; it had the May 28 Safety Hotline Call plus reasonably consistent statements from five employees, all of which describe a close call. Had Johnson also described a close call, there would still be an Investigation. When Johnson denied the close call, there was still an Investigation. The Carrier did not need Johnson’s statement to realize an Investigation was in order. This means that the 15-day clock began running on June 3, and expired on June 18. Because the Investigation was not held until June 25, the 15-day deadline was not met.

We do not find the procedural arguments made in this case to be persuasive. We now turn to the merits of the case. Claimant explained during the Investigation that he was nervous when he wrote his statement, and wrongfully set the date of events as May 19 when the incident actually occurred on May 26. His statement is quoted verbatim below:

On May 19, 2021 I Bill Gonzales had Form-B at Dennison MP300.0 to 300.5 all maines, track had job brifing with foreman Johnson and his crew, about Form B to put in switch tie’s. I asked Foreman Johnson if he had pack set. He told me no that he didn’t know they were putting in tie’s that day they got ready, to start putting in switch ties so aa few east [illegible] call me. And I told the train to stand by. And I got out of the truck and walked up to Foreman Johnson, he said they where in

the clear so I cleared the train on main [illegible]. A 2-train call to get cleared, I told the train to stand by. Again got out of truck and walked up to Foreman Johnson told him east Bounder was calling on main two. He told me they where in clear, and I walked back to truck and cleared the 2-train east bound on main two, and heard a bunch yelling to get off track. So after all that happen, I got out of truck had a talk with Johnson and his crew when I tell you a train calling get in clear, and Foreman Johnson they would get all clear.

Claimant Gonzales provided protection on the day in question; Johnson was the employee in charge. As such, under Rule 6.3.1(F) Reporting Clear/Releasing Authority, Johnson was responsible to verifying that the tracks were indeed clear:

The EIC of an authority must verify that all employees and equipment using the authority are clear of the limits before contacting the train dispatcher or control operator to report clear or release a portion of the authority. When verbally reporting clear the EIC must inform the train dispatcher/control operator that all employees and equipment using the authority are clear of the track. The EiC must recieve [sic] confirmation of this information from the dispatcher/control operator.

Gonzales' reliance on Johnson for verifying that the track was clear was not misplaced, for it was Johnson who was working as the EIC that day, and as such, was identified in Rule 6.3.2(F) as the person responsible for verifying that the tracks were clear. Consistent with the statements of Ramirez, Gentry, Baca and Montoya, there was yelling for folks to get off the tracks just before a train passed. Only Johnson's statement stands out as truly different in that it describes no such event. There is nothing in Gonzales' statement that was contradicted by anyone other than Johnson, and there is no part of Claimant Gonzales' statement that appears untrue. At the Investigation, Gonzales stood by his statement and did not testify.

Dishonesty is an allegation which requires a showing of intent to perpetrate a known falsehood. The record in this case falls short of showing that Claimant intentionally propounded an untruth. Only Claimant and Johnson were party to any exchange between them regarding whether the tracks were clear. Claimant said he advised Johnson of the eastbound train and Johnson represented to him that the tracks were clear. In his statement, Johnson said Gonzales told him about the Eastbound train and in turn Johnson advised the workers that there was going to be an eastbound train. He made no mention of whether he told Gonzales the tracks were clear; he does not deny this assertion by Gonzales.

The Carrier is correct in its assessment that the Conducting Officer is typically in the best position to make credibility determinations, and in most instances the

Board will leave such credibility determinations undisturbed. The reason for this deference is that the Hearing Officer is the trier of fact, and is therefore in the best position to evaluate voice, appearance, behavior and gestures during testimony. In our assessment, this well-established and totally appropriate deference should not be distorted to give a hearing officer license to misuse the Investigation platform in order to discredit written statements that appear to be true, without the benefit of oral testimony or other credible evidence.

A charge of dishonesty requires proof that the individual intentionally and volitionally put forward a known falsehood, a finding which goes far beyond a simple finding that testimony lacks persuasive value. We cannot find adequate support in the record to uphold a charge of dishonesty against Claimant Gonzales; no falsehood has been or can be identified.

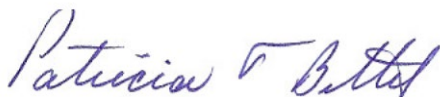
AWARD:

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 3, 2023

A handwritten signature in blue ink that reads "Patricia T. Bittel". The signature is written in a cursive style.

Patricia T. Bittel, Neutral Member


Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member