

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 568

Carrier File No.: 14-21-0258

Organization File No.: 2417-SL13C5-2125

Claimant: J. Gentry

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 Jeffery Gentry (0107268), Seniority Date 03-05-2012, 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 regarding 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 2 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 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 they were not pulled from service, they 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 states as follows:

Rule 13 Discipline, Investigations:

An employee in service for 60 days or more will be will not be disciplined or dismissed until a fair and impartial investigation has been held. Such investigation shall be set promptly to be held no later

than 15 days from the date of occurrence except in personal conduct cases will be subject to 15-day limit from the date information is obtained by officer by the officer of the Company, excluding employees from 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 investigate the alleged incident in a timely manner. 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. It contests the characterization of his statement a dishonest, arguing he was on a job that required a high degree of focus and described what he observed.

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 reports of a 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 me from myself as I had my back away from the train and Edward was facing me and yelled facing the train and yelled hot rail, get off the track. I looked back and literally had to run off the track, barely missing this train by at least 1.5 to 2 seconds to where if I had ripped tripped on the rails it would've ended really badly."

On June 3, Baca provided a statement 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. The Carrier had

enough information on June 3 to determine that there was an incident, but it still had not heard from an arguably critical person: the foreman.

Baiamonte testified that he trusted 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 said “I informed the section guys and Jeff Gentry on the backhoe that there was going to be a 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 foreman, Johnson was the individual most responsible for the safety and welfare of the employees involved. In Baiamonte’s assessment, no fact-gathering regarding the incident would be complete without adding the foreman’s statement to the information on which a decision to charge or not to charge would be made. 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

We do not find the procedural arguments made in this case to be persuasive. We now turn to the merits of the case. Claimant’s statement is quoted verbatim below:

Well morning started with a briefing with the EIC Gonzalez and the guys we went over the form b info and what time we were on and that Craig Johnson was our contact on the tracks. We put a few ties as the day went on. We had quite a bit of traffic on the tracks to deal with and there was a train on both sides of us on m1 so site distance was limited. I had put a 15’ tie half way in when I stopped for Chopo walking up on m1 to tell Craig and even I heard him in the machine we have a train cleared On main 2. Then Craig then shouted at me due to the noise of the machine to make it clear that we had a train cleared on m2. This all happened while all the guys were standing within 6’ of him and we stayed cleared of m2. At that time I was shoveling a tie in from the end of the tie and was watching my bucket on the tie and the end of the tie the guys kept shoveling the tie off between m1 as it went in I was looking at my stinger and tie being installed when some shouting occurred and I stopped and looked up to see the guys in the clear in between m1 as the train zipped by a few seconds later. I never seen them fouling just people somewhat scrambling between m1 to get off the tracks.

The problem with this statement is that it flatly says “We stayed cleared on M2,” despite the fact that he was shoveling and watching his bucket and looking at his stinger and tie so attentively that he did not see the track fouled. If he was so preoccupied by his duties, then he would not know whether his group “stayed clear on m2.” It well established from the statements of other employees that they were not clear of the track when the train came. Further, it is well established that there was marked yelling as the train came close. It is difficult to believe that Claimant’s eyes stayed glued to his work when all this was going on.

Though the Carrier failed to point out the flaws in Gentry’s statement to support its conclusion that he had perpetrated a falsehood, we are persuaded that Gentry’s statement was contrived enough to give the Carrier reason to doubt its reliability on its face.

Because Claimant was not pulled from service, he did not suffer a loss in wages, and no compensation for the day of investigation is due.


AWARD:

The claim is denied.

Dated: May 3, 2023



Patricia T. Bittel, Neutral Member


Jeffery L Fry, Labor Member

A handwritten signature in blue ink, appearing to read "Logan McKenna", with a stylized flourish at the end.

Logan McKenna, Carrier Member