

BEFORE PUBLIC LAW BOARD NO. 7590
CASE NO. 3

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES DIVISION

v.

BNSF RAILWAY
(Former ATSF Railway)

Carrier File No. 14-11-0198
Organization File No. 160-13SI-115

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 29, 2011 when it assessed Claimant, Juan A. Cordova, a Level S 30-day Record Suspension, with a 3-year review period, for alleged violation of Maintenance of Way Operating Rule 6.3.3-Visual Detection of Trains, for alleged failure to provide proper lookout protection while working as Lead Welder at Grier, New Mexico.
2. As a consequence of the violation referred to in part (1), 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 account of this incident.

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7590 has jurisdiction over the parties and the dispute involved herein.

Claimant received a letter dated March 10, 2011, which directed him:

Arrange to attend investigation at 1000 hours, Wednesday, March 23, 2011, at the BNSF Conference Room, 121 S. Main St., Clovis, NM, 88101, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to provide proper lookout protection while inspecting Frog on Main 1 at Grier, New Mexico while working as Welders on TRWX0401 as Lead Welder and Welder Trainee, respectively, at approximately 11:30 AM on Tuesday, March 8, 2011.

This investigation will determine possible violation of MOWOR 6.3.3 Visual Detection of Trains.

Following the hearing, Claimant was sent a letter dated August 29, 2011, which provided in relevant part:

As a result of investigation held on August 2, 2011 at 1000 hours at BNSF Conference Room, 1624 First Street NW, Albuquerque, NM, 87102 you are hereby assessed a Level S 30 Day Record Suspension for your failure to provide proper lookout protection while inspecting Frog on Main 1 at Grier, New Mexico while working as Welder Trainee at approximately 11:30 AM on Tuesday, March 8, 2011.

In addition, you are being assessed a Three (3) Year Review Period that commences on August 29, 2011. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWOR 6.3.3 Visual Detection of Trains.

The Organization contends that the cited rule does not apply to the instant matter because Claimant and his co-worker complied with the rule when they had a job briefing and complied with the requirements of the Statement of On-Track Safety in order to do an inspection. Further, the witnesses agreed that there were miles of visibility in this area and that it was clear for the few seconds that Claimant was looking at the Frog that was being inspected. There was much more time than the 15 seconds to move to a safe location as required by the rule.

The Carrier counters that there was both sufficient testimonial evidence as well as an admission that Claimant failed to maintain a proper lookout. Further, the lack of rail traffic did not relieve Grievant and his coworker of the need to maintain a proper lookout.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

A review of the evidence shows that Claimant and his coworker had the proper job briefing about occupying the main track to perform an inspection utilizing a Statement of On Track Safety. The testimony and evidence also indicated that Grievant was not the lookout. Rather, his co-worker was the lookout.

The evidence establishes that the job briefing and Statement of On Track Safety placed Claimant as the inspector and his co-worker as the lookout. The evidence does not establish what Claimant did incorrectly – he had a job briefing, they utilized the Statement of On Track Safety, and he inspected the Frog.

The testimony further indicates that Claimant's coworker failed to maintain his role as lookout and instead looked at the Frog that his co-worker was inspecting for a short period of time. The evidence does not indicate that Claimant somehow acted in concert with his coworker to circumvent the requirements of maintaining a lookout. It was sloppy attention to safety, however, the sloppiness cannot be shown to be Claimant's sloppiness.

Claim sustained.

Brian Clauss

Brian Clauss, Chairman

Samantha Rogers

Samantha Rogers, Carrier Member

David D. Tanner

David D. Tanner, Organization Member

Signed on December 23, 2013