

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 11-13-0085
Organization File No. T-D-4188-M

Claimant — Lynn Brost

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on November 29, 2012, when it dismissed Claimant, Lynn Brost, for violation of MOWOR 6.3.3 — Visual Detection of Trains, for failure to establish authority or method of on-track safety while foul of controlled siding track at approximately 1123 hours on October 10, 2012 at MP52.6 on the KO Subdivision.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return Claimant to service, remove the discipline from Claimant's record, and make him whole for any losses incurred.

BACKGROUND:

The Claimant entered service with the Carrier on May 30, 1978. At the time of his dismissal he had been a Track Inspector for 20 years.

The Carrier has a System Operations Test Team that travels throughout the Carrier's system, observing whether employees are complying with the Carrier's policies and procedures. On October 10, 2012, the Team, Dale Jochems, Manager of Operating Practices, and Troy Hunter, Manager of Operating Rules, was conducting an audit in the Twin Cities Division; they were accompanied by Richie Simmons, Manager of MOW Field Training. At approximately 1120, near Pillsbury, North Dakota, the group observed a BNSF vehicle in the vicinity of a grain elevator, after which they traveled to the next crossing and stopped. Looking back, the three men could see a Carrier employee

near the tracks. They returned to the Company vehicle near the grain elevator and got out of their vehicle. They then observed the Claimant, with an oil can in hand, following the track along a controlled siding. After a short time, Claimant saw the men and walked toward them. After stopping to put the oil can in his vehicle, he approached them. Simmons introduced Claimant to Jochems and Hunter. Jochems asked Claimant what he had for protection for fouling the track, and Mr. Brost admitted that he had none: "There's no use me lying to you because you're going to ask to see it anyway." Jochems and Hunter told Brost to stop what he was doing and to stay off the track. They then contacted the Roadmaster, Jake Anderson.

The Maintenance of Way Operating Rules (MOWOR) include a section dedicated to rules for safe Track Occupancy. Under Rule 6.3.1, employees who are going to be occupying, or fouling, track must receive authority or establish protection before doing so. There are several ways of accomplishing that: the employee may obtain authority from dispatch or, if authorization is not forthcoming from dispatch, there are alternate rules for establishing flag protection. One of them relates to Visual Detection of Trains, the procedures for which are set forth in Rule 6.3.3. Sub-section A, Lone Workers, applies to this case. It states:

Lone workers using individual train detection must complete the form entitled, "Statement of On-Track Safety" prior to fouling a track. The completed form must be in the employee's possession when used to establish on track safety. *[Board note: A copy of the form is included in the printed Rule 6.3.3.]*

Each employee providing protection for a work group, and each lone worker, will maintain immediate access to a working radio, which can be a portable radio capable of monitoring transmissions from train movements in the vicinity.

Lone Worker Responsibilities

Lone workers must:

- Identify a place of safety prior to fouling a track.
- Position themselves in a predetermined place of safety at least 15 seconds prior to the arrival of the train moving at maximum authorized speed

Conditions for Use

Lone workers may perform minor work or a routine inspection using individual train detection when they meet all of the following conditions:

- The work will not affect the movement of trains.
- The lone worker is able to visually detect the approach of a train moving at maximum speed and position themselves in a predetermined place of safety at least 15 seconds prior to the arrival of the train....
- Visibility is sufficient to observe the entire track segment at the minimum separation distance as specified by the "Statement of On-Track Safety."

- Power-operated tools or roadway maintenance machines are not in use within hearing distance.
- The ability to hear and see approaching trains and other on-track equipment is not impaired by background noise, lights, precipitation, fog, a passing train or other physical condition.
- Natural or artificial light and conditions are sufficient to observe approaching trains, engines or on-track equipment at the minimum separation distances as specified by the “Statement of On-Track Safety.” ...
- The work is performed outside the limits of a control point or a remotely controlled hump yard facility. Automatic interlockings are not control points.

When the Team asked him if he had protection, Claimant readily acknowledged that he had not filled out the Statement of On-Track Safety form required of all lone workers using individual train detection.

The Carrier sent Claimant a Notice of Investigation dated October 11, 2012, indicating that an investigation would be held “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to establish authority or method of on track safety while foul of controlled siding track at approximately 1123 on October 10, 2012 at MP 52.6 on the KO Subdivision.”

Following mutually agreed postponement, the hearing was held November 8, 2012. At the hearing, Simmons, Jochems and Hunter, who had witnessed Claimant’s actions on October 10, testified. According to Jochems, failure to establish protection is considered a “critical decision failure, which results in the employee being removed from service for the remainder of the shift and returned the next shift pending investigation. The Claimant testified that he was doing his “monthly routine inspection of all my switches.” He had just released his track and time from the West Switch at Pillsbury and driven to the East Switch, which is on a siding near the grain elevator. The Claimant is not covered under hours of service, so he works six hours a day, anywhere from 10 to 14 hours a day. His normal territory was 73 miles, because his gang was short one Track Inspector. When one of the other two Inspectors is absent due to illness or vacation, he has to cover 102 miles of track. Mr. Brost acknowledged that he knew he was supposed to obtain authorization or fill out the Statement of On Track Safety form before fouling on the track to perform any maintenance and stated his deep remorse for his mistake.

By letter dated November 29, 2012, the Claimant was informed that he had been found in violation of MOWOR Rule 6.3.3, and that he was being dismissed as a result. The Carrier points out that this was Claimant’s second Level S serious violation in less than five months and he was dismissed in accordance with the policy. From the Organization’s perspective, Claimant was in compliance with Rule 6.3.3. but for filling out the On Track Safety form. The point of progressive discipline is to correct, educate and rehabilitate. That is what should have happened to the Claimant, who has over thirty years’ loyal experience. Under the circumstances present in this case, the level of discipline assessed—termination—was abusive.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

There is no dispute here that Claimant failed to establish track protection prior to fouling the track at the East Switch at MP 52.6 on the KO Subdivision; Claimant himself admitted as much when first approached by the System Operations Test Team in the field on October 10, 2012. The Carrier found him in violation of Rule 6.3.3, presumably the “lone worker” provisions of Paragraph A. There is also no real dispute that a Rule 6.3.3 violation qualifies as a Level S Violation under the Carrier’s Policy for Employee Performance Accountability, or PEPA. The real issue here is the level of discipline assessed against Claimant.

The Carrier based its decision to terminate on the fact that the October 10, 2012, violation was the Claimant’s second Level S violation within five months under PEPA. Regarding the disciplinary progression for Level S, or Serious, Violations, PEPA provides:

A. Progression:

The first Serious violation will result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 years of service and having been discipline-free during the five years preceding the date of the violation in question.

A second Serious violation committed within the applicable review period may result in dismissal.

The parties’ Agreement requires that the Carrier have just cause before it terminates an employee. While PEPA sets forth certain standards and expectations the Carrier has regarding employee performance, PEPA does not replace the terms of the Agreement, and any decision to terminate must be evaluated by the Board on the basis of the principles of just cause. Moreover, the actual language of PEPA does not, in fact, mandate dismissal for a second Level S violation within a review period: it states that a second violation “*may* result in dismissal”—not “will.” This indicates that termination is not, or should not be, the automatic response to a second Level S violation within the review period. Instead, every individual case should be evaluated on its unique facts and circumstances.

Rule 6.3.3 requires an employee who is not obtaining authority from dispatch or another form of protection to fill out and keep with him a Statement of Track Safety form that details location, place of safety, method of warning and maximum authorized train speed at the location. That is not all that is needed to ensure on-track safety, however. Indeed, for lone workers such as

the Claimant, there are a number of other requirements that must be met before fouling track to perform maintenance and repairs. The lone worker must, among other requirements: (1) have a working radio; (2) identify a place of safety; (3) be able visually to detect the approach of a train moving at maximum speed in time to reach safety; (4) have adequate visibility of the entire track segment at the minimum separation distance; and (5) be able to see and hear approaching trains and on-track equipment. While the Statement of Track Safety is important, it is only part of establishing safe conditions for fouling track for lone workers. In fact, the Statement does not, in itself, offer any protection to employees. What it does is require employees to be mindful of their safety: to think in advance about how they will protect themselves if a train or other on-track equipment arrives, to develop a concrete safety plan, and to document that plan. There is no indication in the record here that the Claimant was in violation of any of the other requirements for establishing track safety prior to oiling the switches at MP 52.6. The Board strongly supports all efforts by the parties to ensure the safety of employees, members of the public and equipment. That said, the fact is that with the exception of filling out a piece of paper, the Claimant met all of the requirements of Rule 6.3.3. He was a highly experienced Track Inspector performing routine, regular maintenance in his normal territory. He knew his job, he knew the site, and he knew how to perform his task (oiling a switch)—a “minor repair”—safely with or without a written Statement of On-Track Safety. The Carrier’s requirement that employees complete the form is reasonable, and it was a mistake for him not to complete the form as required. But in the context of the Claimant’s having otherwise met all of the substantive requirements necessary to establish track protection at MP 52.6, neglecting to fill out the form was not as serious as failing to meet the substantive requirements.

One of the principles of just cause is that any discipline imposed should be proportional to the seriousness of the violation. While all safety violations are serious, some are more serious than others, and failing to complete paperwork that is simply held by the employee is relatively minor as safety violations go. This is not a case where the employee forgot to complete a form than needed to be forwarded to dispatch or to other employees or management. The Statement of On-Track Safety is completed by the employee solely for his own use. Its purpose is make the lone worker stop and think about surrounding conditions and how his on-track work can be safely accomplished. Here, the Claimant was already familiar with the switch and surrounding conditions. He had oiled the switch at MP 52.6 numerous times before. As a result, he had a pre-existing understanding of how to accomplish his task safely, and the evidence is that he was otherwise in compliance with the requirements set forth in Rule 6.3.3.A for on-track protection for lone workers. Under these circumstances, his failure to complete the form, without more, did not warrant termination.

Another principle of just cause—the one that gives progressive discipline its name—is that the employer may properly consider the employee’s prior disciplinary history in determining the appropriate level of discipline for subsequent misconduct or poor performance. Claimant’s prior disciplinary record establishes that on May 10, 2010, he was assessed a Level S violation with a 30-day record suspension for violating Rule 6.3.1 when he began traveling on the rail without first briefing other employees. On July 16, 2012, he was assessed another Level S violation, for violating MOWOR Rule 8.2, apparently for mislining a switch. He received a five-day actual and 25-day

record suspension. The Carrier contends that this history warranted termination as the next appropriate step in the disciplinary progression when the Claimant failed to complete the Statement of On-Track Safety. The Board disagrees. The Claimant did violate Rule 6.3.3 when he failed to complete the On-Track Safety form on October 10, 2012, but he was working safely and in compliance with the other requirements of Rule 6.3.3. The purpose of progressive discipline is to give employees notice and an opportunity to reform their conduct. Claimant's violation on October 10, 2012, appears to be less serious than the two prior incidents for which he was disciplined. In May 2010, he failed to communicate with other members of his gang, which means that the safety of other employees was also compromised. Regarding the July 2012 incident, mislinning a switch can result in an accident or even derailment, with the possibility of serious injury for other employees and anyone in the vicinity. In comparison, failing to complete the On-Track Safety form is significantly less serious, and termination, especially given Claimant's 34 years of service, was disproportionate to the seriousness of his rules infraction.

This is not to say that there was no cause to discipline the Claimant; he had violated a clear and reasonable safety rule for no good reason. An additional suspension would have been appropriate, along with a three-year review period. In addition, given the fact that this was Claimant's second safety rule violation, the Carrier could appropriately have put him on a last chance agreement, to underscore the fact that any further safety violations *would* result in termination. The Board hereby orders the Claimant returned to his position with seniority and benefits intact but for a 90-day actual suspension, a three-year review period that will commence with his return to work. Furthermore, Claimant will be subject to a Last Chance Agreement to run simultaneously with the review period. Finally, Claimant is entitled to back pay for the period of his absence from work, less any interim earnings or other payments (such as unemployment or Social Security).[ZV1]

AWARD

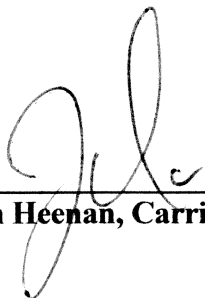
Claim sustained in accordance with the findings.

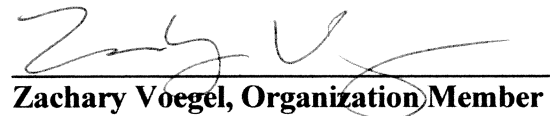
(Continued next page)

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award partially favorable to the Claimant be made.


Andria S. Knapp, Neutral Member


Joseph Heenan, Carrier Member


Zachary Voegel, Organization Member

5/25/2016
Date