

Award No. 47
Case No. 47
NMB Case No. PLB-07602-000047

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

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

Carrier File No. 10-15-0097
Organization File No. C-15-D040-5

Claimant — Tim G. Behrens

BACKGROUND:

This claim challenges the Carrier's imposition of a Level S 30-day record suspension with a 3-year review period for the Claimant's actions in hand operating a dual control switch in October 2014. At the time of the events giving rise to the discipline, he had worked for the Carrier for approximately nine years and was working as a Foreman on the Seward Section, Ravenna Subdivision.

On October 7, 2014, the Claimant was assigned to change points and stock rail at Nantasket. His was one of several working groups operating under track and time authority obtained by Chad Mazanec, a Section Foreman at Grand Island. Mazanec was acting as the EIC, or Employee in Charge, and he had gotten authority from CP1096 to West Ravenna, a distance of some 17 to 18 miles. It is not unusual for several working groups to "piggyback" on one person's or working group's track and time authority. On the day in question, Claimant was working near MP 125 while Mazanec was working two or three miles away on another assignment, closer to Ravenna. Mr. Behrens acknowledged that he threw the switch in question without obtaining further authority to do so; it was his understanding that the group already had authority. The incident came to light when a Dispatcher saw the signal indication light. Because no authority for lining the switch by hand had been established, the

Dispatcher contacted the Assistant Roadmaster, Katie Bruce, to see if she knew what was going on. Bruce followed up with Mazanec and Behrens, and Behrens readily admitted to having thrown the switch in the course of his work.

The Carrier sent Behrens and Mazanec a Notice of Investigation dated October 9, 2014, informing them that an investigatory hearing had been scheduled “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged unauthorized movement of a dual control switch and signal indication while working at or near MP 125.1 on the Ravenna Subdivision at approximately 1000 hours, Tuesday, October 7, 2014.”

Following a mutually agreed postponement, the hearing was held October 29, 2014. At the hearing, the Claimant, Mr. Mazanec and Ms. Bruce testified to the facts as above. The Claimant explained that the switch needed to be thrown so that the switch could be removed for repair. He stated that he thought he already had authority to throw the switch, but he did not say why he was under that impression.

The Carrier’s Decision Letter, issued November 12, 2014, concluded that the Claimant had violated MWOR 9.13.1, Hand Operation of Dual Control Switches, and assessed a Level S 30-day Record Suspension with a three-year review period. The Organization filed a timely appeal protesting the Carrier’s decision. The parties having been unable to resolve the matter through their grievance process, the matter was submitted to the Board for a final and binding decision.

According to the Carrier, the Claimant acknowledged that he had thrown the dual control switch without obtaining authority as required by Rule 9.13.1, which establishes his guilt. It is up to employees to make sure that they have the proper authority; the Claimant assumed he had it when he did not. Claimant’s action was a serious safety violation because the dual control switches are sometimes linked, and throwing one switch can affect others, either on adjacent tracks or further down the line. This is why employees need to get authority from Dispatch, which can then make sure that other switches are not adversely affected. The penalty under the Carrier’s PEPA Policy for a first serious safety violation is a Level S 30-day record suspension with a three-year review period, which is what was assessed in this case. The conduct having been admitted and the standard penalty having been issued, the claim should be denied.

The Organization contends that the discipline imposed on the Claimant was excessive and arbitrary, in light of the mitigating circumstances that existed. Track protection had been established over an extensive section of track. The problem with piggybacking several working groups on a single track and time authority is that the EIC, who obtained the authority and knows exactly what authority he asked for and was granted, is often working miles away from other working groups. Questions of authority may arise, but employees are under pressure to complete their work within the limited period of the authority granted. When the EIC is remote, employees in other working groups may assume that their authority is broader than it is—which is what happened here. If Claimant's working group had had its own track authority, he would have known exactly what it was. The Carrier has failed to establish that the Claimant intentionally, willfully or maliciously violated the rule in question. He was not deliberately negligent or careless; he was just trying to do a routine task within the time allotted. The discipline assessed was excessive and should not be upheld.

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.

MWOR 9.13, When Instructed of Operate Dual Control Switches by Hand, addresses circumstances when a control operator is unable to line a dual control switch:

“If the control operator cannot line the dual control switch to the desired position, or the control machine does not indicate that the switch is lined and locked, the control operator must instruct the employee to operate the switch by hand.

Before passing over the switch, the movement must stop and the employee must operate the switch by hand as outlined in Rule 9.13.1 (Hand Operation of Dual Control Switches). After the entire movement has passed over the switch points, the employee must return the switch to power unless otherwise instructed by the control operator.”

Rule 9.13.1, Hand Operation of Dual Control Switches states, in relevant part:

“An employee must get permission from the control operator to operate a dual control switch by hand. Operate the switch as follows: [detailed instructions omitted].”

There is no dispute that the Claimant did not personally obtain authority to throw the switch at MP 125.1 prior to doing so. Thus the questions before the Board are: (1) whether the circumstances were such as to excuse his failure to obtain authority himself, and (2) whether under the circumstances the level of discipline assessed was excessive.

Dual control switches are, as their name suggests, switches that can be activated or changed either on site, by hand, or remotely, through the Carrier’s central dispatch office. Train Dispatchers are responsible for coordinating train movements across various territories and for establishing track and time authority when sections of track need to be taken out of service for any reason. In its April 17, 2015, letter to the Organization, the Carrier stated that switches that are thrown can have ripple effects on other switches elsewhere in the system, so that if thrown, a switch located inside a track and time authority can affect signals “outside” of the track and time authority, which could potentially cause a train to attempt to stop abruptly, even going into emergency mode. Dispatchers need to know what switches inside a given track and time authority are being lined by hand, so that they can activate the appropriate blocking devices *outside* that authority to avoid ripple effects elsewhere on the system overall. Thus, the impact of relining a switch by hand without first obtaining authority from a Dispatcher is not limited to the track and time authority where maintenance work is being done, but can occur externally elsewhere in the system. This is why it is so important to coordinate switch movements between Dispatch and employees working on site, and is the rationale underlying Rule 9.13.1.

The Organization does not dispute the importance of employees on site obtaining proper authority to operate switches “on hand.” The point of its argument in this case is that the Claimant was not the person who obtained the authority to work in Nantasket on October 7, 2012. Instead, he was working under authority granted to another Foreman, Chad Mazanec. As a result, he acted under the mistaken impression that he had not only track and time authority, but authority to switch by hand in his work area. The record establishes that the Claimant did believe that he had authority to reline the switch by hand, so this is not a case of a willful violation of Rule 9.13.1.

The record below is incomplete in several critical respects. It establishes that it is not uncommon for several working groups to work under authority that has been given to an EIC, or Employee In Charge—in this case, Mr. Mazanec. There is no evidence regarding the appropriate protocol in the record before the Board, and such evidence is critical to determining whether Claimant violated Rule 9.13.1.

The Carrier's rules exist for a reason and need to be respected, especially those aimed at ensuring everyone's safety. But the rules do not exist in a vacuum—there is a context within which they are implemented. The Carrier has the burden of proof in establishing an employee's misconduct. In this case, the EIC was responsible for obtaining track and time authority for several working groups. The record does not indicate whether he was also responsible for obtaining switch authority as well. Nor does it indicate that individual employees are responsible for obtaining switch authority when working under track and time authority obtained by someone else.

In the absence of sufficient information about the practices and protocols regarding authority that are used when several working groups work under the oversight of an EIC, it is impossible to evaluate whether the Claimant was guilty of violating Rule 9.13.1 or whether he reasonably expected that the EIC had obtained switch authority when he got track and time authority. If the latter, he should not have been charged with violating Rule 9.13.1 himself. Given the ambiguities in the record, the Board cannot conclude that the Carrier has met its burden of proof, and the claim must be sustained.

AWARD

Claim sustained.


ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made and the incident expunged from his record. The Carrier is ordered to make the Award effective on or before 30 days

following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Nathan O. Moayyad, Carrier Member



Zachary Voegel, Organization Member



Date