PUBLIC LAW BOARD 7702

CASE NO. 3

BNSF RAILWAY COMPANY

CARRIER CASE NO. 10-12-0028

V.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. C-12-D070-1

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The discipline (dismissal) imposed upon Mr. J. Galutia by letter dated October 19, 2011 for alleged violation of MOWOR 6.3.3. Visual Detection of Trains Part A. Lone Worker, in connection with charges of alleged failure to position himself in a predetermined place of safety at least fifteen (15) seconds prior to the arrival of the train (BNSF 9708) traveling East bound on Main Track 1 which allegedly resulted in said train being placed in emergency and stopping two (2) cars short of his working location at Mile Post 99.8 on the Orin Subdivision at approximately 1336 on August 4, 2011 was on the basis of unproven charges, unwarranted and in violation of the Agreement (System File C-12-D070-1/10-12-0028 BNR).

2) As a consequence of the violation referred to in Part (1) above, Claimant J. Galutia shall now receive the remedy prescribed by the parties in Rule 40G."

FINDINGS:

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

Public Law Board 7702 has jurisdiction over the parties and the dispute involved herein.

The Claimant was a long term 19 year employee of the BNSF Railway.

The Claimant was working as a foreman on the Orin Subdivision in Wyoming on August 4, 2011. At approximately 1336, the Claimant was at MP 99.8 and positioned directly on Main Track 1. At the same time, BNSF 9708 was travelling East Bound on the same track, and as it approached.

The Carrier charges that the Claimant failed to position himself in a predetermined place of safety at least 15 seconds prior to the "arrival" point of the train moving at maximum authorized speed as indicated in the Statement of On Track Safety, which is part of MOWOR Rule 6.3.3.

As a result, the train was placed into emergency and stopped just short of the Claimant's position, after attempts to warn him with whistle and bell.

MOWOR 6.3.3. Visual Detection of Trains

A. Lone Workers

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.

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 as indicated in the Statement of On-Track Safety.

The testimony of the Claimant, the train engineer, and the Roadmaster all confirm, Rule 6.3.3 requires that an employee must remove himself/herself from the track to a place of safety before an approaching train arrives at a point after which it would reach the employee's location on the track in 15 seconds, where the train is traveling at the maximum of the speed limit.

That "arrival" point is defined as a distance in feet and is prescribed in the "Statement of On-Track Safety," as mandated in Rule 6.3.3. For the location involved in this case, all the witnesses except the Claimant agree that train arrival point was 1,100 feet from where the Claimant was standing on the track.

The Carrier argues:

The only affirmative defense that the Claimant offered was that he thought that he had to be in a place of safety 15 seconds before the train arrived where he had been standing on the track. However that is not consistent with the Statement of On-Track Safety.

Rule 6.3.3 requires the employee to clear the track by the time that it reaches a distance provided in the Statement of On-Track Safety.

In the distance calculation table that is part of the Statement of On-Track Safety, the minimum distance for the location in question, which had a speed limit of 50 MPH, is 1,100 feet. That means that the Claimant should have been 1,100 feet from the train at the time he was *already* off the track and in safety.

Since the cars were about 50 feet long, this means the Claimant was only about 750 feet from the train at that time, putting his own life in danger and putting immense emotional stress on the engineer, who then had to put the train into emergency mode in order to avoid killing the Claimant.

Clearly, the train's "arrival" point under the Rule is the 1,100-foot mark— not at the Claimant's location on the track; he was supposed to follow the prescribed distance chart, not to try to estimate for himself when the train might reach a point only 15 seconds from his position on the track. The other witnesses at the Investigation agreed that the Claimant was considerably less than 1,100 feet from the train when he finally reached safety, and that he was in violation of Rule 6.3.3.
In this case, the Investigation revealed that the Claimant was still on the track when the train was considerably closer than 1,100 feet, recklessly putting his own life in danger and giving the train crew a severe fright

The signed statements and testimony of both the engineer and the conductor were that the Claimant was on his hands and knees in the track when they first saw him, and that their train was only two or three car lengths from the Claimant when the train finally came to a stop. Manifestly, the Claimant was not in compliance with the rule. If the Claimant had been in compliance with the rule, the engineer would not have had to put the train in emergency-stop mode a process that is gut-wrenching, train- wearing, and sometimes risky for the train crew's own safety.

The engineer also testified that he blew the train whistle and rang the bell constantly trying to get the Claimant's attention.

It is absolutely clear that when the engineer put the train in emergency-stop mode, the Claimant was still on the track and only 750 feet from the approaching train.
And that is considerably short of the 1,100 feet required for the Claimant to have already been off the track and in a place of safety.

The Claimant is an experienced track worker and is tested regularly on the rules—including an annual test on all Maintenance of Way employees Operating Rules (MOWOR), including Rule 6.3.3, which he had last taken only a few months prior to this incident. He is also a foreman, who should know better.

Both the Engineer and the Conductor agreed that the Claimant was still in the middle of the track, at imminent risk to his own life, at a point when the train was much closer than the distance established by the Rule to protect the safety of all involved. Once that point was reached, the crew was busy trying to stop the train to avoid hitting and killing the Claimant.

The Organization argues:

First, that an adverse inference should be drawn from the Carrier not providing the Organization with the Event Recorder which would have accurately reflected what actually occurred and the exact times.

Second, that the Carrier did not meet its burden as the Carrier's witness's testimony was inconsistent coupled with the procedural violation of not turning over the Event Recorder.

Third, the Claimant consistently and adamantly testified that he was clear in time in accordance with Rule 6.3.3.

And, finally, that discipline was excessive for what occurred. The Carrier should have considered the Claimant's 19 year service and the fact that he was working alone on the tracks at the time of the alleged incident.

After weighing the evidence presented it is determined that:

There is absolutely no question that the Carrier must provide a safe work place for its employees.

Here, what is in dispute is whether the Claimant was still occupying the track when the train got within 1,100 feet of where he was standing on the track.

A review of the record shows:

The credible testimony of the engineer and the conductor was that the Claimant was still on the track when the train was put into emergency stop mode at 750 feet, and that he remained there for some period of time thereafter.

It is also very clear from the testimony and evidence presented that the Claimant was still on the track when the train was within 1,100 feet of him. The Claimant was clearly in violation of Rule 6.3.3, as even the Claimant, himself, interpreted the Rule.

As shown during handling of this claim this was the Claimant's second Level "S" (Serious) violation within a 36-month period.

In discipline cases the Carrier must only show substantial evidence to prove their burden. Here, the evidence does support the charges as the Carrier's burden was met.

The Organization's procedural argument is without merit. The Event Recorder was not requested until a time period after the Carrier is required to keep the record while the testimony and evidence presented by the Carrier and its witnesses was credible enough to show substantial evidence.

Dismissal was the proper penalty in this case.

AWARD:

The Claim is hereby denied.

Marc A. Winters
Neutral Member

Dated: November 27, 2015

Joseph Heenan
Carrier Member

Kevin Evanski
Organization Member