

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39472
Docket No. TD-38926
08-3-NRAB-00003-050420
(05-3-420)

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(BNSF Railway Company)

STATEMENT OF CLAIM:

“The Burlington Northern Santa Fe Company (hereinafter referred to as ‘the Carrier’) violated the current effective agreement between the Carrier and the American Train Dispatchers Association (hereinafter referred to as ‘the Organization’), including but not limited to Article 24(b) in particular when on April 26, 2004, the Carrier arbitrarily disciplined train dispatcher D. W. Couvillion, without cause and absent any rules violation. The Carrier shall now overturn the previous decision to discipline the aggrieved and shall remove this suspension from her record and making her whole for any and all lost time (including wages for all time lost a result of attendance at the disciplinary hearing), and shall restore the record of the aggrieved to its state prior to the Carrier’s April 26 decision.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant serves in the capacity of Train Dispatcher in the Centralized Train Dispatching Office located in Fort Worth, Texas. On March 16, 2004, the Claimant was protecting the second shift Ravenna District position. Shortly before 3:00 P.M., the crew on train BNSF 9992 reported to the Claimant that they were stopped at milepost 9.9 after encountering a yellow/red track flag at milepost 8.1. The Claimant contacted the Track Foreman, learned that Form B track restriction bulletin 7234 was set to expire at 3:00 P.M., and was not void, as the previous Dispatcher had indicated. The Claimant allowed the restriction to expire without incident; however, according to the Carrier, the Claimant did not report the previous Dispatcher's failure to accurately report the track bulletin status in effect or the absence of a new Form B to anyone. The Carrier asserts that failure to report such a deviation is a violation of Rule 1.4, Carrying Out Rules and Reporting Violations, in the General Code of Operating Rules ("GCOR") and Rule 40.21, Rules Violations, in the Train Dispatchers and Control Operators Manual ("the Manual"). For this violation, the Carrier assessed the Claimant a 30-day record suspension.

Before proceeding to the merits, we first address the procedural issues raised by the Organization. It takes the position that the Claimant was denied Agreement due process and a fair Hearing. In particular, it asserts that the charges against the Claimant were insufficiently precise, that the Hearing was unfair because the Hearing Officer served in multiple roles, and that the Carrier waived its response on the property. In toto, we find the Organization's procedural objections are not well founded under these facts.

Addressing the issue of multiple roles, the Board acknowledges the substantial precedent established, as noted in Public Law Board No. 6836, which stands for the proposition that a hearing officer who also assesses discipline upon a claimant or serves in other multiples roles, absent any other facts, does not per se deprive a claimant of his Agreement due process rights. There must be a compromise of the

integrity of the process or the prejudice of the Claimant's ability to present a defense. There has been no such showing in this case.

Addressing the issue that the charges were insufficiently precise, the Board rejects this claim. The very cases that the Organization cites for support of its position support findings among many tribunals that are consistently contrary to the Organization's position. On the property, the Organization acknowledges that the Carrier apprised the Claimant that she was charged with violating GCOR Rule 1.4 and Rule 40.21 of the Manual. Rule 40.21 of the Manual provides:

"When it becomes apparent that you or employees in the field may be involved in a rules violation, immediately report the violation to your supervisor." [Emphasis added]

GCOR Rule 1.4 provides in part:

"[Employees] must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees and any misconduct or negligence that may affect the interest of the railroad."

The Claimant was a seasoned eight year veteran Dispatcher at the time of the incident. She, therefore, knew or had reason to know what she was defending when she was charged with a failure to report a Rules violation on March 16, 2004 given these facts. It is true that the Notice of Investigation does not identify a specific Rule violation; however, it is clear that the Investigation was required to determine the facts and whether a Rule was violated. The Claimant alone knows better than anyone does what she did and did not do. The Board is not persuaded that the Claimant's confusion and failure to timely discern the facts is a defense to the charge of failing to report the situation to her supervisor. In fact, it is the essence of the Carrier's position. The Carrier clearly scrutinized the Claimant's failure to report to her Supervisor the prior Dispatcher's handling of Form B restriction 7234, whether it ultimately was or was not a Rules violation. The Claimant had every opportunity to explain why she felt the facts did not support a finding that she should have recognized a potential Rules violation or such an unsafe irregularity. She did not.

The Claimant's suggestion that the Carrier must first prove up the prior Dispatcher's violation is without merit. The Carrier does not have to prove up a Rules violation in this situation, but merely has to demonstrate that the circumstances warranted the Claimant's awareness and decision to notify her supervisor because of the potential that a violation may have occurred in accordance with Rule 40.21. the Claimant has not met the burden of proof to establish that the Carrier violated her Agreement due process rights in the Investigation or that she did not know what she was defending. The evidence adduced at the Hearing and supported by the transcript testimony demonstrates that the Claimant's assertion that she had no reason to believe a Rules violation had occurred or may have occurred is disingenuous at best. The Rules themselves very clearly do not require that an actual violation must have occurred; therefore, it is possible that a Rules violation may not have occurred and a person still may be found guilty of violating GCOR 1.4 and Rule 40.21. The Rules are clearly pre-emptive in nature.

Finally, as to the claim that the Carrier waived its response on the property, the substantial written record demonstrates otherwise. We find no merit in this procedural objection.

Attending to the merits, on March 16, 2004, BNSF 9992 specifically advised the Claimant that they had a yellow/red flag and "needed something on it." The Claimant, then, sought assistance from the Foreman to "help her get this train past these flags." The transcript reveals that BNSF 9992 expected and wanted the appropriate Form B restriction. The Claimant followed up acknowledging a Form B was typically required; yet, she decided against issuing the Form B in favor of allowing the Form B she thought was void to expire. It is clear that the Claimant was in "solution mode" during a busy afternoon of dispatching; however, it does not excuse the logical conclusions that the Claimant should have reached and/or considered. She never adequately explained to the Hearing Officer (and to the Board) how she could possibly know and understand these facts; yet, never come to a conclusion that a Rules violation may have occurred or that the conditions she observed could threaten the safety of trains and the Carrier's employees. However, the Claimant repeatedly admits at the Hearing that she was confused by the circumstances unfolding before her. She was confused apparently because circumstances were not as they should have been nor readily explained. Certainly, if ever there were a time to contact a supervisor

pursuant to GCOR 1.4, it would be when the Claimant is confused. She also admits that a Rules violation never occurred to her. However, the facts before her certainly put her on notice that a Rules violation may have occurred or that conditions were such that GCOR Rule 1.4 and/or Rule 42.01 were implicated. She knew something was not right, if even for only five minutes while the Form B expired. We find the Carrier appropriately scrutinized the Claimant's lack of safety situational awareness, or nonchalance at best, and have no basis upon which to overturn the Carrier's judgment and imposition of discipline.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of December 2008.

Labor Member's Dissent
To Third Division Award No. 39472
Docket No. TD-38926
(Referee Danielle L. Hargrove)

The Claimant in this case was charged and found guilty of not reporting a rules violation. Contrary to the Majority suggesting that a rules violation need not occur to be found guilty of not reporting a rules violation, it is just not possible to have violated a rule that requires the reporting of a rules violation when a rules violation never occurred in the first place.

The hearing transcript reveals that the dispatcher the Claimant relieved voided a Form B, by mistake. However, there is no evidence or testimony in the hearing transcript that indicates what, if any, rule was violated as a result of that mistake. There are no rules referenced during the hearing that the relieved dispatcher supposedly violated. Yet, the carrier takes the position that the evidence contained in the transcript allowed the hearing officer to determine that the Claimant recognized the relieved dispatcher's rule violation. Without any rules on which to base that determination it was impossible for the hearing officer to do that.

As an appellate body, our review must be confined to the evidence and testimony presented at the hearing. We have no choice but to adhere to that mandate. And when we do so, it is impossible to reach the conclusions set forth in this Award.

The Majority classifies the Claimant's testimony as being disingenuous when she asserts that she had no reason to believe a rules violation had occurred. There is nothing in the record that supports this negative characterization and the only way to challenge what the Claimant believed would be to have access to her thoughts, which the Majority didn't have. What the Majority did have access to was the facts and circumstances on which the Claimant based her belief.

The record indicates that the Claimant began her tour of duty around 2:30 PM on the day in question. Shortly thereafter at "14:49:8 seconds," the Claimant contacted the BN 9992 West to see if the train was moving. The train advised the Claimant that it was stopped at a red flag. Then at "14:53:24 seconds," the Claimant continued the conversation with the BN 9992 West and Foreman Mader, who was in control of the respective Form B. Because the Form B was set to expire "in five minutes," the Claimant decided to allow it to expire instead of giving it to the train. However, Foreman Mader advised the Claimant that the flags for the Form B were down and that the train had passed the flag "30 minutes ago." Based on these facts, there is no reason to suggest that the Claimant was being untruthful or dishonest in stating her belief that a rules violation did not occur.

In order for the discipline assessed the Claimant to withstand the Board's appellate scrutiny, the carrier must satisfy its burden of proof. In order for the carrier to satisfy that burden it must first prove that a rule violation took place, which the Claimant was then

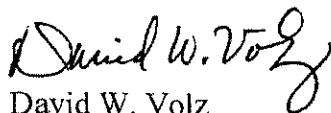
Labor Member's Dissent
To Third Division Award No. 39472
Docket No. TD-38926
(Referee Danielle L. Hargrove)

required to report. She was not charged with failing to report what may have been a rules violation or what she should have thought was a rules violation. The Claimant was charged with and found guilty of not reporting a rules violation. And as shown above, the carrier did not prove that the relieved dispatcher violated a rule that the Claimant should have reported.

The Majority suggests in several places that it was not necessary for a rules violation to have occurred in the first place. In making these statements, the Majority exceeds its jurisdiction. Again, the Board is an appellate body and must confine its review to the record before it. It cannot interject its own arguments that the carrier did not make to substantiate or excuse the carrier's actions. The carrier never took the position that the Claimant was guilty of reporting what could have been a rules violation. The carrier never took the position that the Claimant failed to report a potential rule violation. Nor did the carrier ever take the position that the Rules themselves do not require an actual rules violation or that a rules violation may not have occurred, but yet the Claimant should have reported it. The carrier's case was based on a rules violation being committed by the relieved dispatcher that the Claimant did not report.

The Majority, in dealing with the procedural issue raised by the Organization involving multiple roles was quick to acknowledge and follow arbitral precedence "as noted in Public Law Board No. 6836." However, the Majority ignored the clear arbitral precedence set by Public Law Board 6836, Awards 11 and 12 (both of which were provided to the Majority at the original hearing). In both of these Awards, the carrier had found the Claimants guilty of not reporting a rules violation. However, the carrier never proved that a rules violation occurred in the first place that needed to be reported under the same rules involved in the instant case and the Awards overturned the carrier's finding of guilt.

For the foregoing reasons, I dissent.



David W. Volz
Labor Member