Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39471
Docket No. TD-38925
08-3-NRAB-00003-050400
(05-3-400)

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
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(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 March 23, 2004, the Carrier arbitrarily disciplined train dispatcher K. A. Williams, without cause, absent any rules violation, and without producing a transcript of the proceedings of March 5, 2004. 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 as a result of attendance at the disciplinary hearing), and shall restore the record of the aggrieved to its state prior to the Carrier's March 23 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 Regional Operations Center located in San Bernardino, California. At the time of the incident involved, the Claimant worked as the Shift Dispatcher on the Port/Gateway District and had ten years of service, three of which were as a Dispatcher. The Claimant was assessed a ten day record suspension on March 23, 2004 for allegedly failing to properly handle and report a protect open switch condition at the North Siding Switch, Lodge Pole, California. Specifically, the Claimant showed the switch restored to normal position in the CWTC computer database with information from a crew who was not the last train to traverse the switch.

The Organization first asserts several procedural violations by the Carrier that purport to violate the Claimant's Agreement due process rights. First, the Organization claims that it did not receive a transcript of the Claimant's Hearing until September 10, 2004, more than six months after the Hearing. It asserts that such untimeliness violates Article 24 of the "Agreement between Burlington Northern Inc. and its Employees Represented by the American Train Dispatchers Association" effective March 7, 1970 ("the Agreement"). The Organization also asserts or implies that the Carrier imposed discipline without the benefit of review of the transcript. This, it believes, violates the Claimant's Agreement due process rights. Finally, the Organization takes issue with the Hearing Officer also filling the role of Charging Officer.

Addressing each procedural issue, the Organization first asserts that the Carrier did not submit the transcript to the Organization as requested until six months after the Hearing decision. We find that the record provides sufficient evidence to rebut the allegations that the transcript was not sent by U. S. Postal Service, certified mail, on or about March 26 and/or June 25, 2004. The Board recognizes that the Organization and the Carrier hotly dispute whether the transcripts were forwarded to the Organization as alleged; however, the Board can only conclude that there is some evidence that the transcripts were sent. The

Organization has not met its burden to demonstrate that the Carrier's assertions are false. Therefore, we cannot find that the Carrier violated Article 24 of the Agreement. As the Board stated in Third Division Award 35772, cited by the Organization, precedent in the railroad industry imposes the burden to prove receipt of a letter upon the sender. The Organization's reliance on this Award is misplaced however. First, in that Award, the issue involved the Carrier not being obligated to forward a copy of a contract to the Organization if it did not receive correspondence from the Organization requesting it. The Board in that case refused to draw an adverse inference against the Carrier because the Organization could not demonstrate that it sent the letter. The referenced Award implies that the Organization failed to present any evidence that it sent the request to the Carrier.

To the contrary, in this case, the Carrier demonstrates that it sent "something" to the Organization as requested and required. The Board would agree that the e-mail correspondence offered as evidence from Messers. Brice and Bailey might, on their own, be merely self-serving and perhaps incredible. However, the Board finds that Brice's and Bailey's statements are sufficient evidence supporting the Carrier's contention that it forwarded the transcript to the Organization. We recognize that the Organization disputes the Carrier's contention that it forwarded the transcript; however, it is not the Board's role to make fact determinations not clearly established on the record. The Organization readily admits receiving other documents purportedly sent at the time the transcript was alleged to have been sent. The Board is without an explanation for why the transcript would not be included and the Organization failed to provide any evidence or offer of proof to explain or suggest why the Carrier would not provide the transcript in this case.[1] We simply find that the Carrier met its burden more so than the Organization that it sent what it purports it sent to the Organization. We also find that there is no credible evidence produced on the record to the claim that the discipline imposed on the Claimant was done without the benefit of and review of the transcript. There was also no evidence presented that the Claimant lost the ability to present any argument, obtain evidence, or was harmed in any way by any

[1] Transcripts are provided in the normal course of business in the Investigation process. It is inexplicable that the Carrier would choose to refuse to send the transcript and the Organization did not produce any evidence to support such a claim. Further, any speculation that the Carrier did not have the transcript was also not supported by the record.

delay in receiving the transcript. Therefore, even assuming arguendo, that the Organization did not receive the transcript until three and one-half months after the Hearing, we hold no harm is evident from the record. Finally, the record evidence does not reveal any impropriety or partiality, nor does the Organization raise any specific objection in the handling of the Hearing by the Hearing Officer. Therefore, we find no merit to the Organization's general dual-role objection in this case.

Moving to the merits, the factual course of events is generally not in dispute. At about 2:45 A.M. on January 28, 2004 the Chief Dispatcher notified the Manager, Dispatching Practices/Rules that BN 7807 had entered the siding at Lodge Pole, California, without any notification that the north siding switch was in the reverse position, or could be in the reverse position. An investigation revealed that there was a track warrant (No. 393) that did not contain a Box 20 reading, which warned the train crew to be prepared to stop short at the north siding switch at Lodge Pole until it was known to be in the normal position. In summary, the track warrant authorized the train to proceed from milepost 132 to 191 without putting it on notice to be cautious regarding the north siding switch at Lodge Pole. As a result, the train proceeded through the switch into the siding at a speed four times the authorized speed.

After a Hearing, in a letter dated March 23, 2004, the Claimant was advised that she was found to have violated Rule 42.19 – Protect Open Switch as contained in the Train Dispatcher's /Operator's Manual effective July 13, 2003. Specifically, the Carrier found the Claimant improperly utilized the CWTC computer system to change the database to reflect that the switch was restored to normal position using information from a train that had not traversed the switch last. The record evidence reflects that the train that traversed the switch last was BN 4179; however, the Claimant did not know this fact. The Claimant assumed that BN 9256 was the last crew to traverse the switch. We find that although the Claimant demonstrated an earnest effort in fulfilling her responsibilities and made reasonable assumptions, she clearly made a mistake in acting on the report from the wrong crew (BN 9256). Rule 42.19 provides the following in part:

"Provide protection for open main track switches in track warrant territory only by use of a computerized track warrant system and under the following provisions . . . ." [Emphasis added]

Not unlike the findings in Award 1 of Public Law Board No. 5998, the Board is sensitive to the safety issue reflected in these facts. We find that, despite the Claimant's efforts that seemed reasonable at the time, she ultimately did not provide protection for the open main track at Lodge Pole in accordance with Rule 42.19.

In protect open switch track territory, the Dispatcher maintains a database that is in the CTWC machine that reports the positions of the track switches. That database is used to determine whether a Box 20, Be Prepared to Stop Short, warning is necessary for track warrants that are later generated by the Dispatcher. In fact, the Dispatcher transfer report[2] prepared by the second Shift Dispatcher listed the north siding switch at Lodge Pole as being in reverse in the CTWC at 2245 on January 27, 2004. However, the Claimant made an entry into the database at 2313, less than 30 minutes later, to change the position to reflect that the north siding switch at Lodge Pole was restored to the normal position.[3] She did this based upon information she received, upon her request, from a crew she believed to be the last crew on the track. However, the crew she spoke with (BNSF 9256) was not the last crew. BNSF 4179 North was the last crew over the north siding switch at Lodge Pole when the Claimant received her report at 2313 on January 27; however, the Claimant was not aware of the track warrant which would have advised of this fact. Nevertheless, it is the Carrier's position that regardless of the reasonableness of the Claimant's deductions, she was not to enter the change into the database absent the specific exceptions noted in the Rule. Interestingly, the Organization provides no argument as to the applicability of those exceptions.

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[2] This information is found as Hearing Exhibit 15 and Carrier's Exhibit 1 in its Submission.

[3] Normal position means lined for main line movement, not lined for entry into the siding. In reality, the CTWC database reflected the switch was in the normal position because the Claimant changed it to read so, not because it actually was so. It is her decision to modify the database that the Carrier scrutinizes.

The Organization failed to provide any rebuttal to the Carrier's assertion and interpretation of Rule 42.19 that the Claimant was not to make any entry into the database. The Organization's claim centers on the reasonableness of the Claimant's actions or thought processes, not whether her entering data in the database when she did was prohibited at all by Rule 42.19 as the Carrier contends. For this reason, we find no evidence produced on the record to support modifying the Carrier's decision to impose discipline in this case. Yet, the Board notes it is unclear from the record, whether the Carrier's imposition of discipline is based upon the Claimant's changing the database with incorrect information or the Claimant's changing the database at all. That is, the Carrier's Submission and the record evidence are unclear as to whether the Claimant would have been disciplined if she had received an incorrect report from the correct crew and took the same action of modifying the database. The Board is troubled by the ambiguity of the Carrier's position. Yet, it cannot escape the reality of the Claimant's failure to protect the open switch as she was charged. Therefore, the claim must be denied.

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. 39471
Docket No. TD-38925
(Referee Danielle L. Hargrove)

Simply put, the Majority's findings in this case make no sense and had it confined itself to the record it would have had to come to a completely different conclusion.

While the Majority tries to twist the record involving the carrier's failure to provide the Organization with a copy of the transcript as required by the Agreement, there can be no doubt on this record that the carrier did not do so.

With regard to the carrier's failure to provide the transcript to the Organization, the Majority stated, "We find that the record provides sufficient evidence to rebut the allegations that the transcript was not sent by U. S. Postal Service, certified mail, on or about March 26 and/or June 25, 2004." So, what exactly was this "sufficient evidence?"

- "...in this case, the Carrier demonstrates that it sent 'something' to the Organization as requested and required."

- "...the e-mail correspondence offered as evidence from Messers. Brice and Bailey might, on their own, be merely self-serving and perhaps incredible.[1] However, the Board finds that Brice's and Bailey's statements are sufficient evidence supporting the Carrier's contention that it forwarded the transcript to the Organization."

- "...the Organization failed to provide any evidence or offer of proof to explain or suggest why the Carrier would not provide the transcript in this case."

- "Transcripts are provided in the normal course of business in the Investigation process. It is inexplicable that the Carrier would choose to refuse to send the transcript..."

Of course, none of this is actually evidence. The fact that the carrier may have sent the Organization "something" does not satisfy the Agreement requirement that it provide the Organization with the transcript. To recognize that the email statements were "self-serving" and "incredible" in one sentence only to deem them as "sufficient evidence" in the next is "incredible." To suggest that the Organization must be able to somehow delve into the thoughts of the carrier to determine its motives is nonsense. Further, to suggest that because providing transcripts is "normal," the carrier must have done it is nonsense as well.

The Majority also found that, "Therefore, even assuming arguendo, that the Organization

[1] Brice's and Bailey's emails stated that the transcript was provided to the General Chairman and were dated more than five months and nearly three months later respectively.

did not receive the transcript until three and one-half months after the Hearing, we hold no harm is evident from the record."

The Agreement between the parties requires that the carrier provide the transcript to the Organization and that the Organization has sixty (60) days in which to appeal the decision rendered on the hearing. For the Majority to suggest that there is no harm in the carrier not providing the transcript in time for the first level appeal is unbelievable.

As correctly noted by the Majority, "the Claimant made an entry into the database at 2313, less than 30 minutes later, to change the position to reflect that the north siding switch at Lodge Pole was restored to normal position. She did this based upon information she received, upon her request, from a crew she believed to be the last crew on the track. However, the crew she spoke with, BNSF 9256 was not the last crew."

The record clearly showed that she made no changes to the database until she gained this information. The Claimant used the only information available to her and contacted the train this information told her was the last train over the switch. She had no way to access any other information and this was confirmed by carrier witness Brice at the hearing. To then hold the Claimant accountable for something she had no way of knowing to be incorrect information is unreasonable and arbitrary.

I dissent to this decision.

David W. Volz
Labor Member