

PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA-010B-08
BNSF File No.	06-08-0468
NMB Case No.	14
Award No.	14

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

"The BNSF Railway Company ("Carrier") violated the current effective agreement between the Carrier and the American Train Dispatchers Association ("Organization"), including but not limited to Article 24(b) in particular when on April 4, 2008, the Carrier arbitrarily, capriciously and unilaterally disciplined train dispatcher Paxton, assessing her a "Ten (10) day record suspension" for alleged violation of Rule 43.2, without due cause and absent any reasonable demonstrated violation.

The Carrier shall now overturn the decision and remove the mark from her personal record. Further, it is now incumbent upon BNSF to make principle whole for any and all lost time, including wages not paid as a result of attendance at the disciplinary hearing.

FINDING

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in the dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

BACKGROUND

G. S. Paxton ("Claimant") began her employment with the Carrier on June 4, 1977, and at the time of the events leading to this arbitration she was assigned to work as a Train Dispatcher at the Carrier's Ft. Worth, Texas Centralized Train Dispatching Office. On February 11, 2008, the claimant was working her regular assignment as second shift dispatcher on the Pasco East Dispatching District. During her shift, Form B Track

Bulletin 7708 was in effect and established that the main line and siding were restricted on the Lakeside Subdivision between Mile Post 107.0 to 108.5 from 0600 to 2000 Pacific Time due to flooding conditions.

At 1942 PT on the date in question, the Maintenance Foreman who was in charge of Form B 7708 contacted the Claimant and requested that the closing time of Form B 7708 be extended from 2000 on February 11, 2008, to 0600 (Pacific Time) the following morning. The Claimant consulted with her Chief Dispatcher about extending the Form B, and she was informed that the time limits of the existing Form B could not be extended. Instead, the Chief Dispatcher instructed the Claimant to issue an emergency Form B for the affected area. The Chief Dispatcher also sent a written CAD message to the Claimant instructing her to issue the new Form B for the same area and with the effective time of 2000 on February 11 to 0600 on February 12. The written instructions specifically stated that the new Form B must include both the main track and siding.

Following receipt of the Chief Dispatcher's CAD message, the Claimant issued emergency Form B 7962 extending the restriction for the affected area. However, Form B 7962 only listed the main track as being affected, and it did not include the siding. As a consequence, a train entered the siding during the restricted hours without first contacting the Maintenance Foreman in charge. No accident or injury resulted from the train entering the restricted siding.

An investigation of the matter was initially scheduled by the Carrier to take place on February 23, 2008, and after two postponements, the investigation was conducted on April 4, 2008. At the conclusion of the investigation, a Disciplinary Letter dated April 17, 2008, was issued to the claimant which states in pertinent part as follows:

As a result of formal investigation held in the MDPR Conference Room, on the second floor of the BNSF East Office Building (EOB), 3017 Lou Menk Drive, Fort Worth, TX at 1000 CT on April 4, 2008, the following notation will be placed on your personnel record:

"Ten (10) day record suspension for violation of Rule 43.2 from the Train Dispatcher's, Operator's and Control Operator's Manual, on February 11, 2008, when you failed to include the siding as requested when issuing Form B track bulletin 7962"

A timely claim was filed protesting the issuance of the subject Disciplinary Letter and having been unable to resolve the matter during earlier steps of the appeal procedure, the claim was submitted to this Board for final and binding resolution.

DISCUSSION

The Claimant attended an interview with members of Carrier management concerning the incident on April 4, 2008. During the interview, the Claimant was allowed to listen to the tapes of her conversation with the Maintenance Foreman and after discussing the matter with the members of management who were present during the interview, she accepted responsibility for the incident. Having established the Claimant's error, the Carrier offered to her the alternative discipline of one day of training at 80 percent pay in accordance with the collective bargaining agreement. The Claimant subsequently declined to accept the alternative discipline and a formal Letter of Investigation dated February 19, 2008 was issued to her which states as follows:

Arrange to attend investigation in the MDPR Conference Room, on the second floor of the BNSF East Office Building (EOB), 3017 Lou Menk Drive, Ft. Worth, Texas at 1000 CT on February 23, 2008, to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to correctly issue a Form B request in TSS (Form B Restriction 7962) on the Lakeside Subdivision between MP 107.1 and MP 108.5 on the Main Track and Siding as requested by Foreman Smith. This alleged failure to correctly issue Form B 7962 resulted in train H PASKXK9 11 (FURX 7246) to enter the siding at Cromwell (siding within the limits of Form B 7962) without first allegedly contacting Foreman Smith. This alleged incident occurred at approximately 1943 CT on February 11, 2008 while you were working as the 2nd shift dispatcher on the Pasco East Dispatching District in the NOC in Ft. Worth, Texas. (Emphasis added)

The Organization and Carrier mutually agreed to postpone the investigation on two occasions and with each postponement, the Claimant was provided with another Letter of Investigation containing the same basic language that was contained in the initial Letter of Investigation.¹ The investigation subsequently took place on April 4, 2008 and at the conclusion of the investigation, it was determined that the Claimant had violated TDOCOM Rule 43.2 which states in pertinent part:

- When notified of a track condition on a main track, siding or controlled track or asked to place a track restriction, issue a track restriction to cover the condition, unless otherwise instructed by your supervisor.
- Make sure that information issued on track restrictions:
 - corresponds with the request for the track restriction
 - is in accordance with the rules
 - when received verbally from the field, is recorded on the prescribed form

¹ All three Letters of investigation cited that the subject siding was located at Cromwell rather than Connell.

The Charges

The record clearly established, and the Claimant did not dispute that the Track Maintenance Foreman requested an extension of Form B 7708 from 2000 PT on February 11, 2008 to 0600 PT on February 12. The record also established that the Claimant's Chief Dispatcher informed the Claimant that an extension could not be issued, and he instructed her to issue a new Form B listing the restriction for the main track and siding at the same area. The evidence shows that the Claimant subsequently issued Form B 7962 to cover the extension. However, Form B 7962 only restricted the main track in that area and it did not restrict the siding.

The evidence also established that the Claimant failed to verbally notify her relief dispatcher on the 3rd shift that the subject siding was restricted. As a consequence, the restriction was not discovered until shortly after the beginning of the third shift that night when the crew of a train that was lining into the subject siding to meet an opposing train encountered the limits of the Form B flag without having received a corresponding track bulletin. The crew then notified the dispatcher who researched the matter and discovered the Claimant's error.

Based on the foregoing, the evidence established that the Claimant was guilty of the misconduct outlined in the Letter of Investigation.

THE ORGANIZATION'S ASSERTIONS

Errors Contained in the Letters of investigation

The Organization offered several technical arguments on the Claimant's behalf. First, the Organization pointed out that in all three of its Letters of Investigation to the Claimant, the Carrier had improperly listed the location of the incident to be at **Cromwell** rather than **Connell** and it argued that no such siding or station of Cromwell exists on the indicated subdivision. The Organization also pointed out that in all three Letters of investigation, the Carrier had improperly cited the time of the subject incident as 1943 Central Time rather than the correct time of 1943 Pacific Time. As a consequence, the Organization argued that the Carrier's errors constituted fatal flaws which warrant removal of the subject Disciplinary Letter from the Claimant's file.

During the investigation, the Organization pointed out the errors contained in the Letters of Investigation, and the Carrier had acknowledged those errors. At the same time, the Carrier corrected the record to reflect that the incident occurred at Connell rather than Cromwell, and the incident had taken place at 1943 Pacific Time rather than Central Time. The Carrier also pointed out during the investigation that notwithstanding those two clerical errors, the Letter of Investigation nonetheless had correctly specified that the incident took place at the Lakeside Subdivision between Mile Post 107.1 and Mile Post 108.5 on the Main Track and Siding. Thus, it was clear exactly where the incident took place, and the time discrepancy was easily cleared up with a minimal effect.

During her initial interview with management concerning the incident as well as during the investigation, it was clear the Claimant understood that Form B 7962 was being discussed, and she acknowledged her error in not including the siding on that Form B. In addition, since the clerical error had been corrected during the investigation and because neither the Claimant nor the Organization requested additional time to prepare a defense after the discrepancy had been corrected, this Board finds that those minor clerical errors did not deprive the Claimant of an opportunity to prepare an adequate defense or deprive her of her right to due process.

Right to a Fair and Impartial Hearing

Next, the Organization argued that the Claimant was not afforded a fair and impartial hearing because Transportation Process Specialist D. L. Mead had served as the Hearing Officer and was also the person who assessed the discipline upon the Claimant. The Organization maintained that since Mr. Mead participated in multiple roles during the disciplinary process, the Claimant's due process rights were violated.

This Board fully agrees with the Organization's argument that a fair and impartial hearing is absolutely necessary before discipline is assessed to an employee. In the instant case, the evidence established that the charges were clearly explained to the Claimant, and she was given a full opportunity to explain her version of the facts. In addition, there is no evidence to show that Mr. Mead was biased during the investigation or that he neglected to consider all of the evidence before reaching a decision. Therefore, this Board finds no merit to the Organizations argument that the Claimant's due process rights were violated because of an unfair or biased hearing is not sustained.

Adversarial Hearing

A third argument advanced by the Organization asserted that Mr. Mead acted in an adversarial manner while serving as the Carrier's conducting officer at the investigation. However, no evidence was offered to support a finding that Mr. Mead refused to allow the admission of evidence or that he neglected to consider all of the evidence and testimony. To the contrary, a review of the transcript of the investigatory interview established that the Organization was allowed to fully cross examine the Carrier's witnesses without interruption. The transcript recorded that the Claimant was allowed to speak freely and present her side of the issue. Further, no evidence was submitted to support a finding that the Claimant was denied a fair opportunity to explain her side of the story. Therefore, the Organization's argument in this matter must also fail.

Discipline Excessive

The Organization next argued that the discipline issued was excessive. Simply stated, the Board disagrees. The Carrier submitted PLB 5998, Award No. 1, in which the Board held:

The Board is sensitive to the safety issues germane to this industry and a violation such as the one under scrutiny in this case represents a fundamental encroachment upon such safety requirements. Such conclusion is consistent with precedent emanating from other arbitral forums in this industry. Further, with respect to the quantum of discipline, the board can come to no other conclusion, upon reviewing the Claimant's record, that the determinations by the Carrier here were neither arbitrary nor capricious and that such cannot reasonably be disturbed by the Board.

This Board agrees with the opinion of PLB 5998, Award 1 and finds that it has application to the instant case. The Claimant's failure to include the restricted siding on Form B 7962 allowed an unsafe condition to exist that was discovered only after a train had entered the restricted siding.

The evidence established that the Claimant had previously been disciplined for unsatisfactory job performance on 16 occasions during her career with the Carrier; several of which were for incidents of negligence similar to the instant case. Therefore, in view of the foregoing, this Board does not find the discipline in this case to be excessive or punitive.

Challenges to Positions Presented by the Organization

Finally, the Organization asserted that because the Carrier had not responded to one of the letters sent to it by the Organization concerning this appeal, the Carrier had not challenged the positions presented by the Organization. Therefore, the Organization maintained that this claim should therefore, be sustained. The Organization specifically cited a letter addressed from ATDA Vice General Chairman R. B. Aldridge to General Director Labor Relations O.D. Wick dated January 10, 2009. In his letter to Mr. Wick, Mr. Aldridge disagreed with the material statements made by Mr. Wick in his denial letter addressed to Mr. Aldridge dated November 15, 2008.

In support of its argument, the Organization submitted National Railroad Adjustment Board Second Division Award No. 12750 involving pay to Carmen for time lost due to the shutdown of connecting Carriers. The Board explained its denial of the claim this way:

We find for the Carrier in this dispute. On the property, the Carrier stated that it was forced to curtail its operations because of the nation-wide strike and that it created an emergency within the meaning and intent of Rule 24. The Organization on the property did not contest or rebut the Carrier's position and, therefore, it stands as excepted fact. We therefore, must deny the claim.

The above award made it abundantly clear that the Carrier had satisfactorily explained its reasons for curtailing its operations because of numerous strikes among its connecting carriers and that the Organization did not contest or rebut the Carriers explanation. This Board finds that Carrier in the instant case had also satisfactorily explained it reasons for assessing discipline to the Claimant and for denying the claim.

The Organization also submitted National Railroad Board Third Division Award No. 28459 involving disputed work performed by an outside janitorial service. In denying the claims, the Board found:

With respect to the three separate Claims, we note that the wording of the individual Claims and the following correspondence is the same for each. The Carrier, in its identically worded denial letters, substantially gave its reasons for rejecting the Claims. There is nothing in the record properly before us that refutes these material statements and assertions. It has been consistently held by the Board that when material statements are made by one party and not denied by the other party, so that the allegations stand un rebutted, the material statements are accepted as established fact. On that basis, we must deny these Claims.

As with Award 12750, it is clear once again from the above cited language, that in Award 28459, the Carrier had again satisfactorily explained its reasons for denying the subject Claims and that the Organization had not rebutted the Carrier's explanation. Moreover, there is nothing contained in either of the above awards which indicates that the Carrier is required to respond over and over to each and every reiteration of the Organization's arguments that are submitted during the appeal process. In the instant case, the Carrier had substantially and clearly set out its reasons for denying the Claim in its November 15, 2008, letter and addressed all of the arguments that had been made by the Organization during the appeal process. Although the Organization's subsequent letter was well written and well intended, it appears to be a repeat of the Organization's previously raised arguments. As such, the Carrier was not required to provide a further reply. In view of the foregoing, the Organization's technical argument advanced in this regard is also not sustained.

Pay for Time Spent During an Investigation

In its submission, the Organization requested that the Claimant be made whole for any and all lost time, **including wages for all time lost as a result of attendance at the disciplinary hearing.** (Emphasis added) However, as this Board has previously held in prior PLB 7292 Awards, Article 24 only provides for the repayment of lost wages, minus interim earnings, if the dispatcher is cleared of the charges and it makes no provision for pay to a claimant while attending an investigation. Public Law Board No. 6519, Award No. 4, examined this same argument and in that award the Board had this to say:

The Board must find that the only Article specifically written and applicable to the facts, is Article 24 pertaining to Discipline and denoting the provisions relevant to an investigation. **There is no language in Article 24 providing for compensation for attendance at an investigation.** (Emphasis added) The Carrier pointed out on property that there was no past practice. The facts indicate that the Claimant was charged and found guilty as a result of that investigation. Whatever the consequence of being censured and in addition, losing a day's wages, the parties have no language which provides compensation herein, and Articles 18 and 20 do not apply. Accordingly, the Board must deny the claim.

This Board concurs with PLB 6519 and finds that the Organization's request to have the Claimant compensated for time spent while attending the investigation constitutes a demand that is not provided for in the Collective Bargaining Agreement. Accordingly, the Organization's request for pay while attending an investigation is hereby denied.

CONCLUSION

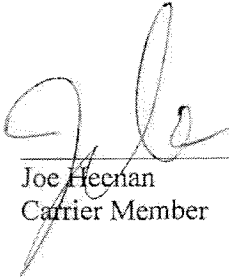
The evidence record clearly established that the claimant committed the violation for which she was disciplined and that the Organization's technical arguments should not be sustained.

AWARD

The claim is denied in its entirety.



Paul Chapdelaine
Chairman and Neutral Member
May 2, 2011



Joe Hechan
Carrier Member



Paul Ayers
Employee Member