PUBLIC LAW BOARD NO. 7292

ATDA File No.	MA06-08-001
BNSF File No.	06-08-0556
NMB Case No.	20
Award No.	20

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

The Burlington Northern Santa Fe 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 May 28, 2008, the Carrier arbitrarily disciplined train dispatcher M. L. Penney, disciplining him without cause and absent any rules violation.

The Carrier shall now overturn the previous decision to discipline the aggrieved and shall make him whole for any and all lost time (including wages and 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 arbitrary May 28, 2008 decision.

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

M. L. Penney ("Claimant") began his employment with the Carrier as a dispatcher on September 10, 2001. At the time of the events leading to this arbitration, he was assigned to work as a train dispatcher at the Carrier's Network Operations Center in Ft. Worth, Texas.

The Carrier falls under the jurisdiction of the Federal Railroad Administration ("FRA") and is required by the FRA to maintain Dispatcher Transfer Reports as a part of the Federal Hours of Service Record. The FRA audits the Dispatcher Transfer Reports periodically to assure they have been completed correctly. On April 24, 2008, the Carrier's Manager of Dispatching Practices ("MDP") was conducting a routine internal audit of the Omaha Split Dispatcher Transfer Report for April 11, 2008, and noted that the Claimant had improperly completed a Transfer Report as the relieving dispatcher. Specifically, the MDP noted that in the area designated for "hours off since previous shift", the Claimant had written "99+," and he also entered the improper comment "**Not Long Enough**" in parenthesis in that same area. The MDP was concerned with the Claimant's improper entry for the reason that the only information allowed by the FRA to be entered in that section is the total time the relieving dispatcher has been off since his/her previous shift. Therefore, an investigation was initiated and the Claimant was presented with an investigation notice dated April 24, 2008, which states in pertinent part:

> Attend an 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, April 28, 2008, to ascertain the facts and determine your responsibility, if any, in connection with you allegedly writing a superfluous remark in the space provided for on the Dispatcher Transfer Report, on the line stating "Hours off Since Previous Shift." This allegedly occurred at approximately 1440 CT on April 11, 2008 when you were starting your transfer requirements on the 2nd shift Omaha Split Dispatching District in the Network Operation Center, Ft. Worth Texas. This incident was first discovered on April 24, 2008 during a routine audit of Dispatcher Transfer Reports by a BNSF official.

The Investigation was subsequently postponed and eventually conducted on May 13, 2008. During the investigation, it was confirmed that the Claimant had written the "not long enough" entry on the Report. As a consequence, a discipline letter dated May 28, 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, Ft. Worth, Texas at 1400 CT, May 13, 2008, the following notation will be placed on your personnel record:
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> "Twenty (20) day record suspension for violation of TDOCOM Rule 50.2.5 Time and Sign and General Code of Operating Rules Rule 1.4 Carrying Out Rules and Reporting Violations, when I failed to properly complete the Dispatcher Transfer Report as required by rule while I was beginning my shift as 2nd shift dispatcher on the Omaha Split Dispatching District at approximately 1440 CT on April 11, 2008 in the Network Operation Center, Ft. Worth Texas.

A timely claim was filed protesting the issuance of discipline 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 Charges

During the Carrier's investigation, MDP Daniel McCaslin testified that the Dispatcher Transfer Report is a form used for the sole purpose of transferring information between the Dispatcher who is going off duty and the relieving Dispatcher who is coming on duty. Mr. McCaslin also testified that the Report is intended to allow the dispatcher who is going off duty to exchange only relevant information with the dispatcher coming on duty concerning speed restrictions, operating conditions, weather alerts, etc. that could affect the operation. Mr. McCaslin made it clear that only the number of hours that the dispatcher had been off before the beginning of the shift should be entered into the "Hours Off Since Previous Shift" section of the Dispatcher Transfer Report and that superfluous editorial comments are not permitted.

During the investigation of the instant infraction, the Claimant readily admitted that he had written the inappropriate "not long enough" comment in the "Hours Off Since Previous Shift" section of the subject Transfer Report on April 11, 2008. Therefore, by his own admission, the Claimant has established that he committed the act for which he had been charged.

In National Railroad Adjustment Board Fourth Division Award 4779, the board had this to say concerning an admission of guilt:

> While these contentions were advanced with skill and vigor and are not without merit, the organization nonetheless cannot overcome the long-standing precedent in this industry that when there is an admission of guilt, there is no need for further proof and the only remaining question is the degree of discipline, if any.

In view of the foregoing and based on the Claimant's admission that he had entered the inappropriate comment on the Dispatcher Transfer Report on April 11, 2008, this Board concludes that no further proof is required to establish that the Claimant was responsible for the Rules infraction as stated in the discipline letter dated May 28, 2008.

THE ORGANIZATION'S ASSERTIONS

Right to a Fair and Impartial Hearing

The Organization argued that the Claimant was not afforded a fair and impartial hearing because Nebraska Zone Corridor Superintendent, Jared Wootton, served as the Charging Officer, the Hearing Officer, and ultimately assessed the discipline upon the Claimant. The Organization maintained that because Mr. Wootton participated in multiple roles during the disciplinary process, the Claimant's due process rights were violated. In support of its argument, the Organization submitted Third Division Award 4317 which examined the issue of an employee who was charged with reporting late for duty and drinking intoxicants prior to reporting for duty. In that award, the board had this to say:

> In our opinion, it is well-nigh impossible for impartiality to be shown where the same person functions in the tripartite capacity of complaining witness, prosecuting attorney and trial judge. Although we appreciate that some deviation from strict legal procedures in hearings of this kind are contemplated by the parties when entering into the collective bargaining agreement and some degree of tolerance with such deviations can be expected from this Board, the procedure in this instance hasn't retained the slightest semblance to the observance of American precepts of a fair and impartial trial.

This Board fully agrees with the determination in Award 4317 that a fair and impartial hearing is absolutely necessary before discipline is assessed to an employee. However, this Board respectfully disagrees with that board's finding that a carrier official who serves in a multiplicity of roles cannot be impartial and therefore deprives a claimant of his right to due process.

The Organization also submitted National Railroad Adjustment Board Third Division Award 13240 which states, in pertinent part:

> The judge or hearing officer must be impartial. One who has formed an opinion before hearing all the evidence is devoid of impartiality. The person making the charge is not qualified to sit in judgment as to its merits in the absence of acquiescence by the person charged.

Once again, this Board fully agrees that the judge or hearing officer must be impartial and should not form an opinion before hearing all the evidence. However, this Board again respectfully disagrees with the finding in Award 13240 that "The person making the charge is not qualified to sit in judgment as to its merits . . .". Therefore, this Board is

unable to draw an analogy between the instant claim and the claim addressed in Award 13240.

Other boards have also examined this same issue and drawn a different conclusion. In these Awards, the boards have determined that such an argument does not necessarily validate an assertion of a lack of due process. For example, in Public Law Board 6829, Case 6, the Board ruled as follows:

> This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. It is fundamental that the same person may play different roles in the investigation process as long as the Claimant's due process rights were fully guaranteed. A review of this record makes it clear to this Board that the Claimant was guaranteed all of his due process rights throughout the entire procedure.

In the instant case, the evidence established that the Claimant's due process rights were protected throughout the process. The charges were clearly explained to him at the outset and he was given a full opportunity to explain his version of the facts. In addition, there is no evidence to show that Mr. Wootton 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 Mr. Wootton served in a multiplicity of roles during the disciplinary process.

Carrier Determined Claimant to be Guilty of a Rule Violation Not Referenced Prior to Discipline Being Imposed

The Organization argued that although the Carrier had determined the Claimant to be in violation of TDCOMC Rule 50.2.5 and General Code of Operating Rules Rule 1.4, Rule 1.4 was never mentioned or entered into the record of the hearing transcript. In addition, the Organization argued that none of the witnesses or the Principal was questioned about this rule during the Investigation. Therefore, the Organization maintained that the Claimant's due process rights were violated and offered National Railroad Adjustment Board First Division Award 26295 in support of its argument. In that Award, the board found:

> It stands to reason that a violation cannot be proven if the existence of a rule has not been proven. That proof must be presented at the Investigation. To find such proof, we must look to the transcript. Just as the Organization may not defend an employee with evidence not proffered

at the Investigation, so may not the Carrier discipline an employee on the basis of something other than what is contained in the record. In Award 19394, the First Division held:

> "In assessing discipline imposed as a result of a trial investigation, the scope of our review is necessarily confined to the transcript or record. (Awards 14319, 15745) The reason behind this principle is that the evidence adduced at trial investigation is the sole basis for the discipline imposed."

In our review of the record before the Board, we find that the Rules relied upon by the Carrier were neither quoted in the Investigation nor attached to the transcript.

The Organization also submitted PLB No. 6993, Award 5 which addressed the issue this way:

> However, the Claimant was denied his due process rights because he was not advised of the Operating Rules in issue until he received the determination letter citing those Rules. In PLB 6993, Case No. 3, this Board found that the charge letter was sufficient to put the claimant and her representative on notice of the charges against her (overlapping blocks) and to enable them to prepare a defense. However, in that case, the Carrier did not cite any Rules after the fact in the determination letter. In this case, however, the Carrier determined that the Claimant had violated specific Operating Rules that were not cited or provided to the Claimant either in the charge letter or at the investigation.

This Board also examined PLB 7225, Award 6 in which that board had considered a similar argument advanced by the Organization. In this award, the board held:

> . . . the Organization correctly notes that Claimant was found guilty of violating a rule, Rule 40.1.1 (Avoid Dangerous Conditions) that was not mentioned in the charge letter nor referred to at any time during the course of the investigation. Unlike the situation reviewed by this Board in our Award No. 5, no similar or more encompassing rule was read into the record that would have provided Claimant sufficient notice of the charges against him and the opportunity to respond. Nonetheless, so basic a rule is encompassed by the charge that Claimant was "allegedly negligent and failed to perform your assigned duties in a safe manner." We do not find, under the specific circumstances here, that the failure to refer to Rule 40.1.1 prior to the letter assessing discipline deprived Claimant of knowledge of the offense with which he was being charged nor that it prevented him from presenting a full defense to that charge.

Although First Division Award 26295 and PLB 6993 Award 6 may have application is some instances, this Board finds that PLB 7225 has more specific application to the

instant case. Notwithstanding the Organization's vigorous argument on this issue, the evidence shows that the Claimant was aware at all times that he was being charged with entering an improper comment on the Dispatcher Transfer Report on April 11, 2008. This Board also finds it relevant that the Claimant had previously been issued a 10-Day record suspension for the same infraction, and he had been put on notice at that time that such conduct was prohibited and could lead to more severe disciplinary action. Therefore, this Board is not persuaded by the Organization's vigorous argument that the Claimant was disadvantaged by the Carrier's omission of a specific rule violation prior to discipline being imposed.

Challenges to Positions Presented by the Organization

The Organization also asserted that because the Carrier had not responded to one of the Organization's letters 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 dated December 18, 2008, from ATDA Vice General Chairman Philip Maucieri to General Director Labor Relations O.D. Wick. In his letter to Mr. Wick, Mr. Maucieri disagreed with the statements made by Mr. Wick in his denial letter addressed to Mr. Maucieri dated November 3, 2008 and he advised Mr. Wick that Mr. Wick's decision was unacceptable to the Organization.

The Organization submitted National Railroad Adjustment Board Second Division Award 12750 involving pay to carmen for time lost due to the shutdown of connecting carriers. In that Award, a similar argument had been advanced by the carrier and the board explained its denial of the Organization's 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 carrier's explanation. This Board finds that in the instant case, the Carrier had also satisfactorily explained it reasons for assessing discipline to the Claimant and for denying the claim.

In another case, a similar argument was advanced by the carrier in National Railroad Board Third Division Award 28459 involving disputed work performed by an outside janitorial service. In denying the organization's 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 unrebutted, 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 that in Award 28459, the carrier had again satisfactorily explained its reasons for denying the subject claims and 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 to each and every reiteration of the organization's arguments that have been 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 3, 2008, letter to Mr. Maucieri and had addressed all of the arguments that had been made by the Organization during the appeal process. At that point, the Organization knew the Carrier's position and it was free to reiterate those arguments at the arbitration hearing.

In view of the foregoing, this Board finds no merit to the Organization's claim that the Carrier did not challenge the positions presented by the Organization or that the Organization's positions should be accepted as unrebutted.

The 20-Day Record Suspension was Unwarranted

Finally, the Organization argued that the 20-Day Record Suspension was unwarranted. At first glance, it appears that the Organization's argument for a lesser penalty may have some merit in the interest of progressive discipline. Therefore, this Board must direct its attention to the penalty assessed.

The Federal Railroad Administration (FRA) is concerned with train dispatcher rest requirements, and the Carrier is required to maintain accurate Dispatcher Transfer Reports for periodic audit by the FRA. During the investigation, Manager of Dispatching Practices McCaslin stated that the Carrier had previously been cited by the FRA in 2006

when it was discovered during an FRA audit that a similar improper comment had been entered on a Transfer Report. According to Mr. McCaslin, the Carrier had subsequently reminded all dispatchers, including the Claimant, numerous times during daily job briefings of the Carrier's rules prohibiting such comments. Mr. McCaslin specifically cited the Train Dispatcher Daily Job Briefing and Incident Review form dated November 30, 2006, which documented that TDOCOM 50.23 had been reviewed with the Claimant and other dispatchers as follows:

> **Suggested Briefing Topic – TDOCOM 50.2.5 Sign and Time**
>
> **This is the second briefing this month** concerning signing, dating and entering the total amount of time on duty or hours off since previous shift on the dispatcher's transfer report. The need to re-emphasize this information is due to the fact that the FRA was in the NOC this past week to do follow-up auditing of dispatchers work practices and completion of required transfer information. They noted six exceptions in the record in regard to dispatchers not completing the transfer information as required. One exception the FRA noted was a dispatcher making a comment in the "Hours off Since Previous Shift" stating "**not Long enough**". Refrain from such comments and only list the hours and minutes a dispatcher was on or off duty. **Continued violation of this rule will lead to progressive discipline being assessed to the individual dispatcher.** (Emphasis added)
>
> **50.2.5 Time and Sign**
>
> To accept responsibility for the position, the relieving dispatcher must time the transfer page at the exact time the transfer is started. When transfer is completed, dispatcher must sign a transfer page to signify acceptance of the transfer. The time you log on the CAD system must match the time written on the computer-generated transfer page.
>
> Student and qualifying dispatchers must sign and enter time on the transfer indicating on an off duty times.
>
> All times entered will be used for Federal Hours of Service records. Time off duty before showing on duty must be entered. Time off up to 99 hours must be precise (15 hours 5 minutes for example). Time off over 99 hours may be shown as 99+.
>
> The dispatcher being relieved will sign and time the transfer at the exact time duties are relinquished.

The Daily Job Briefing form dated November 30, 2006, clearly documented, that the issue of correctly completing the Dispatcher Transfer Form had been discussed two times during daily dispatcher Job Briefings in November 2006. That Daily Job Briefing form also specifically documented that among other discrepancies, the FRA had cited the Carrier because a dispatcher had neglected to enter the number of hours he had been off

since his previous shift and that he had also entered the comment "not long enough" in the section titled "Hours Off Since Previous Shift". According to Mr. McCaslin, it was the Claimant in the instant case who had entered the "Not Long Enough" comment in 2006 which had resulted in the Carrier being cited by the FRA.

As a consequence of his actions in the 2006 incident, the Claimant had signed a waiver dated December 18, 2006, in which he waived his grievance rights and agreed to accept a 10-day record suspension for his misconduct. In addition, the Claimant agreed to an 18 month review period which extended until June 18, 2008, and he acknowledged his understanding that "should another infraction be progressed against me during this review period and it is proven in a separate hearing, progressive discipline may be assessed". Notwithstanding this clear warning, the Claimant deliberately committed the same act of misconduct on April 11, 2008, while the 18-month review period was still in effect.

The Carrier and its employees depend upon the Railroad Dispatchers to safely coordinate the movement of trains and crews around the system, and it is imperative that Dispatchers direct their undivided attention to their duties and exhibit sound judgment in the exercise of their job responsibilities at all times. This Board finds that in the instant case, the Claimant displayed extremely poor judgment and exposed the Carrier to FRA sanctions when he deliberately entered the "not long enough" comment on the subject Dispatchers Transfer Report. There is no question that the Claimant knew or should have known that entering that editorial comment on the Report was improper and would expose him to further disciplinary action if discovered; yet, he made the decision to do so nonetheless.

In PLB 6829, Award 5, the Board examined another case involving discipline and had this to say regarding the penalty assessed by the Carrier:

> This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support a finding that the Claimant was guilty of sleeping on the job on June 17, 2003. The Claimant was training in a new position and immediately fell asleep while he was working. He stated at the hearing " . . . I guess I had dozed off for a minute or so."
>
> Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside the Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

This Board agrees with the findings of PLB 6829. The Claimant in the instant case had received a 10-day record suspension less than 18 months prior to this incident for the very same act of misconduct and he was warned at that time that progressive discipline could be assessed if he committed another infraction during that period. Therefore, this Board finds sufficient evidence to sustain the penalty assessed.

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. 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 6519, Award 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.

As previously stated in other PLB 7292 Awards, 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

Based on the evidence record, the evidence supports a finding that the Claimant's misconduct warranted severe disciplinary action, that the Carrier has properly applied the progressive discipline of a 20-day record suspension, and that the penalty is not excessive or punitive.

AWARD

The Claim is denied in its entirety.

Paul Chapdelaine
Chairman and Neutral Member
May 8, 2011

Joe Heenan
Carrier Member

Paul Ayers
Employee Member