

PUBLIC LAW BOARD NO. 7292

ATDA File No.	We 10-07-002
BNSF File No.	06080069
NMB Case No.	11
Award No.	11

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

"THE BNSF RAILWAY 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 October 3, 2007, the Carrier arbitrarily disciplined train dispatcher P. E. Ayers, 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 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 arbitrary October 3, 2007 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 this 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

P. E. Ayers ("Claimant") began his employment with the Carrier in October of 1978, and at the time of the events leading to this arbitration he was assigned to work as a Train Dispatcher at the Carrier's Fort Worth, Texas Centralized Train Dispatching Office. At 1559 Central time on August 6, 2007, Claimant issued Track Warrant No. 466 to the crew of BNSF 7704 North, at milepost 183. At 1612 Central time that same day, a

Maintenance of Way Foreman called the Claimant and requested a 30 MPH slow order at milepost 167.4 to 167.5, which affected the movement of BNSF 7704 North. However, the Claimant did not immediately pass that slow order on to the crew of BNSF 7704.

At 1640 Central Time, the Claimant called BNSF 7704 requesting a track release. The train crew reported that the train was "all by" milepost 165. Noting the reported location, the Claimant realized the train had already passed the location of the temporary slow order without having been issued the speed restriction. At that time, he disclosed the possible error to his supervisor.

The Carrier conducted an investigation on June 26, 2007 and determined that the Claimant's actions constituted a violation of General Code of Operating Rule 15.1, Track Bulletins, as well as Train Dispatcher's, Operators and Control Operator's Manual Rule 43.8, Delivering Track Bulletins and Restrictions.

On October 3, 2007, a Disciplinary Notice 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, TX at 1400 CT on September 17, 2007 the following notation will be placed on your personnel record:

"Ten (10) day record suspension for violation of General Code of Operating Rule 15.1 Track Bulletins and Train Dispatcher's, Operator's and Control Operator's Manual Rule 43.8 Delivering Track Bulletins and Restrictions, as a result of investigation held on June 26, 2007 for failure to issue track bulletin to train H-PLXETT4-04, BNSF 7704 North."

General Code of Operating Rule ("GCOR") Rule 15.1 states in pertinent part:

Track Bulletins

Track bulletins must not be changed unless specified by Rules 15.1.1 (Changing Address of Track Warrant or Track Bulletins) or Rule 15.13 (Voiding Track Bulletins). **The train dispatcher will issue track bulletins as required.** (Emphasis added) Track bulletins will contain information on all conditions that affect safe train or engine movement. Forms other than track bulletin Forms A and B may be used when necessary.

Train Dispatcher's/Operators Manual Rule 43.8 states in pertinent part:

Delivering Track Bulletin Restrictions

Deliver track bulletin restrictions to all trains affected by the restrictions.

A timely claim was filed protesting the issuance of the Disciplinary Notice 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

There was no dispute that a Maintenance of Way Foreman contacted the Claimant at 1612 Central Time on the date in question and requested a 30 MPH slow order for the subject track at milepost 167.4 to 167.5. There was also no dispute that although the Claimant had received the slow order, he failed to promptly notify the crew on BNSF 7704 North of that slow order. As a consequence, rather than reducing the speed of the train to a maximum speed of 30 MPH, the train crew may have operated BNSF 7704 over the subject track between mileposts 167.4 and 167.5 in excess of 30 MPH and up to the normal speed of 49 MPH.

The transcript of the Investigation indicates that the Claimant did not recognize his error for a substantial amount of time after the Maintenance Foreman requested the slow order. In a written summary of his investigation of the incident, Manager of Dispatching Practices, Robert E. Newlun presented his findings as outlined below:

At 1640 Central Time the Dispatcher called the BNSF 7704 asking for a rollup and the train reported all by Milepost 165. At that time the Dispatcher realized that the train was past the location of the temporary restriction between milepost 167.4 and milepost 167.5 and had not been issued the restriction. There was no discussion of an unspecified yellow flag. **The Dispatcher immediately walked to his supervisor's pod and disclosed the error.** (Emphasis added)

Mr. Newlun's report also described the following interaction with the Claimant:

He (Claimant) was obviously aware of the situation having reported it to his supervisor. I asked what he thought may have caused the error and he advised that **he took full responsibility for the incident and was not making excuses, but thought that the fact that he had four weather alerts probably contributed to the incident.** (Emphasis added)

The Organization argued that it was not necessary for the Claimant to relay the subject speed restriction to train BNSF 7704 because, in the Organization's view, there was insufficient proof to establish that the train had not already traversed the subject area when the Maintenance Foreman requested the speed restriction.

The Organization's argument was well chosen and could have some merit if confirmed. However, the Carrier provided a realistic timeline of travel for the subject train which left no doubt that the train had traversed through the speed restricted area while the speed restriction was in effect. In addition, the Claimant's action of immediately reporting his error to his supervisor indicates that the Claimant had no doubt at that time that the train had traversed through the area while the speed restriction was in effect. Further, the

record reflects that the Claimant acknowledged his error during the post-incident interview and took full responsibility for his actions.

In view of the evidence and the Claimant's admission, the record supports a finding that the Claimant undoubtedly understood the slow order he had received from the Maintenance Foreman, and he failed to properly inform the crew of BNSF 7704 of that slow order. Therefore, the Carrier has established a sound *prima facie* case and no further proof of the Claimant's transgression is necessary.

The Organization offered several technical arguments in support of its position. First, the Organization argued that the Claimant was not afforded a fair and impartial hearing because the Corridor Superintendent, who had brought forth the charges against the Claimant, was the same person who assessed the discipline upon the Claimant. While the Organization's argument for the necessity of a fair and impartial hearing is well-founded, the evidence clearly establishes that the Claimant was given a full opportunity to explain his version of the facts. In addition, there is no evidence to show that the Corridor Superintendent was biased during the process or that he neglected to consider all of the evidence before reaching a decision. Therefore, the Organization's allegation that the Claimant was not afforded a fair and impartial hearing is not sustained.

The Organization next argued that the Carrier assessed discipline without first reviewing the transcript. According to the Organization, it had advanced that same argument during its appeal and the Carrier responded that "Mr. Sibila was in possession of the transcript and studied it carefully before he made the discipline decision." The Organization rejected the Carrier's explanation due to the lack of proof supporting its explanation. The Organization insisted that the Organization's argument must be accepted as fact.

The Organization's argument that a review of the transcript is necessary during the disciplinary procedure represents a bona fide *affirmative defense* argument. However, as with all *affirmative defense* arguments, the burden shifts to the Organization to provide evidence in support of that argument. In this instance the Organization may have legitimately suspected that the transcript had not been reviewed. However, suspicion alone is not sufficient to carry the burden of proof. Therefore, in the absence of persuasive evidence to the contrary, the Organization's claim that the Carrier assessed the discipline without reviewing the transcript is not sustained.

A third argument advanced by the Organization asserted that Corridor Superintendant Stevens acted in a prosecutorial fashion while serving as the Carrier's conducting officer at the investigation. However, once again no evidence was offered to support a finding that Superintendant Stevens failed to allow the admission of evidence or that he neglected to consider all of the evidence and testimony. In addition, as previously stated, no evidence was submitted to support a finding that the Claimant was denied a fair opportunity to explain his side of the story. Therefore, the Organization's argument in this matter is also not sustained.

Next, the Organization argued that the Carrier improperly charged the Claimant with a violation of GCOR Rule 43.8 and that GCOR Rule 15.1 was not explored during the investigation. Notwithstanding the Organization's argument on this issue, the evidence shows that the Claimant was aware at all times that he was being charged for failing to deliver the slow order to BNSF 7704 on the date in question. Also, as previously discussed, by his action of immediately reporting the incident to his supervisor after discovering the error, there can be no doubt that the Claimant understood the seriousness of his transgression and the nature of the charges being lodged against him. Further, although Article 24 requires that the charges lodged against an employee must be precise, no evidence was submitted to show that Article 24 requires the Carrier to cite a specific rule violation in order to discipline an employee. Additionally, there is no evidence to show that this minor discrepancy somehow deprived the Claimant of a fair opportunity to prepare an adequate defense. Therefore, this argument advanced by the Organization is also not sustained.

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 during the appeal process. As such, the Organization maintained that the claim should therefore, be sustained. The Organization specifically cited a letter addressed from ATDA General Chairman Jay Weber to General Director Labor Relations O.D. Wick dated May 7, 2008. In his letter to Mr. Wick, Mr. Weber disagreed with the material statements made by Mr. Wick in Mr. Wick's Claim denial letter addressed to ATDA Vice General Chairman, P.E. Ayers dated February 27, 2008.

In support of its argument, the Organization 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.

It is clear from the above cited language, that in Award 28459, the Carrier had provided material statements which satisfactorily explained its reasons for denying the subject claims, and the Organization had not denied the Carrier's material statements. However, there is nothing contained in that award which indicates that the Carrier is required to respond over and over to each and every letter of correspondence that is submitted by the Organization during the appeal process. In the instant case, in its February 27, 2008 letter, the Carrier had substantially provided its reasons for denying the Claim and had refuted all material statements made by the Organization during the appeal process. Although Mr. Weber's May 7, 2008 letter is 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.

In its submission, the Organization also 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, 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. Referee Marty E. Zusman examined this same argument in Public Law Board No. 6519, Award No. 4, and in his award he 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.

In view of the above, 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. Therefore, that request is hereby denied.

CONCLUSION

The evidence record clearly established that the Carrier has sustained its burden of proof that the Claimant committed the violation for which he was disciplined and that the Organization's technical arguments should not be sustained. Now the Board must turn its attention to the appropriateness of the discipline assessed. In Fourth Division Award 4779, the Board held:

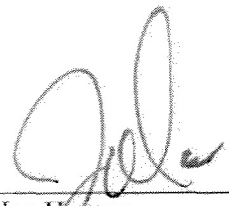
While these Contentions were advanced with skill and vigor and are not without merit, the Organization nonetheless cannot overcome the long-standing precedent in this industry that when there is an admission of guilt there is no need for further proof and the only remaining question is the degree of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

An examination of the record fails to establish that the Claimant had any active element of discipline in his file. Of further consideration is the fact that upon discovering his error, the claimant immediately reported the error to his supervisor and he took full responsibility for his actions during the investigation. Accordingly, under the unique circumstances of this particular case, the board finds that the penalty of a 10 day record suspension is excessive.

AWARD

The claim is granted in part and denied in part. The 10 day record suspension is reduced a formal reprimand.



Paul Chapdelaine
Chairman and Neutral Member
May 2, 2010

Joe Heenan
Carrier Member

Paul Ayers
Employee Member