

PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA-001A-08
BNSF File No.	06080265
NMB Case No.	12
Award No.	12

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 November 21, 2007, the Carrier arbitrarily disciplined train dispatcher Huckaby, assessing her a ten (10) day record suspension without due cause and absent any demonstrated rules violation.

The Carrier must now overturn this decision to discipline and remove the mark from her personal record. Further, it is now incumbent upon BNSF to make principal whole for any and all time lost, 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 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

On May 18, 2007, Kadijah Huckaby ("Claimant") was assigned to work as a second trick dispatcher on the Denver South desk at the Carriers Network Operations Center in Fort Worth, Texas. As second trick dispatcher, Claimant reported for duty at approximately 1440 hours and relieved the first trick Denver South train dispatcher.

At approximately 1614 hours, a Maintenance of Way Welder contacted the Claimant by radio to release his track and time authorization and to advise that his crew had been working on the switch from the Main 1 Track to Hump 3 at Canon City Junction. The Welder further advised he was taking the switch out of service and that, in the event the dispatcher needed to authorize a train in or out of Hump 3, a maintenance of way employee would be required to "walk" the train over the switch. The Claimant confirmed the Welder's instructions regarding the switch by repeating his instructions.

At approximately 1616 hours, the Claimant used the computer mouse and clicked "Create Device Block." However, she did not complete the event and the "Device Block" was not applied to the system. Consequently, there was no marking device to provide protection for the switch that was taken out of service by the Welder. In addition, the Claimant failed to make any notation of the unsafe switch condition on her written transfer to the third trick dispatcher relieving her on May 18 and the unsafe condition of the switch remained unprotected.

On May 21, 2007, the third trick Denver South dispatcher was unable to locate a track bulletin referencing the switch being out of service and reported the situation to the Manager Dispatcher Practices Rules ("MDPR"), Junetta Wells, who was on duty at that time. MDPR Wells subsequently researched the computer records and audiotapes and found that on May 18 the Welder had reported to the Claimant that the switch had been taken out of service. MDPR Wells also found that no track bulletin, track tag or device block had been applied to the system to protect the unsafe switch condition.

The Claimant was subsequently interviewed by Chief Dispatcher Marty Stinson and MDPR Ron Bailey on May 24, 2007, during which the three of them listened to an audio recording of the Welder and the Claimant discussing the subject switch. At the conclusion of that interview the Claimant was directed to attend an investigation on May 27, 2007, to review the facts and her responsibility in connection with the unblocked Hump 3 switch. The investigation was postponed a number of times and was subsequently held on November 6, 2007. At the conclusion of the investigation, a disciplinary notice dated November 21, 2007, was issued to the Claimant which states in pertinent part:

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 1300 on November 6, 2007 the following notation will be placed on your personnel record:

"10 Day Record Suspension as a result (of the) investigation held on November 6, 2007, for violation of Train Dispatcher, Operators and Control Operator's Manual (TDOCOM) Rule 44.2 "Blocking or Marking Devices", TDOCOM Rule 40.1.1, "Avoid Dangerous Conditions" and TDOCOM Rule 50.1 "Responsibilities of Dispatchers being Relieved" by failing to protect movement as requested over unsafe track conditions and failing to note the unusual track condition needing protection on the end of shift transfer to your relief.

A timely appeal 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

A Maintenance Welder contacted the Claimant by radio at 1615 on May 18, 2007, and notified her that he was removing the subject Hump 3 switch from service. The following transcript of the Claimant's radio conversation with the Welder reveals the content of that radio conversation:

(Welder) Ah dispatcher the first thing I got, I got some track and time I can release, but also, we were working on that Hump three switch, switch oh-seven twenty-seven, the South end of Hump three at Canon City Junction, and I'm going to need to take that switch out of service, ah, we changed the insert on it but we just can't get a good point on it due to the stock rail on there. So we're going to take it out of service. You will be able to use it as long as there is maintenance there to walk a train out or in there, over.

(Claimant) Ok, so, click oh-seven thirty-seven is out of service at Canon City Junction. So in the event that I need to put a train in or take one out of Hump three maintenance needs to be called. Is that correct, over?

(Welder) That is correct, but the click number is oh-seven two-seven, oh-seven twenty-seven, over.

(Claimant) Oh-seven twenty-seven. Ok, roger. I will show it out of service, over.

From the transcript of this conversation, it is clear that the Claimant understood exactly which switch was being removed from service and her responsibility to show the defective switch to be out of service.

After the Carrier discovered that the Claimant failed to show the subject switch out of service, she was interviewed by Chief Dispatcher Marty Stinson and MDPR Ron Bailey. Mr. Bailey's notes of that interview indicate the following:

Kadisha reported to the MDPR pod along with CD Stinson. She had been informed of the events on the way back by Marty. I asked if she understood how and why to place blocking and she advised that she did. I played the recording for her and asked why she hadn't done something with the track defect as soon as she got it and she said that she just got busy and forgot to do it. **She said that as soon as Marty mentioned the problem she remembered it and that she hadn't dealt with it and she took full responsibility.** (emphasis added)

The foregoing discussion clearly revealed, and the Claimant did not deny, that she failed to place a track bulletin, track tag or device block into the system to protect the unsafe switch condition. She also failed to communicate the unsafe condition to the relieving dispatcher in her written transfer. Therefore, by her own admission, the Claimant's rule violation has been established, and no further proof of the charges is necessary.

The Organization offered several technical arguments in support of its position. First, the Organization argued that the initial charge letter was not issued to the Claimant within the requisite five-day time limits as specified in Article 24 (b) of the Agreement. Article 24 (b) states in pertinent part as follows:

(b) INVESTIGATIONS.

A train dispatcher who is charged with an offense which, if proven, might result in his being disciplined, shall be notified in writing of the nature of the complaint against him **within five (5) days from the date that the knowledge of the facts on which such complaint is based was received by the Superintendent**, and he shall be given a fair and impartial investigation by the Superintendent or a designated representative within five (5) days of the date of such notice, (emphasis added)

As the Organization correctly points out, the incident occurred on May 18, 2007 and the Notice of Investigation was dated May 24, 2007. Thus, it would appear that the subject Notice was untimely. However, the evidence established that although the incident did occur on May 18, the Carrier did not actually learn of the Claimant's transgression until May 21, 2007. Therefore, the evidence clearly shows that the Notice of Investigation was issued on the third day after the Carrier learned of the incident; which is well within the five-date time limit.

Next, the Organization argued that the Claimant was not afforded a fair and impartial hearing because Transportation Process Specialist, Dennis L. Mead served as the hearing officer and ultimately assessed the discipline upon the Claimant. This Board does not dispute the Organization's argument that a fair and impartial hearing is absolutely necessary before discipline is assessed to an employee. At the same time, however, there

is no showing that any provision of Article 24 or any other provision of the Collective Bargaining Agreement prohibits a member of management from performing more than one role during the disciplinary process. In the instant case, the Claimant was provided a full opportunity to explain her version of the facts during the investigation. In addition, there was no evidence to indicate that Mr. Mead was biased during the process or that he neglected to consider all of the evidence before reaching his decision. Therefore, this Board finds no evidence to support a finding that the Claimant was deprived of a fair and impartial hearing.

A third argument advanced by the Organization asserted that Transportation Specialist Mead, while serving as the Carrier's conducting officer at the investigation, acted in a prosecutorial fashion. However, regardless of how the Organization may view Mr. Mead's method of conducting the investigation, once again, this Board finds no evidence to show that he was not objective during the investigation or that he suppressed any relevant evidence or mitigating circumstances that could have proved the Claimant was not guilty of the charges.

The Organization pointed out that the subject switch was not in CTC territory and argued that it cannot, therefore, be blocked by the dispatcher. Accordingly, the Organization advanced the assertion that the Claimant was somehow being held responsible to perform an action that is impossible to accomplish. An examination of the evidence reveals that although a dispatcher cannot actually block a switch which is not within CTC territory, the dispatcher is still required to protect the unsafe track condition. In this case, the Claimant had a responsibility to control entry over the subject switch by placing a label or a device block on the out-of-service Main 1 track switch that controls access to the Hump 3 track, and she failed to do so.

Finally, the Organization asserted that the Carrier had not challenged positions presented by the Organization during the handling of this dispute and that the claim should therefore, be sustained. In support of its argument, the Organization submitted several previous Board decisions which are summarized in National Railroad Board Third Division Award No. 28459 involving disputed work performed by an outside janitorial service. In denying those claims, the Board held:

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 Union had claimed that the Carrier violated the Collective Bargaining Agreement when it subcontracted janitorial work to an outside contractor. In that Award, the Board held that the Carrier had provided material statements during the dispute resolution process which adequately explained its reasons for denying the subject Claims and that the Organization had not denied the Carrier's material statements. Likewise in the instant case, by letter dated June 27, 2008, General Director Labor Relations, O. D. Wick had clearly provided the Carrier's reasons for denying the Claim and had disputed all of the Organization's assertions and arguments raised on appeal. 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.

In its submission, the Organization also requested a remedy that would make the Claimant 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 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.

In view of the above, this Board also 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.

CONCLUSION

The evidence record clearly established that the Carrier has sustained its burden of proof that the Claimant committed the violation for which she was disciplined and that the Organization's technical arguments should not be sustained. Concerning the appropriateness of the discipline assessed, previous boards have recognized the heavy responsibility carried by dispatchers to assure the safety of passengers, train crews and property. In the instant case, the evidence established that the Claimant had received notice that the subject switch was defective and out of service. However, because of her failure to institute a track bulletin, track tag or device block in the Carrier's system regarding the out-of-service switch, the unsafe condition was allowed to exist for three days. As a consequence, this Board finds that the Claimant's job performance falls far short of what can reasonably be expected of a train dispatcher and that the discipline assessed was not excessive or capricious.

AWARD

The claim is denied in its entirety.


Paul Chapdelaine
Chairman and Neutral Member
May 2, 2011


Joe Heenan
Carrier Member


Paul Ayers
Employee Member