

PUBLIC LAW BOARD NO. 7292

ATDA File No.	A08-079
BNSF File No.	06-08-0557
NMB Case No.	15
Award No.	15

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 May 27, 2008, the Carrier arbitrarily disciplined train dispatcher S. K. Nance, assessing a suspension without cause and absent any rules violation.

The Carrier shall now overturn the previous decision to discipline the aggrieved and shall remove this mark from her record, make 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 arbitrary May 27, 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

S.K. Nance ("Claimant") began her employment with the Carrier as a clerk operator in 1989 and progressed to the position of dispatcher in Springfield, Missouri in 1992. 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 March 31, 2008, the Claimant was working as second shift Boise City Assistant Dispatcher. Maintenance personnel were performing work on the track in the Boise City Subdivision that evening which required the Claimant to issue General Track Bulletin (GTB) No. 13761 listing the necessary restrictions for the area. However, as was later discovered, the Claimant had neglected to properly include in GTB 13761 the territory from La Junta to Las Animas, which included six speed restrictions. As a result, Train No. H-DENAMA1-30 entered the territory unaware of the speed restrictions. The train encountered a yellow flag within the territory and, as required by Carrier rules, the crew slowed the train to 10 miles per hour until the dispatcher was contacted and the appropriate restrictions were issued. Consequently, the train experienced a delay.

A Letter of Formal Investigation dated April 5, 2008 was subsequently issued to the Claimant which states in pertinent part:

Arrange to 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 on April 9, 2008, to ascertain the facts and determine your responsibility, if any, in connection with your alleged issuance of insufficient limits on GTB 13761 for the train crew called for train H DENAMA1 30 at La Junta. This alleged incident occurred at approximately 1625 CT on March 31, while you were working as the 2nd shift Boise City Assistant Dispatcher, in the Network Operations Center, in Fort Worth, TX

After having been postponed two times, the investigation was subsequently conducted on May 9, 2008 and at the conclusion of the investigation, a formal Disciplinary Letter dated May 27, 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 1430 CT on May 9, 2008, the following notation will be placed on your personnel record:

"Ten (10) day record suspension for violation of Rule 43.8 and Rule 41.3 from the Train Dispatcher's, Operator's and Control Operator's Manual, when you issued insufficient limits on March 31, 2008 on GTB 13761 for the train crew called for train H-DENAMA1-30 at La Junta."

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

On April 4, 2008, the Claimant attended an interview with members of Carrier management concerning the incident. During the interview, the incident was discussed with the Claimant and she was allowed to listen to the tapes of the incident. At the conclusion of the discussion, the Claimant was offered 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 the issue progressed to formal investigation wherein the Carrier determined that her actions constituted a violation of Rule 43.8 and 41.3 which provide:

43.8 Delivering Track Bulletin Restrictions

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

In the GTB system, track bulletin restrictions are delivered based on train schedules. DSTL presents origin/destination stations based on schedule information. Do not depend solely on this origin/destination pair to ensure that all needed restrictions will be delivered. Verify that the subdivision templates display the expected limits that the train will be traveling.

41.3 Track Bulletin Restrictions in Effect

At their initial station, issue the conductor and engineer a general track bulletin or track warrant that lists:

- Track bulletin restrictions in effect
- or
- "None or No" if no track bulletin restrictions are in effect.

Make sure that all track bulletin restrictions which are in effect between point of origin and final destination for a train or engine crew are on the general track bulletin or track warrant received at the initial station.

Convey track bulletin restrictions placed in effect at a later time by one of the following:

- List them on a subsequent general track bulletin or track warrant (Notify crew that subsequent GTB or track warrant is being sent.)
- or
- Send them electronically to a printer or a fax (Verify receipt of track bulletin restrictions delivered electronically without a general track bulletin.)

Refer to TCOCOM Rule 41.5.2 regarding restrictive track bulletin restrictions.

At that point, the Claimant was issued the formal Disciplinary Letter and 10 day record suspension dated May 27, 2008.

THE CHARGES

During the investigation, the Claimant acknowledged that she was on duty on the 2nd shift on March 31, 2008, and she was assigned to work as the Boise City assistant dispatcher that evening. She did not dispute that GTB 13761 was issued during her shift to cover the restrictions necessitated by track maintenance work that was being performed in the Boise City Subdivision at that time. She also did not dispute that the territory from La Junta to Las Animas and at least two of the subject speed restrictions were improperly omitted from GTB 13761. However, the Claimant did not accept responsibility for issuing GTB 13761.

The Claimant agreed that her initials "SKN" appeared as the dispatcher who authorized GTB 13761. She also agreed that GTB 13761 had been entered into the dispatching computer under her login authority but she did not agree that she was the person who had generated that GTB. According to the Claimant, she never logs off the computer when she leaves her work station to get coffee and she believed that she had gone for coffee without logging off her computer session when GTB 13761 was generated. According to the Claimant, she had previously caught two other people using her logon authority while she was away from her desk and she had told them to stop doing that. Therefore, the Claimant asserted that it was someone else who had generated GTB 13761.

The evidence clearly established that the territory from La Junta to Las Animas and six speed restrictions had been omitted from GTB 13761. The evidence also established that GTB 13761 was generated under the Claimant's logon authority while she was logged into the dispatching computer. The Claimant was issued a confidential logon password for the purpose of logging into the dispatching computer and she was responsible for protecting the confidentiality of that password. Although the Claimant asserted that she had caught other dispatchers using her computer terminal in the past while she was away from her work station, no witness or evidence was submitted to support that assertion. In addition, no evidence was submitted to establish that she had reported those previous computer security violations to management or that she had ever changed her password as a result. Moreover, there was no evidence to show that anyone other than the Claimant had prepared and submitted GTB 13761. The Claimant's admission that she routinely leaves her work station without logging off her computer session only served to underscore her carelessness and disregard for safeguarding her logon authority and her

assertion that it was someone other than herself who generated GTB 13761 is unconvincing.

Based on the foregoing, this Board finds that the Claimant was responsible for the misconduct as charged in the formal Disciplinary Letter dated May 27, 2008.

THE ORGANIZATION'S ASSERTIONS

Carrier Imposed Discipline Without a Transcript and/or its Review

The Organization offered several technical arguments on the Claimant's behalf. First, the Organization contended that because the Carrier had provided an undated transcript copy of the subject investigative proceedings to the Organization, the subject discipline was imposed on the Claimant without the Hearing Officer having first reviewed the investigation transcript. Therefore, the Organization maintained that the Carrier had deprived the Claimant of her right to due process. According to the Organization, it had previously notified the Carrier of this contention during the appeal process and the Carrier had failed to substantiate its assertion that the Hearing Officer had read the transcript prior to making his decision to impose discipline.

The Organization submitted National Railroad Adjustment Board First Division Award No. 25043, July 27, 1999 in support of its argument. In sustaining the claim, the Board held:

A review of the record of this case reveals a decision by the Hearing Officer was rendered four days before the transcript of the Investigation was produced. The hearing involved Claimant, his Union representative, and a Carrier witness. The investigation transcript ran to 105 generously spaced pages. The Organization contends that the rendering of the decision in this case without the advantage of the transcript of the investigation constitutes prejudgment and failure to provide a fair and impartial Investigation. The Organization has cited as support of its position numerous Division and Board Awards on the issue. This Board takes special note of two cited Awards on his property with these parties: First Division Award No. 25935, Referee LaRocco, and Public Law Board No. 6040, Award No. 13, D. A. Eischen, Chairman. In both of these cases, the tribunals sustained the claim on procedural grounds, chastising the Hearing Officer for making a decision without benefit of the record of the Investigation before him.

As the above referenced award, and the cites contained therein, make clear, the Hearing Officer is required to review the transcript of the proceedings if the Claimant is to be provided with a fair and impartial hearing. The award also makes it clear that in Award 25043, the Board found corroborating evidence to establish that the Hearing Officer had not reviewed the transcript of the proceedings before rendering a decision.

In the instant case, the Organization asserted, and the Carrier did not dispute, that the transcript copy provided to the Organization was undated. Therefore, it was not unreasonable for the Organization to suspect that the Hearing Officer may not have reviewed the transcript before rendering his decision. However, suspicion alone is not evidence and as the moving party in this contention, the Organization assumes the burden of providing corroborating evidence to substantiate its assertion. The mere fact that the Organization's copy of the transcript was not dated does not in and of itself prove that the transcript had not been produced and reviewed by the Hearing Officer prior to assessing the disciplinary action. In the absence of any corroborating evidence to support its assertion, this Board finds no merit to the Organization's claim.

Right to a Fair and Impartial Hearing

Next, the Organization argued that the Claimant was not afforded a fair and impartial hearing because Superintendent Sibila issued the investigation notice, conducted the hearing and was also the person who assessed the discipline upon the Claimant. The Organization maintained that because Mr. Sibila participated in multiple roles during the disciplinary process, the Claimant's due process rights were violated. In disputing the Organization's argument, the Carrier submitted Public Law Board 6829, Case No. 6, in which the Board held:

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.

This Board fully agrees with the Board's findings in PLB 6829 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 Claimant's due process rights were protected throughout the process. The charges were clearly explained to the Claimant at

the outset and she was given a full opportunity to explain her version of the facts. In addition, there is no evidence to show that Mr. Sibila 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.

Adversarial Hearing

A third argument advanced by the Organization asserted that Mr. Sibila acted in an adversarial manner while serving as the Carrier's conducting officer at the investigation. However, once again no evidence was offered to support a finding that Mr. Sibila 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.

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 rule 41.3 of the Train Dispatchers Operators and Control Operators Manual, that rule 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 were questioned about this rule during the Investigation. Therefore, the Organization maintained that the Claimant's due process rights were violated.

This Board examined PLB 7225, Award No. 6, in which that Board had considered a similar argument advanced by the Organization. In PLB 7225, 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.

This Board finds that PLB 7225 has 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 she was being charged with failing to properly include the territory from La Junta to Las Animas as well as six speed restrictions in GTB 13761. In addition, 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 the omission of a specific rule violation somehow deprived the Claimant of a fair opportunity to prepare an adequate defense. Therefore, this argument advanced by the Organization is also not sustained.

Discipline Excessive

The Organization next argued that the 10-day record suspension was excessive for the reason that the Claimant had not committed an act of hostility or willful misconduct. The Organization pointed out that the Claimant is a veteran employee of nearly twenty years service and argued that her record is otherwise clear of any disciplinary action. Therefore, the Organization insisted that the Claimant is entitled to a lesser penalty in the interest of progressive discipline.

This Board previously examined 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 also has application to the instant case. The Claimant’s failure to include the territory from La Junta to Las Animas in GTB 13761, which included six speed restrictions, allowed an unsafe condition to exist that was discovered only after a train had entered the restricted

area and encountered an unspecified yellow flag. Therefore, her actions warranted disciplinary action. In view of the foregoing, this Board finds that a 10-day record suspension is not 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. For that reason, the Organization maintained that this claim should 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 30, 2009. In his letter to Mr. Wick, Mr. Aldridge disagreed with the statements made by Mr. Wick in his denial letter addressed to ATDA General Chairman J. A. Weber dated December 5, 2008.

A similar argument was previously advanced by the Carrier in National Railroad Adjustment Board Second Division Award No. 12750 involving pay to Carmen for time lost due to the shutdown of connecting Carriers. That 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.

In another case, a similar argument was advanced in 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 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 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 December 5, 2008, letter to Mr. Weber and addressed all of the arguments that had been previously 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.

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

The evidence record clearly established that the claimant committed the violation for which she was disciplined and that the Organization's technical arguments should be denied.

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