

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 566
Carrier File No.: 14-21-0260
Organization File No.:2417-SL13C5-2126
Claimant: B. Hardy

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

STATEMENT OF CLAIM:

“We Present the following claim on behalf of Brett Hardy (0236109), Seniority Date 11-14-2013, for the removal of the claimants Standard Formal Reprimand and 1 Year Review Period. In addition, we request all record of discipline be removed from the Claimants record. The Claimant shall be made whole as a result of the Carrier's violation, including the following compensation(s).”

CARRIER POSITION:

On July 21, 2021, Claimant Hardy was issued a Formal Written Reprimand with a One-Year review period for dishonesty regarding his statement regarding employees fouling the track on May 26, 2021.

The Notice of Investigation was first issued on June 14, 2021 for an Investigation on Friday June 18 at the BNSF Conference Room in Flagstaff, AZ. A second Notice was issued on June 15, changing the date of Investigation to June 25, and a third Notice dated June 23 changed the location of the Investigation to the Doubletree Hilton.

The Carrier asserts that the date of first knowledge was June 10 when it finally had statements from all the employees who were involved. As Roadmaster Baiamonte

testified, the first date that all of the statements were available for review was June 10, not June 2 or 3 as alleged.

JASON BAIAMONTE: Okay. So on for uh Mr. Gonzales, on the 2nd I received his so that would be June 2nd. I received another one from Jeff Gentry on the 3rd of June. Edward Montoya the 3rd of June. Uh Art Baca the uh the June June 3rd. Uh Matt Ramirez June 2nd. And then I know I received uh Mr. Johnson's on June 10th. I do not have a date for Mr. Hardy's, but I know it was between the 3rd and Mr. Hardy was between the 3rd it was actually 2 between the 3rd and and the 10th I received Mr. Hardy's, but it wasn't after the 10th. TR 27-28.

JASON BAIAMONTE: on June 10th when I received uh Mr. Johnson's uh statement uh there was one statement that uh was really conflicting with what his statement had on there. So that's when I knew that there was something going on uh when when this uh conflicted with other on the statements. TR 28

According to Baiamonte, once all of the individual statements were presented, it became evident that an investigation into the situation would be necessary because the statements contained conflicting assertions. The Carrier concludes that first knowledge of the case was June 10, when the final statement was provided, and there was no breach of procedural deadlines in the case.

As the Carrier sees it, the Conducting Officer is the person responsible for determining credibility, and therefore his finding should stand undisturbed.

The Carrier further disputes the Organization's contention that Claimant should be compensated for his time spent in the Investigation. It contends Claimants were not withheld from service nor dismissed. Because they were not pulled from service, they did not suffer a loss in wages and the Carrier reasons no compensation for the day of Investigation is due.

ORGANIZATION POSITION:

The Organization references Rule 13 of the Agreement, which states as follows:

Rule 13 Discipline, Investigations:

An employee in service for 60 days or more will be will not be disciplined or dismissed until a fair and impartial investigation has

been held. Such investigation shall be set promptly to be held no later than 15 days from the date of occurrence except in personal conduct cases will be subject to 15-day limit from the date information is obtained by officer by the officer of the Company, excluding employees from the Security Department, and except as provided in Section B of this rule.

The Organization maintains that multiple Carrier officials knew about the track being fouled well in advance of the 15-day time limit, yet they failed to investigate the alleged incident in a timely manner. It references J. Baiamonte's testimony that both he and Division Engineer Sheri Miller knew a Safety Hotline Call was made on May 28, 2021. Nonetheless, the Investigation was not held until June 25, 2021, twenty-two days from the date information was obtained.

The Organization does not agree with the level of discipline levied against Claimant and argues that a Standard Formal Reprimand with a One (1) Year Review Period is both extreme and abusive.

DECISION:

The first indication of a problem was when the Safety Hotline Call came in. However, a single call is inadequate to prompt the Carrier to take action; it is obliged to look into the facts of a situation before implementing measures. The Carrier did just this, and requested statements from the employees involved.

On June 2, W. Gonzales provided a statement that he heard "yelling to get off the track." This statement is consistent with there having been a close call with an eastbound train. That same day M. Ramirez provided a statement describing a "close call." His statement was particularly graphic: "And all of a sudden Edward was standing across from me from myself as I had my back away from the train and Edward was facing me and yelled facing the train and yelled hot rail, get off the track. I looked back and literally had to run off the track, barely missing this train by at least 1.5 to 2 seconds to where if I had ripped tripped on the rails it would've ended really badly."

On June 3, Baca provided a statement said Johnson was "yelling at us to get off the track repeatedly [sic]." That same day J. Gentry submitted a statement saying people "scrambled" to get off the tracks. Also on June 3, E. Montoya turned in his statement that people were "yelling" to get off the track as an east bound train was coming. All of these statements were submitted after the May 28 Safety Hotline Call. A video showing two employees fouling the track was obtained on May 28, though the identity of the employees could not be determined from it. The Carrier had

enough information on June 3 to determine that there was an incident, but it still had not heard from an arguably critical person: the foreman.

Baiamonte testified that he trusted Johnson and intended to rely on him to describe what really happened. He reasoned that he could not consider himself to be “informed” until Johnson’s statement was submitted. But Johnson’s statement said “I informed the section guys and Jeff Gentry on the backhoe that there was going to be a eastbound. Once the train showed up it was not at 25. We cleared the tracks and had a job briefing with Gonzales.” According to Baiamonte, Johnson told him there had been no close call.

As foreman, Johnson was the individual most responsible for the safety and welfare of the employees involved. In Baiamonte’s assessment, no fact-gathering regarding the incident would be complete without adding the foreman’s statement to the information on which a decision to charge or not to charge would be made. According to Baiamonte, “I did not personally know of the incident May 26th because when I asked the Foreman, he told me it never happened, there was no close call. He said there was no close call. That’s what he told me, that never happened. There was no close call.”

There is no explanation for the tardiness of Johnson’s statement submission. Management knew it had 15 days to hold the Investigation, and was responsible for getting the statement in.

Under Rule 13, the Carrier had 15 days after acquiring “information” regarding an incident in which to hold the Investigation. As of June 3, the Carrier had enough “information” to make charging decisions; it had the May 28 Safety Hotline Call plus reasonably consistent statements from five employees, all of which describe a close call. Had Johnson also described a close call, there would still be an investigation. When Johnson denied the close call, there was still an investigation. The Carrier did not need Johnson’s statement to realize an investigation was in order. This means that the 15-day clock began running on June 3, and expired on June 18. Because the Investigation was not held until June 25, the 15-day deadline was not met.

We do not find the procedural arguments made in this case to be persuasive. We now turn to the merits of the case. Claimant’s statement is quoted verbatim below:

May 26 we had a form B at denison to replace ties. Gonzales briefed us on the form b info and we started to work. A train was parked on both sides of the os on m1. Gonzales stepped out of his truck, walked up the track and informed us a train was calling on m2. We acknowledged him and stated we were clear of m2. We continued working getting the tie installed. On m1 Eddie and the new guy were shoveling rock in

front of the tie and continued to do so between the mains. We heard the train horn behind us and I realized they were between the mains. Wich is when we all yelled to them to clear. We had just stepped over the field side rail of m1 when the train passed us on m2.

This description of events is consistent with that of the statement of other employees (Johnson excepted), and hence does not indicate any evident falsehood. Dishonesty is an allegation which requires a showing of intent to perpetrate a known falsehood. The record in this case falls short of showing that Claimant intentionally propounded a falsehood. Hardy admits telling Gonzales the workers were clear when they were between the mains, indicating he was not hiding from potential fault.

The Carrier is correct in its assessment that the Conducting Officer is typically in the best position to make credibility determinations, and in most instances the Board will leave such credibility determinations undisturbed. The reason for this deference is that the Hearing Officer is the trier of fact, and is therefore in the best position to evaluate voice, appearance, behavior and gestures during testimony. In our assessment, this well-established and totally appropriate deference should not be distorted to give a hearing officer license to misuse the Investigation platform in order to discredit documentary statements that appear to be true, without oral testimony or other credible evidentiary basis.

Dishonesty is an allegation which requires a showing of intent to perpetrate a known falsehood. The record in this case falls short of showing that Claimant intentionally propounded a falsehood. Indeed, no particular part of Hardy's story has been pointed to as false. With the exception of Johnson, Claimant's statement does not conflict with those of other employees in any meaningful way. This Board cannot find any basis for a conclusion that Hardy's statement was intentionally false.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident, including any pay lost as a result of the Investigation.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

Dated: May 3, 2023



Patricia T. Bittel, Neutral Member



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member