

**PUBLIC LAW BOARD NO. 5850**

**Case No. /Award No. 574**  
**Carrier File No.: 14-22-0024**  
**Organization File No.: 2401-BN4012-2115**  
**Claimant: D. Sharp**

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<b>BNSF RAILWAY COMPANY</b>	)
<b>(former Burlington Northern Railroad Company)</b>	)
	)
<b>-and-</b>	)
	)
<b>BROTHERHOOD OF MAINTENANCE</b>	)
<b>OF WAY EMPLOYES DIVISION - IBT</b>	)

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**STATEMENT OF CLAIM:**

*We present the following claim on behalf of Devin Sharp (3060258) Seniority Date 08-14-19 for the removal of the Claimant's Dismissal. In addition, we request all record of discipline removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's violation, including the following compensation(s):*

- 1. Straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service).*
- 2. Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service, including any and all 401k contributions including any market adjustments.*
- 3. Overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service.*
- 4. Health, dental and vision care insurance premiums, deductibles, and co-pays that he would not have paid had he not been unjustly disciplined commencing December 2, 2021, continuing forward and/or otherwise made whole. All notations of the disciplined should be removed from all Carrier records.*

**CARRIER POSITION:**

On November 16, 2021, Claimant was underwent a FRA Random Breath Alcohol Test; he tested positive for alcohol. This was confirmed via a second test, which resulted in an alcohol content of 0.078.5 As a result of the positive tests, he was withheld from service and on November 24, 2021, an investigation was held.

Neither Claimant nor a representative appeared at the investigation. Neither Claimant nor his representative has disputed the validity of the test results or denied violation Maintenance of Way Operating Rule 1.5 – Drugs and Alcohol. The Carrier points out that Claimant signed and certified the US Department of Transportation (DOT) Alcohol Testing Form, certifying that “I have submitted to the alcohol test, the results of which are accurately recorded on this form.”

The Carrier maintains there was no procedural violation in the handling of this case. Rule 40 places no time limitation on when the Carrier should provide the transcript to Claimant and the Organization: “E. The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.” The Carrier maintains the transcript was provided in accordance with this provision. It argues that the Investigation itself must be deemed fair, and maintains the transcript demonstrates this.

On May 5, 2021, Claimant was assessed a Level S Record Suspension with a 36 Month Review Period. As a result, the instant alleged violation of MOWOR 1.15 constituted a serious violation within his 36 Month Review Period. Accordingly, the Carrier concludes that Claimant was subject to dismissal under PEPA C(2)b, which states: “b. If an employee commits an additional Serious Violation within the Review Period, he or she may be subject to dismissal.”

**ORGANIZATION POSITION:**

The Organization argues that there were serious procedural violations in this case. It alleges that neither Claimant nor the Organization were furnished a Notice of Investigation in a timely manner. Claimant did not receive the Notice until December 2, 2021, eight days after the investigation, and the Organization asserts it still has not received the Notice. The Organization references Rule 40, which states as follows in pertinent part:

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

Though the Carrier did provide a transcript dated December 20, 2021, the Organization contends a transcript of investigation must be received within 30 days. In its view, the Carrier’s breaches of procedural protocol warrant that granted the claim as written.

**DECISION:**

The parties' Agreement is very clear and specific in requiring five days' advance notice to a claimant as well as to the Organization of an impending investigation. Not only that, the Notice must specify the charges being leveled against the employee. In this case, the Carrier failed to meet that deadline. Neither Claimant nor a representative from the Organization received the Notice prior to the Investigation, and neither appeared for the Investigation. The Carrier proceeded with the Investigation in their absence, without any input on Claimant's behalf. The Hearing Officer made the following statement on the record:

Let the record reflect that the principal, Mr. Sharp, is not in attendance on November 24th, 2021. Let the record reflect that Union Representative George L. Loveland is not in attendance Wednesday, November 24, 2021. The Union has been contacted and they have no plans to arrange today's investigation scheduled at 09:00 hours. (TR 5)

The burden rests upon the Carrier to establish that Claimant and his Organization were notified of the upcoming Investigation and afforded the contractually defined five-day period in which to prepare to address specified charges. This burden is not met when there is no evidence of record that either Claimant or the Organization was notified of the time and location where the Investigation was taking place, not to mention the charges involved. The Hearing Officer's description of a phone call cannot be taken as testimonial evidence, and even if it could, there is no indication of when the call was made or what information was conveyed. The fact that neither Claimant nor the Organization participated in the Investigation is strong evidence of prejudice from this procedural failure.

Despite the foregoing, this case does not present as one susceptible to cursory analysis. The record contains no timely objection from the Organization that the Investigation was held without its participation. There is no allegation that Claimant and the Organization were unaware that the Investigation was taking place. There was no request to reset the Investigation for a time when all could appear. There was no request to continue the hearing so that Claimant and his representative could add to the record. There was no request for reconsideration in view of the non-participation of Claimant and his representative. There was only silence. This silence reverberates in the absence of any argument on the record from the Organization regarding the merits of the case. This Board not only seeks to ensure procedural fairness, but also to disfavor manipulation of procedural error in a fashion congruent with gamesmanship.

The Carrier proceeded and held the Investigation without any input or participation whatsoever on Claimant's behalf. A hearing can hardly be deemed fair and impartial when only one side participates and the other's absence is not clearly volitional. That said, the record does not support a finding that Claimant had meaningful arguments regarding the merits of his case, yet was denied the opportunity to have them heard.

**AWARD:**

Claim partly sustained in accordance with findings. Claimant shall be offered reinstatement subject to the Carrier's return to service policies. The Carrier shall reduce the discipline in Claimant's record to an actual suspension of time lost from work, and his time away shall be administratively treated as a suspension unless otherwise indicated here. To the extent Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. The Carrier shall not be required to compensate Claimant for lost time or benefits of any kind not specified herein. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. No review period will be added to the employee's record concerning this incident. Any other claims not expressly granted by this Award are hereby denied.

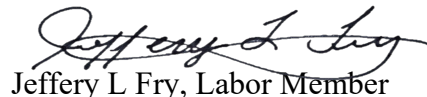
**ORDER:**

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: January 7, 2024



Patricia T. Bittel, Neutral Member



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member