

PUBLIC LAW BOARD NO. 5850

Case No. /Award No. 575
Carrier File No.: 14-22-0023
Organization File No.: 2401-BN40S1-2160
Claimant: M. Yisrael

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

STATEMENT OF CLAIM:

We present the following claim on behalf of Malakyah Ben Yisrael (0125039) Seniority Date 04-13-12 for the removal of the claimants 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 work day 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 401 k 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 the day in question, Claimant was operating a tamper. While in reverse he collided with a regulator, causing damage to his tamper. Following investigation, the Carrier found him guilty of violating MWOR 6.50 Movement of On-Track Equipment, MWOR 6.51 Maintaining a Safe Braking Distance and MWOR 6.52 Spacing of On-Track Equipment. As a result, the Carrier dismissed him from service.

The Carrier addresses the Organization's claim that the Carrier violated Rule 40D because the Dismissal Letter was not received until after the 30-day limit in the rule: as the Carrier sees it, the provision does not say that a decision must be "delivered" within 30 days following an investigation. On the contrary, it states that a "decision shall be rendered" within that time frame. The Dismissal Letter in the instant matter was written and sent on the 30th day following investigation. The Carrier concludes it must be deemed timely rendered. It also notes that there is no contractual deadline for transmission of the transcript of the Investigation, arguing none can be imposed by the Board.

In the Carrier's assessment, the facts are clear. Claimant admitted he struck another piece of BNSF equipment and acknowledged that the collision resulted in approximately \$2,500 worth of damage. The Carrier contends that where there is an admission of guilt, there is no need for further proof. While Claimant downplays the severity of the incident, the Carrier has determined that he failed to pay attention to his surroundings. It deems him to be in direct violation of three rules: MWOR 6.50 which requires him to move at a speed allowing him to stop within half the range of vision short of men and equipment fouling the track, MWOR 6.51 which obligates him to ascertain before backing equipment that a backup alarm is activated, that it has sounded, and that the distance to be traveled was clear of workers and on-track equipment, and finally MWOR 6.52 which establishes the obligation that he maintain safe spacing between on-track equipment. As the Carrier sees it, Claimant violated these rules because he did not stop his machine prior to striking the Ballast Regulator, he did not sound an alarm indicating he was backing his machine, he failed to make sure the distance to be traveled was clear of on-track equipment and he did not maintain safe spacing between on-track equipment.

The Carrier contends Claimant and his co-worker could have been severely injured; there was major damage to both machines in the collision. It maintains the absence of bodily injury does not diminish the severity of the violations.

Claimant's disciplinary record is an important consideration in this case. He had prior disciplines including record suspensions for safety violations, the most recent of which issued in July of 2020. That suspension was accompanied by a 36-month review period. Because the incident of concern here occurred in December of 2020, the Carrier maintains the dismissal decision was appropriate.

ORGANIZATION POSITION:

The Organization maintains Claimant is a nine-year employee who has been entirely truthful and forth-coming at every step of the process. It argues that Claimant's dismissal must be overturned on a procedural basis alone because Claimant did not receive a copy of the Dismissal Letter or a copy of the investigation transcript with exhibits in a timely manner. The Dismissal Letter and related documents were placed into the mail on December 2, 2021, the 30th day after Investigation, but were not delivered to the Claimant until December 4, 2021.

DECISION:

We find the Carrier's position to be persuasive on the procedural issues in this case. Transmission of the transcript does not have a specific deadline. Though certainly a delay in receipt by the Organization could impact its ability to process a claim, there is no indication that the Organization's efforts were impaired in this way.

As to the Dismissal Letter, it was sent on the 30th day and was therefore rendered within the 30-day limit required by the Agreement. There is no requirement that the Letter be received by Claimant and/or the Organization within 30 days. This question was resolved by Third Division Award 44279:

This claim will be decided on the merits. The Organization alleges a violation of Rule 40.D, which requires that "a decision shall be rendered within thirty (30) days following the investigation . . . "Rendered" has been interpreted in accordance with the "mailbox rule," meaning that placing the decision in the mail fulfills the requirement to "render." See also Third division Award 10254, PLB 7020, Award 12, Third Division Award 30601.

This Board is in agreement with the interpretation of the language of Rule 40D that finds a Letter of Dismissal to have been "rendered" when it has been written and put into the mail. As a result, we do not find the Letter of Dismissal to be tardy.

As pointed out by the Carrier, Claimant's work history indicates that he has not responded to the opportunities offered by way of progressive discipline:

Date	Discipline	Description
11-9-2012	Formal Reprimand	Failure to secure work heads, damaging tamper
7-31-2013	Actual & Record Suspension	Using cell phone while driving tamper
3-7--2016	Formal Reprimand	Lack of track authority
4-27-2016	Record Suspension	Failure to follow instructions
9-22-2016	Record Suspension	Ran through switch and derailed

7-28-2020	Record Suspension	Failure to lock up/pin up causing damage to machine
-----------	-------------------	---

This history demonstrates a series of six instances where Claimant was unsafe on the job and received a penalty designed to alert him to the criticality of safe practices as an employee of BNSF Railroad. Claimant repeatedly failed to heed the warning or to demonstrate a capacity to work safely. At the time of the incident here concerned, he was under a Review Period for his preceding failure to lock up/pin up his machine. The final incident resulted in a collision, which by its very nature must be deemed unsafe. The Carrier had substantial reason to conclude that Claimant was not capable of working safely for BNSF.

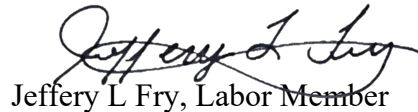
AWARD:

The claim is denied.

Dated: January 7, 2024



Patricia T. Bittel, Neutral Member



Jeffery L. Fry, Labor Member



Logan McKenna, Carrier Member