

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7394

AWARD NO. 7, (Case No. 7)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 23, 2009 when Mr. Paul L. Stephens was assessed a non-serious 30-day record suspension with a 12 month review period on a leniency basis for his violation of Engineering Instructions 4.10--Temporary Speed Restrictions Table and Maintenance of Way Operating Rule 1.6--Conduct.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the Claimant be returned to service, paid for all time lost, and charges be removed from his service record."
(Carrier File No. 12-10-0013) (Organization File No. B-3345-8)

FINDINGS:

Public Law Board No. 7394, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that on August 20, 2009, Division Engineer J. Wiederbolt sent the Claimant a letter which stated in pertinent part the following:

"On August 13, 2009 you were interviewed concerning an 800 Call which alleged you did not properly protect track after switch tie installation on July 28, 2009 at the siding in Noble, Oklahoma on the Red Rock Subdivision and you stated you did issue a temporary Form A.

After researching dispatcher files and tapes it was concluded no Form A request was made.

For violation of Engineering Instructions 4.10 (Temporary Speed Restrictions Table) and Maintenance of Way Operating Rule 1.6 (Conduct) you are Dismissed effective August 20, 2009."

On August 24, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on September 29, 2009, after a mutually agreed to postponement, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, regarding your allegedly not properly protecting track after switch tie installation on July 28, 2009 at the siding in Noble, Oklahoma on the Red Rock Subdivision and then your allegedly stating you did issue a temporary Form A...."

On October 23, 2009, Claimant was notified that he had been found guilty as charged, but in an effort to salvage his career, leniency was being shown by the issuance of a non-serious 30-day record suspension with a 12-month review period for the violation of Engineering Instructions 4.10 in lieu of upholding the dismissal.

It is the Organization's position that the Carrier did not comply with Discipline Rule 91(b)(5) which requires that a decision must be rendered within ten days after the completion of the Investigation. On that basis alone it argued that the discipline should be set aside. It further argued that the Carrier did not meet its burden of proof that the Claimant committed the alleged offense. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant failed to comply with Engineering Instructions 4.10. It also argued that the untimely disciplinary decision did not harm the Claimant as the extra time was used to completely discuss and determine the appropriate discipline to be assessed and in this instance that extra time resulted in a reduction of the assessed discipline.

The Board notes that this is the third case in a series of three cases involving the same Claimant. We have thoroughly reviewed the transcript and the record of evidence and determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule. It is clear that the Hearing was conducted in a fair and impartial manner.

However, there is a question of whether or not after the conclusion of the Hearing the Claimant was denied his "due process" rights when the Carrier rendered an untimely disciplinary decision. Review of the facts substantiate that the Hearing was closed on September 29, 2009 and the decision was issued on October 23rd which was 24 days after its conclusion. The arguments made by the parties on the time limit issue are the same that were set forth in Award Nos. 5 and 6 of this Board and will not be reiterated.

For the same reasoning expressed in the aforementioned Award Nos. 5 and 6 the discipline is set aside as the Carrier's decision was untimely and the Claim is sustained as presented without addressing the merits. The Claimant's disciplinary status reverts to that he held prior to August 20, 2009.

Without any discussion of the merits of this case or the two prior cases the Board advises the Claimant that he should be careful in the future to adhere to all Carrier Rules and Policies and he should recognize that the Carrier considers him to be a worthy asset as it attempted to reduce the discipline in this dispute.

AWARD

Claim sustained.



William R. Miller, Chairman & Neutral Member

Award Date: 8-24-10