

PUBLIC LAW BOARD NO. 7564

Case No. 8/Award No. 8
Carrier File No.: 11-10-0453
Organization File No.: S-P-1536-G

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when it assessed Paul T. Evans, Surfacing Crew Foreman, a Level S 30-Day Record Suspension and a 1-year probation for violation of MOWSR 12.1.1 Operation of Motor Vehicles – General Requirements and MOWOR 1.3.1 Rules, Regulations and Instructions – Safety Rules.

As a consequence of the contractual violation noted above, the Carrier should expunge the discipline from the Claimant's personnel records and make him whole for all lost income.

Facts:

By letter dated May 20, 2010, the Claimant was instructed to attend a May 27, 2010 investigation "for the purpose of ascertaining the facts and determining responsibility, if any, in connection with violations that occurred at approximately 0735 hours, May 18, 2010, at or near the Shell station at the intersection of 6th Avenue South and South Michigan Street, Seattle, Washington, when BNSF Vehicle #17142 was involved in an accident with a private vehicle, including failure to operate a motor vehicle with care and caution, and failure to be alert and attentive, while you were working as a Surfacing Crew Foreman assigned to TSCX0245." Following the investigation, the Carrier assessed the above-noted discipline.

Carrier's Position

The investigation was fair and impartial and the Organization has not shown how Rules 1, 40 and 80 were violated. The Carrier is not required to sustain the Organization's objections made during the investigation. There has been no violation of Rule 42(A) as the unambiguous language therein does not require an answer from the

same person who received the appeal. There were no procedural irregularities that prejudiced the Claimant. The Carrier provided substantial evidence of the Claimant's rule violation, as the Claimant made a left turn across two lanes and failed to yield the right of way. Carrier rules refer to state and local rules so that those rules were properly entered as exhibits during the investigation. The discipline was fair and appropriate and consistent with PEPA.

Organization's Position

The Claimant did not receive a fair and impartial hearing because he was required to submit a statement on the day of the accident and there was no forewarning that he would be alleged to have violated state and local law. The Claimant was not found guilty of violating state or local law but nevertheless was prejudged by the Carrier. Because General Manager Jones did not respond to the letter from Mr. Garisto (the Claimant's Organization representative and Vice-General Chairman), the Carrier has violated Rule 42(C) and the Board must rule for the Claimant on that basis alone as the Carrier is in default. Simply because an accident occurred is not sufficient reason to find that the Claimant violated Carrier rules. He was not charged and was not irresponsible or careless. He was not removed from service, which could have happened with a serious accident, and there was no damage to the Carrier's vehicle. The discipline was excessive for reasons noted above and because the Carrier did not consider the Claimant's prior 36-year history with no other discipline. Furthermore, the discipline was excessive when compared with discipline assessed by the Carrier for previous minor accidents.

Findings:

The request for a statement from the Claimant at the time of the accident is not viewed as a violation of Rule 40(C). because the Claimant's right to an investigation was not compromised. He retained the right to appear with his Organization representative and to call his own witnesses, had he elected to do so. As a result of the accident, it is possible that the Carrier incurred liability for the privately owned vehicle (POV) that was involved. Because of that possibility, it could have been important for the Carrier to have the Claimant's statement as soon as possible.

Nor did the introduction of relevant state and local law as exhibits compromise the investigation. MOWSR S-12.1.1 – General Requirements states that Carrier vehicle drivers must "Know and obey local, state, and federal laws and regulations for operating vehicles, both on and off company property." Even though the Claimant was not charged with a violation of State of Washington or City of Seattle rules, the Carrier had the right to attempt to show that he violated MOWSR S-12.1.1 because operation of the Carrier vehicle was inconsistent with the requirements of state and local regulations. The introduction of state and local laws as exhibits did not lead to charges against the Claimant by these jurisdictions.

Even though the Claimant was not charged by Seattle police, the evidence shows that he failed to yield the right of way when he crossed two lanes of oncoming traffic when attempting to turn left out of the Shell parking lot. Although the Claimant cannot be characterized as having driven recklessly in the sense that he was speeding, driving under the influence or deliberately ignoring hazardous conditions, the accident was nevertheless his fault, with the cause being his failure to see an oncoming vehicle. While there may have been no damage to the Carrier truck, there was damage to the POV that hit the truck. The photos entered as exhibits are not at all clear, but the greater damage to the POV is understandable given that it was a car that collided with a presumably heavier and sturdier truck.

It is possible that the failure of General Manager Jones to respond to the Organization's initial August 9, 2010 letter may constitute a waiver, but this Board does not have enough information to reach that conclusion. The Organization references Rule 21, which is obviously from a different labor agreement. The Board does not have the language of Rule 21 of that other agreement before it and is therefore unable to see if that language is the same as the language of Rule 42.A. in the parties' labor agreement. The inability to make that comparison leads to uncertainty that the award of Public Law Board 1844, Award No. 14 is applicable.

What is clear to the Board, based on the information in the record, is that the discipline meted out to the Claimant was a departure from past practice and a significant overreaction to the facts at hand, including the Claimant's 36 years of tenure without previous discipline. Even though he was at fault, there was no gross negligence involved and not enough concern on the Carrier's part to relieve the Claimant from duty. There were no personal injuries or damage to the Carrier vehicle and moderate damage at most to the POV. The Claimant complied with the requirement to immediately report the accident and has been forthcoming about the facts, even though he voiced an opinion that he had not violated Carrier rules.

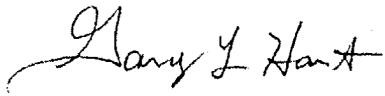
Nevertheless, following a series of formal reprimands and five-day record suspensions for accidents not deemed serious, the decision to label the Claimant's accident as serious and assess a Level S 30-Day Record Suspension and a 1-year review is viewed by the Board as an improvident response that must be characterized as disparate treatment. The Carrier's disciplinary response constitutes a level of managerial arbitrariness that requires the Board to substitute its judgment.

Award:

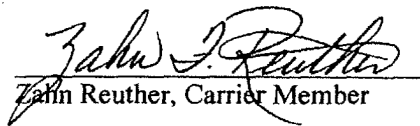
The claim is sustained in part and denied in part.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made and that the above-noted discipline imposed by the Carrier be expunged from the Claimant's personnel record and be replaced with a Formal Reprimand and further that Mr. Evans be made whole for wages lost, if any. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.



Gary Hart, Organization Member



Zafin Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas
November 1, 2012