

PUBLIC LAW BOARD NO. 7564

Case No. 10/Award No. 10
Carrier File No.: 11-11-0318
Organization File No.: B-M-2387-M

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

Statement of Claim:

The Carrier violated the Agreement when on April 28, 2011 Heath E. Braunschweig, Assistant Structures Foreman, was assessed a Level S 30-Day Record Suspension and a 1-year review period for a violation of MOWOR 1.1.1 Maintaining a Safe Course and MOWOR 1.1.2 Alert and Attentive.

As a consequence of the contractual violation, the Carrier should expunge the discipline from the Claimant's personnel records and absolve him of responsibility for the accident.

Facts:

On March 21, 2011 Mr. Braunschweig was instructed to attend an investigation on March 31, 2011 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to maintain safe course and remaining alert and attentive while working at MP 331.39 on the Casper Subdivision on March 17, 2011." Following the investigation the above-noted discipline was imposed.

Carrier's Position:

The Claimant received a fair and impartial hearing as the Agreement does not call for discovery and the discipline was based on facts adduced at the hearing and not predetermined on the earlier investigation by Structures Supervisor Roberts. The Carrier met the requirement to prove the charges by substantial evidence. The Claimant did not participate in a detailed job safety briefing before the work, which he did not plan, was begun. The Organization's procedural objections are without merit and there is no showing that the Claimant was prejudiced by procedural shortcomings.

Organization's Position:

Rule 40 was violated because Mr. Braunschweig did not receive a fair and impartial hearing. He was not at the reenactment of the accident, the discipline was pre-determined by Structures Supervisor Roberts' investigation, with the resulting power point presentation based on guesswork and speculation. Structures Supervisor Roberts was a surprise witness and the Organization was not allowed to see documents prior to the investigation. Thereafter the discipline was issued by other than the conductor of the investigation, who had the greatest knowledge of the testimony and exhibits.

There is no evidence that the Claimant did not maintain a safe course or that he was not alert and attentive. The testimony of those working with the Claimant establishes that the accident was unforeseen. Mr. Braunschweig was not charged with failure to conduct a safety briefing and cannot be held accountable for the safety briefing, as that was the responsibility of the Foreman. The Claimant participated in the briefing, which was primarily about the work to be done. Mr. Braunschweig, and the entire crew, was punished because the accident was reported, as the preferred 4-10 schedule was replaced by a 5-8 schedule.

Findings:

While a number of contentions have been made by the parties, the Board has determined that the dispute is best resolved on the merits. Our determination is without prejudice to the procedural and due process arguments that arose during the on-property handling.

The Carrier bears the burden of showing with substantial evidence that the Claimant failed "to maintain safe course and remaining alert and attentive" on March 17, 2011. The Board has thoroughly reviewed the transcript of the Investigation and finds that the Carrier did not adduce substantial evidence that the Claimant failed to maintain a safe course or that he was not alert and attentive. Regarding the issues surrounding the safety briefing, the record shows that the Claimant participated in the safety briefing conducted by the foreman. Whatever the asserted deficiencies in the safety briefing, the Carrier did not establish the Claimant's participation in the briefing amounted to a failure to maintain a safe course or to conduct in violation of his duty to remain alert and attentive.

Award:

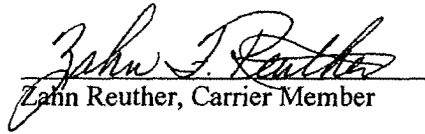
Claim sustained.

Order:

This Board, after consideration of the dispute identified above hereby orders that an award favorable to the Claimant be made and that the Level S 30-Day Record Suspension and 1-year review period be expunged from the Claimant's personnel records. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas
November 1, 2012