PUBLIC LAW BOARD NO. 7564

Case No. 112/Award No. 112
Carrier File No. 10-20-0156
Organization File No. C-20-D040-14
Claimant: Heath E. Miller

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

Statement of Claim:

By letter dated March 16, 2020 Machine Operator Heath E. Miller was assessed Level S 30 Day Record Suspension and a one (1) year review period for an alleged violated of EI 1.10.2 General Requirements. The May 13, 2020 claim from the Organization, Jim L. Varner, Vice General Chairman, appealing the discipline, requests that the discipline issued to Claimant Miller "be removed as it is excessive, unfounded and without merit" and should "be removed from his records in accordance with Rule 40 of the current agreement."

Facts:

By letter dated January 10, 2020, the Claimant was informed that:

> An investigation has been scheduled at 1000 hours, Tuesday, January 21, 2020, at the BNSF Conference Room, 1212 W. 24th, Cheyenne, WY, 92001, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to have Lockout tag out required information filled out on front end loader and alleged failure to have the key in your possession at/or near Fort Collins depot, January 8, 2019, while assigned as a Machine Operator on Headquartered gang TMOX7091.[1]

By mutual agreement, the investigation was postponed until February 18, 2020, time and location unchanged.

The relevant facts in this matter are essentially undisputed. On January 8, 2020 the Claimant was performing an oil change on his assigned front-end loader. He had locked out and thus deenergized the machine. The key to his lock was either on the roof of his privately-owned vehicle (POV), according to Roadmasters Sintas and Gribble, or on the hood of the POV against

[1] January 8, 2019 is an obvious typo because in context, it is clear that 2020 is the correct year.

the windshield, according to Mr. Miller. The POV was an estimated 10-20 feet from the front-end loader. The Claimant's testimony that he was the only Maintenance of Way employee within a mile, that he was wearing a Tyvek suit without pockets over his clothing and that his hands were oily and greasy was uncontradicted.

Roadmasters Sintas and Gribble, the latter the Claimant's supervisor, conducting ops tests that day, stopped when they saw the engine compartment of the front-end loader open. They observed that the required information was not on the lockout tagout (LO/TO) tag and that the keys to the lock were on the Claimant's POV. The Roadmasters made a decision to remove the Claimant from service for the remainder of the day and send him for drug and alcohol testing. Subsequently the above-noted notice of investigation (NOI) was issued, with the investigation resulting in the decision to assess discipline.

Carrier Position:

The Carrier asks that the claim be denied as the Claimant received a fair and impartial investigation devoid of any procedural errors that would have prejudiced him. Mr. Miller was not prejudged. His admission provided the necessary substantial evidence that he violated EI 1.10.2 The discipline assessed was in accordance with the Policy on Employee Performance Accountability (PEPA) and was neither excessive nor unjustified. The thirty (30) day time limit set forth in Rule 40 was not violated as the discipline letter was dated and mailed 27 days after the investigation. There is ample precedent for defining "rendered" as the date the letter was mailed.

Organization Position:

The Organization insists that the claim should be sustained, contending that because the discipline letter was not received until the thirty-first (31st) day after the investigation, the Carrier did not comply with Rule 40. The investigation was not fair and impartial and the Claimant's due process rights were denied. The interpretation of EI 1.10.2 constitutes a grey area. The key to the lock rested on the Claimant's POV 10-20 feet from the front-end loader so that the key should be considered in his possession. The front-end loader had been locked and secured. There had been continuing problems with LO/TO tags that did not retain information written on them. The Claimant was not negligent, careless or unsafe and did not willfully violate the Engineering Instruction. The Carrier could have used the incident as a teaching opportunity rather than imposing discipline that was arbitrary and excessive, punitive rather than corrective.

Findings:

Under Engineering Instructions (EI)1.10 Lockout/Tagout, 1.10.2 General Requirements are the following two relevant provisions:

8. Make sure tags always accompany locks. The tag must identify name and craft/work group of the authorized employee, and display the words "Lockout/Tagout. Tags must be legible and understandable to all authorized and affected personnel who work or otherwise be in the area.

11. Each lock is uniquely keyed. Key(s) remain in possession of the employee. There will be no master key.

The Board first considers whether the Rule 40.D. requirement that "A decision shall be rendered within thirty (30) days following the investigation . . ." means that the decision must be mailed or that it must be received within the thirty (30) day limit. The Organization has provided no precedential support for its contention that "rendered" should be defined as date received. The Carrier's October 2, 2020 denial of the Organization's appeal not only provides support for a definition of "rendered" as date mailed, but also refers to what the Board knows to be true—that date mailed or the "mailbox rule" is the definition widely applied throughout the railroad industry. The Board finds that Rule 40.D. time limits were not violated.

A careful reading of the transcript has uncovered no support for the Organization's oft-made contention that Rule 40.A. was violated. The Claimant received a fair and impartial investigation with no diminution of his due process rights.

We next consider the Carrier's assertion that the Claimant violated EI 1.10.2 General Requirement 11 because the key to his lock was not in his possession. EI 1.10.1 sets forth definitions of twenty (20) terms, but does not define "possession." "Possession" as used in General Requirement 11 is ambiguous. The Claimant's key(s) was/were resting on his POV a maximum of twenty (20) feet away from the front-end loader. His testimony that there was nobody within a mile of where he was (other than the two Roadmasters) stands uncontroverted. If, in that context, the Claimant did not possess the key(s), then who did? The Board finds the application of General Requirement 11 to be unduly mechanistic—almost as though the Roadmasters were intent on finding fault. This Board does not find substantial evidence of a violation of this requirement.

Turning to General Requirement 8, the Board notes that this case is not about a failure to lockout/tagout. The Claimant's testimony and written statement that he had deenergized the front-end loader were not contested and are deemed truthful. In addition, it is undisputed that the LO/TO tag accompanied the lock, as shown in Exhibit 3B. Therefore, the Board is at a loss to understand Roadmaster Gribble's assertion that there was a "critical decision failure" and even more perplexed to understand what appears to be a totally unjustified decision to remove the Claimant from service for the rest of his shift and send him for drug and alcohol testing.

The Claimant's admission that he had not noticed that his name had been smeared off the LO/TO tag provides the necessary substantial evidence that he had violated EI 1.10.2

General Requirement 8. As Roadmaster Sintas testified, the impermanence of information on LO/TO tags had been a problem in the past, apparently remedied by putting a piece of clear tape over the information after it was placed on the tag with a magic marker or a sharpie. In summary, the Claimant had performed the required LO/TO procedure so that the engine was deenergized, placed the appropriate tag on his lock, as pictured in Exhibit 3B, but neglected to ensure that the required information was written on the tag. And, while the key to the lock was not on the Claimant's person, it was on his POV that was 10'-20' from the front-end loader. There is no evidence to support an implication that when Roadmasters Sintas and Gribble came upon the Claimant, he was working in a way that made him a danger to himself or anybody in the vicinity.

The Board further notes that in his closing statement, the Claimant said that "I have figured out a way to fix what they had an issue with. And I will be incompliance (sic) with whatever they want or what they expect" (TR, p. 33, ll. 21-23). The Carrier has the right to assess discipline for a proven violation of a reasonable rule, but it also has an obligation to assess discipline for just cause, one aspect being that "the punishment must fit the crime." This Board has considered the incident in its totality, including the fact that nobody was placed in danger, the Claimant's acknowledgement that he violated EI 1.10.2 and that the problem won't occur in the future. In addition, we have reviewed PEPA. We find that the Level S 30 Day Record Suspension is punitive overkill, an arbitrary and capricious application of the corporate policy. The Level S Record Suspension is to be removed from the Claimant's records and replaced with a Standard Formal Reprimand. The one (1) year review period remains.

Award:

Claim sustained in part.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award partially favorable to the Claimant be made in accordance with the Findings. The Carrier is to make the Award effective on or before thirty (30) days following the date the Award is transmitted to the parties.

Zachary C. Voegel, Organization Member

Joe R. Heenan, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
October 20, 2021