

PUBLIC LAW BOARD NO. 7564

Case No. 113/Award No. 113
Carrier File No. 10-20-0155
Organization File No. C-20-D070-4
Claimant: Stephen R. Little

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

Statement of Claim:

By letter dated March 18, 2020, Wray Maintenance Gang Foreman Stephen R. Little, Claimant, was issued an immediate dismissal for a violation of MWOR 6.3.1 Track Authorization. The May 14, 2020 claim from the Organization, James L. Varner, Vice General Chairman, appealing the discipline, requests that the discipline, characterized as “excessive,” be removed from the Claimant’s records and that he “be made whole for all straight time and overtime lost during this violation, not to be reduced by outside earnings obtained while he was removed from service. He is to be made whole for all health, dental, and vision care paid out during his dismissal. He is to get any general lump sum payments or retroactive general wage increases provided in any agreement that become (sic) affective (sic) while he was out of service.”

Facts:

By letter dated November 22, 2019 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Wednesday, December 4, 2019, at the BNSF Depot, 100 Clayton St., Brush, CO 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stay within track authority limits while setting truck 29365 on the crossing at/or near MP 377.4 on the Akron sub, resulting in an exceeds alarm at approximately 1645 CT, November 20, 2019, while assigned to the Mobile gang TMGX1819. The date BNSF received first knowledge of this alleged violation is November 21, 2019.” After three mutually agreed to postponements, the investigation was held on January 20, 2020, time and location unchanged.

The investigation was scheduled after it came to light that on November 20, 2019, the Claimant, then Foreman and operator of the hy-rail vehicle, had set on the main line at a point slightly outside the limits of his authority, thus triggering the vehicle’s High Rail Compliance System’s (HLCS) exceeds alarm.

Carrier Position:

The Carrier insists that the claim must be denied because the Claimant's admission constitutes the required substantial evidence. The dismissal is consistent with the Policy for Employee Performance Accountability (PEPA). The investigation was fair and impartial, there was no prejudgment and there were no procedural errors that prejudiced the Claimant. If the Board opts to reinstate the Claimant, no damages should be assessed, outside earnings should offset any damages ordered, there is precedent for and against including lost overtime in the Award and insurance premiums should not be considered.

Organization Position:

The Organization asks that the dismissal be set aside because the investigation was not fair and impartial and the Claimant was denied due process. The outcome of the investigation was predetermined. Roadmaster Paz advised Conducting Officer Breden what questions to ask. The Carrier unfairly required Foreman Little to perform multiple roles. He believed that there was a thumbwheel issue that had been resolved. The Claimant was confused about the direction he was traveling and was only a few feet outside the limits of his authority, with no trains in the area.

Findings:

We begin with two preliminary observations. First, while the claim set forth above was a response to a dismissal, this Board is now concerned with a Level S 30 Day Record Suspension and a 1-year review period. On December 6, 2018 Foreman Little was assessed like discipline for an alleged violation of MWOR 6.3.1. This was the first discipline assessed against him since his October 27, 2014 date of hire. On July 30, 2020 Award No. 101 sustaining the earlier claim was adopted, resulting in the removal of the discipline from the Claimant's records. Award No. 101 is dated the same day as General Chairwoman Moody-Gilbert's appeal in what was then still a dismissal case. That appeal was denied on September 28, 2020. However, as reflected in documents in evidence, during the video claims conference held on November 10-12, 2020 the Carrier, represented by Zach Hutto, indicated its willingness to convert the dismissal to "Level S with a 12-month review period and to make Claimant Little whole for wages, including overtime, lost between the dismissal noted herein and a later dismissal that followed, but not to reinstate the Claimant because by this time he had been dismissed again. This explains our consideration of a record suspension rather than a dismissal.

Second, during the investigation Roadmaster Paz introduced MWOR 6.3.1 Track Authorization as well as MWOR 10.3. MWOR 6.3.1 states that "The following [Rules] authorize MW on Main Tracks" and "on controlled sidings and other tracks where CTC is in effect." Because MWOR 10.3 is incorporated by reference into MWOR 6.3.1, the Carrier's mention only of MWOR 6.3.1 in the notice of assessed discipline is sufficient to allow the Board to consider both MWORs.

Regarding the record suspension now before us, having carefully reviewed the investigation transcript, we find that the investigation was fair and impartial as required by Rule 40. We also find that the Claimant's due process rights were maintained. Given the electronic evidence, it is reasonable to assume that there were Carrier officials who could have concluded prior to the investigation that Foreman Little had indeed set on the main line outside of his authority. The critical concern is not whether such conclusions existed, but whether they resulted in an unfair and partial investigation that lacked the requisite due process. As noted above, we do not find that to be the case. The Claimant was allowed to testify in his own behalf and to present what the Organization contends are mitigating factors.

The Carrier has met its duty to prove the charges with substantial evidence. Indeed, the evidence is unimpeachable. Not only did the Organization not cross examine Roadmaster Paz in an attempt to contest his testimony, but also the Claimant admitted that he set on the main line outside of the limits of his authority, an admission echoed in the Organization's closing statement and in the initial claim filed by the Organization.

The Board has considered the Organization's above-noted contentions of mitigation, but when these contentions are weighed against the violation, we do not find the record suspension and review period to be arbitrary and capricious such that the discipline should be set aside. We acknowledge that this case has a "no harm, no foul" element to it because no trains were on the main line, but we are also well aware that being outside the limits of authority has the potential to result in serious property damage, injury and even death. As a general rule, with Award No. 101 showing that there can be exceptions, we believe that strict enforcement of Rules relating to track and time provides the best protection for the Carrier and its employees.

As stated below, we deny the claim with the caveat that we assume that the Carrier has addressed the commitment to make the Claimant whole for wages, including reasonable overtime wages, that were lost—this in accordance with the Claims Conference commitment—between the date of the modified dismissal and the date of a second dismissal, to be considered by this Board in a different Award. If the Board's assumption is incorrect, the Carrier retains that liability, which should take into account wages earned in other employment.

Award:

Claim denied.

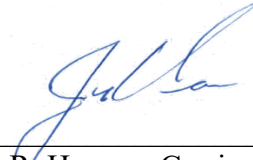
Order:

With reference to the above Findings, the Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be entered.

PLB NO. 7564
AWARD NO. 113



Zachary Voegel, Organization Member



Joe R. Heenan, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
October 31, 2022