

PUBLIC LAW BOARD NO. 7564

Case No. 114/Award No. 114
Carrier File No. 10-20-0185
Organization File No. C-20-D070-8
Claimant: Stephen R. Little

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

Statement of Claim:

By letter dated May 6, 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 June 29, 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 this dismissal. He is to get any 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 March 6, 2020 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Wednesday, March 18, 2020, at the BNSF Depot, 100 Clayton Street, Brush, CO 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to verify that all employees and equipment working under the track authority were clear of the track before releasing authority at/or near MP 402 and MP 394.3 on the Akron Subdivision, March 4, 2020, while assigned as a Foreman on Mobile gang TMGX1819. The date BNSF received first knowledge of this alleged violation is March 5, 2020. By mutual agreement, the investigation was postponed until April 21, 2020, time and location unchanged.

The investigation, with the Claimant not in attendance, was scheduled after Foreman Patrick Husted and Driver Rob Pinkal alleged to Roadmaster Michael W. Paz that twice on March 4, 2020 the Claimant had “shortened up” or released authority that he held as EIC without communicating his action to those working under him, thus “failing to ensure that they were clear of the track.”

Carrier Position:

The Carrier acknowledges that it must carry the burden of proof by substantial evidence and asserts that the Claimant's admission contained in his written statement placed in evidence during the investigation provides the necessary substantial evidence. The Claimant received the required fair and impartial hearing, was not prejudged and was not prejudiced during the on-property processing of the claim. The dismissal was in accordance with the Policy for Employee Performance and Accountability (PEPA) because the violation was the Claimant's second serious violation within an active review period. For all of these reasons this Board must deny the claim.

Organization Position:

The Organization advances a procedural contention because the Carrier's November 20, 2020 declination of the claim was transmitted via e-mail rather than via the Postal Service despite the fact that a temporary agreement providing for e-mail transmission, presumably in response to COVID-related precautions, had expired. The violation of Rule 42 should result in a sustaining award. Additional contentions requiring a sustaining award are that the Carrier has failed to provide substantial evidence of a rules violation, the dismissal was arbitrary and excessive and that the Claimant was neither provided a fair and impartial investigation nor afforded his due process rights. The Carrier intended to take a "second bite of the apple," implicitly prejudged the matter and relied on hearsay testimony from Roadmaster Paz. Moreover, the Claimant used Carrier-provided technology to verify that the track was not fouled before he surrendered his authority.

Findings:

The parties had negotiated an Electronic Exchange Agreement (EEA) effective April 6, 2020 – October 30, 2020 to replace the historic use of U.S. Postal Service and/or mail courier. General Director Labor Relations Heenan's November 20, 2020 declination of the Organization's appeal, sent via electronic mail despite the prior expiration of the EEA, violated the reinstituted use of the Postal Service and/or mail courier. The Board views this as a technical violation and finds nothing in the record to indicate that in any way, shape or form the violation deprived the Claimant of a fair and impartial investigation or diminished his due process rights. Therefore, we cannot justify setting aside the dismissal because of the electronic transmission.

A careful reading of the investigation transcript supports a conclusion that the Claimant received a fair and impartial investigation with due process rights intact. The Organization's contention that the Claimant was the victim of prejudgment is unavailing. As the Board observed in Award No. 113, a case also involving Foreman Little, it is entirely possible that one or more Carrier officials had concluded prior to the investigation that the Claimant had committed the alleged violation. However, "(t)he critical concern is not whether such conclusions existed, but whether they resulted in an unfair and partial investigation that lacked due process." We do not find that to be the case.

MWOR 6.3.1 was properly introduced during the investigation and referred to in the notice of discipline. With reference to Part D, the evidence establishes that twice on March 4, 2020, the Claimant did not brief with the Mobile Gang to assure that they were not fouling the main line before releasing his authority. The evidence rests not only with Roadmaster Paz's hearsay testimony, but with written statements from Trenton Foreman Pat Husted and Vehicle Operator Rob Pinkal that were accepted without protest and neither questioned nor disavowed. The Board accepts the evidence as substantial.

The Board realizes that the Claimant used his smart mobile client (SMC) to assure himself that the crew was not foul of the track when he tendered his authority, but that falls short of full compliance with MWOR 6.3.1. As this Board wrote in Award No. 113 that concerned the Claimant's dismissal reduced to a record suspension for a violation of the same MWOR, the potential for serious property damage, personal injury and even death, fully justifies the enforcement of strict compliance with MWOR 6.3.1 as a prudent form of protection for Carrier and employees alike. Moreover, the Board is concerned that Foreman Little, whose position involved elements of leadership, has been found to have committed two violations of MWOR 6.3.1 within a 3 ½ month period. Both were Level S violations; thus, the Carrier's decision to impose dismissal was in accordance with PEPA.

Award:

Claim denied.

Order:

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



Zachary Voegel, Organization Member



Joe R. Heenan, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
October 31, 2022