

PUBLIC LAW BOARD NO. 7564

Case No. 118/Award No. 118
Carrier File No. 10-21-0043
Organization File No. C-21-D040-3
Claimant: P.J. Donovan

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

Statement of Claim

By letter dated September 17, 2020, Mr. P.J. Donovan was issued a Level S 30-day suspension and a three-year review period because of his alleged “failure to verify that rails on racks were individually tied down prior to unloading on May 21, 2020 at approximately 0941 hours... while working as a motor vehicle operator.” The Claimant allegedly violated MWSR 17.5.3, Rail Handling.

The Organization’s October 13, 2020 claim from Randy S. Anderson, Vice General Chairman, appealed the discipline and characterized it as excessive and prejudicial. The Organization requested that the discipline outlined in the letter received by the Organization on September 18, 2020, be “overturned...and...[Claimant’s] personal record be cleared of this discipline and any mention of this investigation.” The Organization further contends that the Carrier’s failure to respond to the Organization’s appeal letter dated October 13, 2020, submitted via email, violated Rules 40 and 42 of the former-BN Agreement.

Facts

By letter dated May 23, 2020, the Claimant received notice that “[A]n investigation has been scheduled at 0900 hours, Wednesday, June 3, 2020 at ... Lincoln, NE ... for the purposes of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to verify that rails on racks were individually tied down prior to unloading on May 21, 2020, at approximately 0941 hours on the Creston subdivision, Lincoln, NE while

working as a motor vehicle operator.”¹ After four postponements by mutual agreement, the investigation occurred on August 19, 2020, at 0900 hours.

Carrier Position

The Carrier avers that the investigation was fair and impartial, and that Claimant’s admission provided substantial evidence regarding the violation. The Carrier states it did not violate Rules 40 and 42 because the Organization failed to submit the October 13, 2020, email appealing the discipline. Further, the Carrier asserts that Section III of the electronic claim handling agreement that was in effect on October 13, 2020, provides that:

The parties recognize that issues may arise when using electronic mail... Should such issues arise, the parties shall work together to find a mutually agreeable resolution. But technological failures shall not be used by either party in arguing that a fatal procedural flaw occurred if it is proven the electronic mail was used consistent with the spirit and intent of the Agreement.

Section I (A) of the Agreement states, “As soon as possible after receipt of a discipline claim, such designated officer will send a responsive email acknowledging receipt.” The Carrier submits that the Organization should have notified the Carrier that it did not receive an email acknowledging the claim. Instead, the Organization waited until December 17, 2020, to demand that the Carrier remove the discipline imposed on the Claimant.

Organization Position

The Organization asserts that the Carrier violated Rules 40 and 42 by failing to process the appeal requesting the removal of Claimant’s discipline.

Findings

Claimant is charged with violating MWSR Rule 17.5.3, Rail Handling. During the investigation, Claimant admitted he violated MWSR Rule 17.5.3. Claimant’s admission provided substantial evidence regarding the violation.² By letter dated September 17, 2020, Claimant was issued a Level S 30-day suspension and a three-year review period.

On October 13, 2020, the Organization appealed Claimant’s discipline by emailing Steve Thompson, General Manager of the Heartland Division. Based on the record below, a question exists as to whether or not Mr. Thompson was the General Manager of the Heartland Division at the time the Organization appealed Claimant’s discipline. The Carrier did not confirm receipt of the appeal letter. On December 17, 2020, the Organization sent another letter to Mr. Thompson

¹ Exhibit 1.

² Carrier Investigation p.29-30, 32-33.

by Certified Mail, Return Receipt Requested. This letter, marked "Return to Sender, Unclaimed, Unable to Forward," was returned to the Organization on January 9, 2021.

Rule 40 Investigations and Appeals provides the following:

H. The provisions of Rule 42 shall be applicable to the filing of Claims and appeals in discipline cases.

Rule 42 Time Limits provides the following:

A. All claims or grievances must be presented in writing by or on behalf of the employee...to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based.

Notwithstanding the procedural arguments of the Organization, it is questionable as to whether the appeal was emailed and served on the appropriate Carrier manager. The Organization never received notice confirming receipt of the appeal. The Organization's letter dated December 17, 2020, was outside the sixty (60) day period.

The Organization also failed to submit evidence of the alleged October 13, 2020, email appealing the discipline. Section III of the electronic claim handling agreement between the parties, which was in effect on October 13, 2020, provides that:

The parties recognize that issues may arise when using electronic mail... Should such issues arise, the parties shall work together to find a mutually agreeable resolution. But technological failures shall not be used by either party in arguing that a fatal procedural flaw occurred if it is proven the electronic mail was used consistent with the spirit and intent of the Agreement.

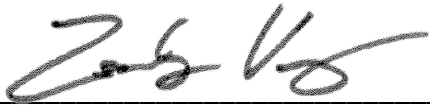
Section I (A) of the Agreement provides that "As soon as possible after receipt of a discipline claim, such designated officer will send a responsive email acknowledging receipt." The Organization failed to notify the Carrier that it did not receive email acknowledgement of its claim. Instead, the Organization waited beyond the sixty (60) day period to demand that the Carrier remove the discipline imposed on the Claimant. As such the claim is denied as untimely.

Award

Claim denied.

Order

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



Zachary Voegel, Organizational Member



Joe Heenan, Carrier Member



Melinda Gordon, Neutral Referee

DATED: June 20, 2023