

PUBLIC LAW BOARD NO. 7564

Case No. 12 (*formerly Case No. 5*)/ Award No. 12

Carrier File No.: 10-11-0632

Organization File No.: C-11-D040-36

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

Statement of Claim:

The Carrier violated the Agreement when on August 31, 2011 Claimant Clayton A. Whitbeck was assessed a Level S 30-Day Record Suspension and a 3-year review period for violating MOWOR 12.2 Special Operating Guidelines.

As a consequence of the contractual violation, the Carrier should expunge the discipline from the Claimant's personnel record and make him whole for lost service time on June 8, 2011.

Facts:

By letter dated June 15, 2011, the Claimant was directed to appear at an investigation "for the purpose of ascertaining facts and determining your responsibility, if any, in conjunction with your alleged failure to notify operator of boomed equipment that a train had been called through FORM B, equipment was left in working position as train was passing said equipment at approximately 1230 hours at or near MP 5.9 on the Creston Subdivision on June 8, 2011. After agreed upon postponements the hearing was conducted on August 3, 2011. The Claimant received notice of the above-noted discipline by letter dated August 31, 2011.

Carrier's Position

The Claimant received a fair and impartial investigation that gave him the opportunity to refute the allegations. The slot train was not on the list of equipment that could continue to operate while a train was passing and thus the Claimant was responsible for allowing the continuous operation.

Organization's Position

The Claimant did not get a fair and impartial hearing because the Carrier prejudged his guilt and because the Georgetown slot train operator was unavailable to testify. The slot train is not on the list of equipment that can or cannot continue working when a train is passing; thus there is a gray area. There were communications problems in the area. Assistant Roadmaster Fullen testified that he heard the Claimant alert the slot train operator to the oncoming train and the Claimant explained his use of hand signals used because of the faulty communications.

Findings:

In order to prevail in this case, the Carrier bears the burden of showing with substantial evidence that the Claimant failed to notify the operator of boomed equipment that a train had been called through the Form B which resulted in equipment being left in working position as the train was passing on June 8, 2011.

The testimony establishes that communications were difficult at or near MP 5.9. Assistant Roadmaster Fullen acknowledged that he heard the Claimant alert the slot train operator. There were no problems earlier in the day that resulted in the slot train continuing to operate while a train was passing, thus indicating that the operator and the Claimant had no problems working together. Also, the slot train is not on the list of equipment that can or cannot continue working when a train is passing.

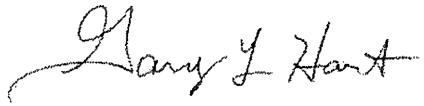
Based upon the evidence presented in this case and because it is the Carrier's responsibility in a discipline case to meet its burden of proof it is determined that that burden was not met in this instance and the discipline assessed is set aside.

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 30-Day Record Suspension and 3-year review period be expunged from the personnel records.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas
February 28, 2013