

SPECIAL BOARD OF ADJUSTMENT NO. 7564

Case No.: 25/Award No.: 25
Carrier File No.: 10-12-0625
Organization File No.: C-12-D040-22
Claimant: Everett W. Porter

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

Statement of Claim:

The Carrier violated the Agreement when on August 25, 2012 Claimant Everett W. Porter was issued a Level S thirty (30) day record suspension and a three (3) year review period for violation of EI 23.1.2 Foreman's Roles, Responsibilities, & Expectations and MOWOR 6.3.2 Protection on Other Than Main Track.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel file.

Facts:

By letter dated June 28, 2012 the Claimant was directed to attend an investigation on July 5, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to provide proper protection for men and equipment on June 22, 2012 at approximately 1730 hours in the Alliance Yards on the Angora Subdivision while assigned as Foreman on gang TRPX0005 temporarily headquartered in Alliance, Nebraska." After two mutually agreed to postponements, the investigation was held on July 24, 2012.

Carrier Position:

The investigation was fair and impartial, as the evidence, including the Claimant's own admission, establish clear violations of EI 23.1.2 and MOWOR 6.3.2. The Organization has not shown how any supposed shortcomings in the investigation prejudiced the Claimant. Progressive discipline was not required and leniency was the prerogative of the Carrier. The Board should not substitute its judgment for that of the Carrier.

Organization Position:

The investigation was not fair and impartial as the inquiry was a formality rather than reasonably objective. The Conducting Officer and Roadmaster Powers attempted to place blame on the Claimant, with the Conducting Officer attempting to absolve exempt employees by shifting blame to a scheduled employee. The Carrier did not meet its burden of proof as the Claimant was charged with violating rules that the parties did not understand. There was testimony about a trailing point switch providing positive protection, which it does not do. The switch was, in fact, properly lined, but was just not locked. Roadmaster Powers was to provide protection in the area of concern, but she did not do so and her radio message that she had the gang covered was not specific to the west end only. The Claimant cannot be faulted as he was unfamiliar with the Alliance Yards, requested assistance because of his unfamiliarity, and did not receive the requested assistance. The Organization had no opportunity to review the Claimant's personnel record, on which the Carrier relied, because the record was not made an Exhibit.

Findings:

The investigation was fair and impartial, as the Board does not find that it was conducted for the purpose of shifting blame from a more appropriate individual to the Claimant. On June 22, 2012, the Claimant as Foreman and EIC was responsible for providing proper protection for men and equipment working in the Alliance Yards. That responsibility was not diminished by any unfamiliarity the Claimant may have had with the Alliance Yards. Had the failure to provide proper protection resulted in injury, death or property damage, it would not have been less so because of the Claimant's unfamiliarity with the Yards.

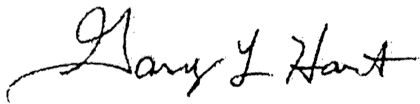
The testimony of Foreman Perez, Machine Operator Aldana and Assistant Roadmaster Smith established that the switch was properly aligned but not locked out as required. In Assistant Roadmaster Smith's words, "there was a switch for a track that was coming directly into the track that we were working out of, uh, that was not locked and tagged for movement, against movement coming into that track" (Investigative Transcript, p. 6). The Claimant could not explain the lack of proper protection to Assistant Roadmaster Smith. The Organization cannot shift blame for this to Roadmaster Powers, as she testified that she did not say that she would lock out the 300 switch but only that she would protect the west end of the area. The Conducting Officer, who issued the discipline, could hardly have done so believing that Roadmaster Powers did not provide credible testimony about what she said that she would be responsible for. The Board has no basis for overriding what was at least implicitly a determination that Roadmaster Powers testified credibly. While the Claimant may have believed that there was miscommunication on June 22, 2012 and that Roadmaster Powers had protected the area, in the final analysis he was responsible, as he acknowledged, for not locking the 300 switch. There is no more that needs to be written.

Award:

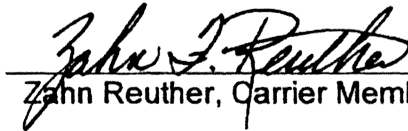
Claim denied.

Order:

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



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
February 12, 2014