PUBLIC LAW BOARD NO. 7564

Case No.: 42/Award No.: 42
Carrier File No.: 11-13-0190
Organization File No.: T-D-4228-M
Claimant: Edward M. Obregon

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

Statement of Claim:

1. The discipline (Level S Combined Suspension) imposed upon Mr. Edward M. Obregon by letter dated March 26, 2013, for alleged violated of MOWOR 6.3.2 Protection on Other Than Main Track on March 6, 2013 at approximately 0915 hours in Grand Forks, North Dakota, for alleged failure to obtain proper on-track protection while working as a machine operator while cleaning snow from the roundhouse tracks.

2. As a consequence of the violation referred to in Part (1) above, Claimant Edward M. Obregon shall now receive the remedy prescribed by the parties in Rule 40(G).

Facts:

By letter dated March 8, 2013, Claimant Edward M. Obregon was directed to attend an investigation on March 14, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to obtain proper on-track protection and indifference to safety when you were questioned about your method of on-track protection while working as a machine operator while cleaning snow from the roundhouse tracks in Grand Forks, North Dakota on March 6, 2013, at approximately 0915 hours." The notice also informed the Claimant that he was being withheld from service pending the results of the investigation.

Carrier Position:

There is substantial evidence that the Claimant violated MOWOR 6.3.2 Protection on Other Than Main Track. Furthermore, the Claimant seemingly was indifferent to safety when questioned by FRA inspectors. He received a fair and impartial investigation. The Notice of Investigation was specific as to time location and nature of the alleged violation and the Organization has not shown any lack of specificity that prejudiced the Claimant's defense. Rule

40.B gives the Carrier the right to withhold employees from service in cases of alleged serious violations, which this was, and there is decisional support for the principle that withholding an employee from service does not *per se* equate to prejudgment. There were no procedural deficiencies associated with the hearing. The assessed discipline was in accordance with PEPA and showed leniency. Because this was the Claimant's second serious violation within 12 months, he could have been dismissed. Should the claim be sustained, the Claimant is due only the remedy specified in Rule 40.G.

Organization Position:

The Claimant did not receive a fair and impartial investigation because, according to the FRA Inspection Report, he was disciplined prior to the investigation, because the Carrier prejudged the matter by withholding the Claimant from service for an alleged non-serious violation and because the charges contained in the Notice of Inspection were not specific as required, having omitted the rule allegedly violated. The Claimant has 39 years of service and an exceptional record. Testimony shows that he is not indifferent to safety. On March 6, 2013 the Claimant followed a long-standing past practice and believed that he had followed the relevant rules and had protection. He had conducted the required briefing and believed his flagmen had followed him to the roundhouse tracks. If a violation occurred, it resulted from a systemic failure as others, including supervisors, were aware of the past practice. The Carrier has filed to meet the burden of proving a violation.

Findings:

The Claimant received a fair and impartial investigation. While the FRA Inspection Report may indicate that the Claimant was disciplined before the inspection was conducted, there is no evidence whatsoever to show such discipline actually occurred. While not understanding how or why the report came to indicate discipline, the Board dismisses that notation as inaccurate.

The Board finds the alleged violation serious and, once again notes that withholding an employee from service does not amount to prejudging the outcome of the investigation. Rationale for this statement may be found in numerous prior awards issued by this Board. The Notice of Investigation provided ample information to the Claimant and the Organization to allow a robust defense, as the Notice included the time and location of the behavior that concerned the Carrier as well as an indication of the behavior itself.

The Board does not conclude that the Claimant was indifferent to safety, although he might have given that impression to the inspectors because he showed a lack of familiarity with MOWOR 6.3.2. The testimony of Roadmaster Christianson and Supervisor Engineering Support Erickson does not support such a characterization. However, the Board cannot avoid the obvious conclusion that the Claimant's unfamiliarity with MOWOR 6.3.2 led to a lack of proper track protection on March 6, 2013. He candidly told the FRA inspectors that he had not locked out the switch. And, during the briefing he was told by Foreman Zuck that blue light protection was insufficient. Furthermore, the Claimant assumed, but did not assure himself, that the flagmen were present before he began the snow removal work.

Having made the above-noted observations, the Board agrees with the Organization that the case highlights a systemic failure as well. We believe that the Claimant followed procedures on March 6, 2013 that he had used in the past and that supervisors or managers had to have been aware of the practice. Nevertheless, the practice was allowed to continue without proper attention paid to MOWOR 6.3.2—something that should concern the Carrier. But, in the final analysis, the Claimant should have known the rule and was empowered to insist that it be followed so that he would be protected from serious injury or worse. "We've always done it this way" is a woefully insufficient explanation for the continuation of unsafe practices resulting from deviation from relevant rules.

While the Claimant might have been dismissed because this was his second serious violation within 12 months, the Board agrees with the Carrier's determination that, in view of the Claimant's longevity and the particular circumstances of this case, the combined suspension was a more appropriate penalty than dismissal. The Board concurs and finds no justification for altering that decision.

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

John Reuther, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
April 23, 2015