

PUBLIC LAW BOARD NO. 7564

Case No. 49/Award No. 49
Carrier File No. 10-14-0157
Organization File No. C-14-D070-4
Claimant: Michael Green, Sr.

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

Statement of Claim:

1. The Carrier violated the Agreement on February 7, 2014 when it dismissed Claimant Michael Green Sr. for violation of MWOR 10.3 Track and Time in connection with Claimant's failure to have proper authority while occupying Main Track 2, MP 14.5 after giving up authority 25-29 at approximately 1111 hours on 12/31/2013 while working on the Chillicothe Subdivision, employed as the Track Inspector with gang TINS 1959 in the Chicago Division.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

Facts:

By letter dated January 2, 2014, the Claimant was advised that there would be an investigation on January 9, 2014 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to have proper authority while occupying Main Track 2, MP 14.5 after giving up authority 25-29 at approximately 1111 hours on 12/31/2013 while working on the Chillicothe Subdivision, employed as the Track Inspector with gang TINS 1959 in the Chicago Division." By letter dated December 30, 2013 the Claimant was notified of a mutually agreed upon postponement of the investigation until February 7, 2014. Both notices informed him that he was withheld from service pending the results of the investigation.

Carrier Position:

The investigation was fair and impartial, as the Conducting Officer allowed the Claimant and his representative to question witnesses, introduce evidence and take recesses when

requested. The Agreement does not call for discovery; thus the Carrier was not required to provide the names of witnesses or exhibits prior to the hearing. The Organization's objection to missing evidence is curious as that evidence was read into the transcript and the Organization did not show what else should have been a part of the record. The Carrier is not required to have the Conducting Officer be the individual who issues discipline, and this is particularly so when there are no credibility issues, which did not arise in this case. Division Engineer Ferencak did not need to attend the investigation in order to make a fair and impartial judgment. The Organization has not shown that any procedural defects that existed prejudiced the Claimant.

The Carrier's burden of providing substantial evidence was met when the Claimant admitted the violation. His intentions are not an issue, as he created a potentially dangerous, unsafe situation by not protecting himself. The dismissal was in accordance with the Policy for Employee Performance Accountability (PEPA), which has been upheld numerous times since being promulgated in 2000. This was the Claimant's second critical decision failure in a year and he had only five years of service. The Board is to interpret the rules but not to substitute its judgment for that of the Carrier unless the Carrier has abused its discretion. Nor is the Board to provide leniency, which is the Carrier's prerogative. Should the Claim be sustained, the Claimant must be made whole in accordance with Rule 40G, with back-pay liability reduced by interim earnings.

Organization Position:

The Claimant was not afforded a fair and impartial investigation because the Conducting Officer did not issue the discipline and thus Division Engineer Ferencak, who did, could not assess credibility. The matter was pre-judged when the Claimant was withheld from service, the Organization's objections were noted but not ruled on and the Conducting Officer was simply out to prove the charges. Furthermore, the portion of PEPA introduced by the Organization and the digital audio copy of radio transmissions were missing from the post-investigation transcript and exhibits provided to the Organization.

PEPA provides discipline for those who show a "marked disregard" for the rules, but the Claimant's violation was not deliberate and therefore the dismissal was not appropriate. He made an honest mistake that was immediately corrected. He had asked for additional training and was refused. The discipline was "unwarranted and unjust."

Findings:

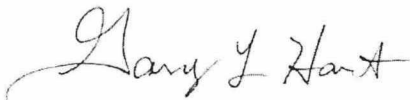
After carefully reviewing the investigation transcript, the Board finds that the investigation was fair and impartial. As the Organization surely knows, there is ample precedent establishing that the Conducting Officer and the officer issuing discipline may be different individuals. The Board believes that the better practice is to have the two roles combined, particularly in cases where credibility is an issue, but it is not in this case. Rule 40B allows the Carrier to withhold an employee from service pending the outcome of the investigation when an alleged serious rule violation is involved. The Organization cannot agree to Rule 40B on the one hand and then attempt to negate the language on the other hand with the argument that the Claimant has been prejudged by being withheld from service. The Board does not agree that the

Conducting Office simply intended to prove the charges. And, in fact, objections were ruled on by being noted in the transcript because those objections obviously were not sustained. The missing PEPA portion and the digital audio copy of the radio transmissions were most unfortunate and should not have occurred, but these exhibits had been read into the investigation transcript and thus were available to the Organization when it fashioned its appeals. No prejudice to the Claimant occurred as a result of the omission, which was later corrected.

Little needs to be written about the violation of MWOR Track and Time. Substantial evidence of the violation of the rule is contained in the Claimant's admission that he did not have proper authority while occupying Main Track 2. The Board does not believe that the mistake was intentional, but in this industry with its inherent dangers and the possibility of extensive property damage, serious injury and even loss of life, intent can almost never be a consideration where safety is concerned. The violation cannot be excused or overlooked because the Claimant did not receive the training he requested. And, the Board is mindful that 18 months earlier the Claimant had been given a 30-day Record Suspension and a 36-month review period for failure to have proper main line track authority. Under the circumstances, there is no basis for considering an alternative to the dismissal.

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
November 30, 2015