

PUBLIC LAW BOARD NO. 7564

Case No. 53/Award No. 53
Carrier File No. 10-14-0217
Organization File No. C-14-D040-16
Claimant: Amanda Miller

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

Statement of Claim:

1. The Carrier violated the Agreement on April 17, 2014 when it assessed Claimant, Amanda Miller, a Level S 30-day Record Suspension, with a 3-year review period, for alleged violation of MWOR 8.2 Position of Switches, for alleged Claimant's failure to hand operate a main track switch and did not complete documentation requirements on the "Position of Switch/Derail" form, while working as Track Inspector on January 30, 2014 at approximately 0948, on the Springfield Division, Hannibal Subdivision at or near MP 42.1.
2. As a consequence of the violation referred to in Part (1), the Claimant's discipline must "... be overturned, she must be compensated for all time lost and that this discipline be removed from and no mention of this be placed on her personnel record."

Facts:

By letter dated February 4, 2014 the Claimant was informed of an investigation scheduled for February 12, 2014 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to hand operate a main track switch and did not complete documentation requirements on the 'Position of Switch/Derail' form, while working as Track Inspector on January 30, 2014 at approximately 0948, on the Springfield Division, Hannibal Subdivision at or near MP 42.1." The investigation was mutually postponed on February 10, 2014 and again on March 4, 2014 and was ultimately conducted on April 3, 2014.

Carrier Position:

The Conducting Officer provided a fair and impartial investigation with recesses granted, questioning of witnesses allowed and evidence entered into the record. There is no requirement that the Conducting Officer and the individual who imposes discipline be the same person. The Organization has not shown procedural defects that prejudiced the Claimant's rights and in addition, the Claimant's admission made the Organization's procedural arguments moot. The admission, standing alone, allows the Carrier to meet the burden of providing substantial evidence of the rule violation. The Board's function is to interpret the rules but not to substitute its judgment for that of the Carrier unless the Carrier has abused its discretion. Nor should the Board consider leniency, as that is the Carrier's prerogative. Should the claim be sustained, since no work was lost the only appropriate remedy would be to remove the discipline from the Claimant's record.

Organization Position:

The investigation was not fair and impartial and the Claimant's due process rights were violated because the new System General Order No. 65, which modified MWOR 8.2 Position of Switches would have eliminated the Claimant's violation had the modified MWOR 8.2 been in effect at the time of the incident. Also, the process was not fair and impartial because Director of Administration Bradford was both the Charging Officer and the officer who imposed the discipline. Because Director of Administration Bradford was not at the investigation, the Director was not in a position to consider the credibility of the Claimant and the witnesses. The Claimant was pre-punished by not being paid to attend the investigation and by having a Conducting Officer interested only in proving the charge and not in a fair process. Telephone witnesses should have been made physically available and should have offered exhibits rather than the Conducting Officer, who was required to be objective.

The Carrier did not offer substantial proof of the violation, as the modification of MWOR 8.2 shows that the Claimant did not commit a serious offense, the evidence shows that the Claimant was within her authority, stopped at the inspecting team's red flag and briefed with them. The Claimant would have completed the Position of Switch/Derail form had she known that was necessary. There is no evidence of a marked disregard for the rules. The incident could have been prevented if the Claimant had been granted the training she requested and if she would have been aware of the Carrier's expectations. The Carrier has an obligation to make expectations known before requiring compliance. Furthermore, the matter could have been handled with the Approaching Others technique instead of with discipline. The Claimant was honest about what happened and has shown leadership and taken responsibility so that others know to complete the form.

Findings:

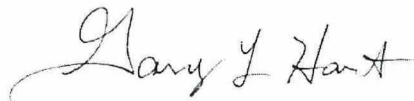
The Organization's procedural contentions, most of which are not new, are not persuasive. There is on-property precedent supporting the separation of the duties of Conducting Officer and disciplinarian. While the Board has repeatedly written that the better practice is to task the same individual with both functions, particularly when a case may turn on credibility

determinations, which this one does not, there is no mandate in the Agreement that it be done this way. Nor does the Agreement prohibit the Charging Officer from also deciding on discipline. The Board does not agree that the policy of not paying the Claimant for time spent at the investigation equates to pre-punishment. After reviewing the transcript of the investigation the Board believes it was fair and impartial.

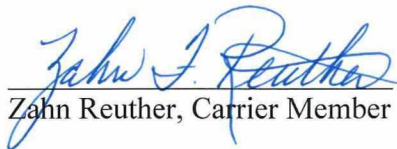
The Carrier rightfully expects employees to be familiar with the relevant rules and particularly those that are directly applicable to a current assignment. The decision of the Carrier not to grant the training requested by the Claimant does not alter the requirement to be aware of the relevant rules. On January 30, 2014 MWOR 8.2 Position of Switches, required the Claimant to complete a Position of Switches/Derail form. While the Claimant's admitted failure to complete the form did not indicate a marked disregard for rules, as she was unaware of the requirement, nevertheless the rule was violated. The Board is aware that a subsequent revision of the rule after the Claimant was disciplined eliminated the requirement to complete the form and would welcome reconsideration of the discipline by the Carrier for that reason. However, the Board is obligated to review the appeal in the context in which it arose and not to rely on the later revision as a justification for substituting judgment for that of the Carrier or considering leniency, which is the Carrier's prerogative.

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