

PUBLIC LAW BOARD NO. 7564

Case No. 62/Award No. 62
Carrier File No. 11-15-0315
Organization File No. T-D-4637-M
Claimant: Thomas J. Raunio

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

Statement of Claim:

By letter dated February 18, 2015 Track Inspector Thomas Raunio was assessed a Level S Combined Suspension (26 days actual, four days record) and a one-year review period because of his alleged failure to conduct a proper briefing. The Claimant was said to have violated MOWOR 8.2 Position of Switches, MOWOR 8.3 Main Track Switches, MOWOR 11.4 Job Briefings and MOWOR 14.12 Voiding Track Warrants. The April 15, 2015 claim from the Organization, John A. Mozinski, Jr., Vice Chairman/Secretary-Treasurer, appealed the discipline characterized as excessive and prejudged, asked that the Claimant "be immediately paid for his lost time while withheld from (sic) service and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Raunio be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on February 20, 2015 from Jeremy Papenfuhs."

Facts:

By letter dated January 26, 2015 the Claimant was informed that "An investigation has been scheduled at 0900 hours, Monday, February 2, 2015 at . . . Brainerd MN . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to conduct a proper job briefing with the Foreman on TMGX02035 when he requested multiple work group authority under on (sic) your track warrant, number 538-4, while working as a Track Inspector on Gang ID TINS1095. This may have contributed to the main track switch at East Aitkin MP 91.995 on the Brainerd Subdivision being left in reverse, which was damaged when Train CBTMC0B008 ran through the switch. After review of the incident, you were subsequently removed from service at 1054 AM on January 24, 2015 pending results of this

investigation. The date of the investigation remained the same, but a subsequent letter relocated the site of the investigation within Brainerd, MN.

Carrier Position:

The Carrier asserts that it produced the required substantial evidence that the Claimant failed to conduct a proper briefing. If any procedural shortcomings occurred, they did not prejudice or harm the Claimant. Agreement was not needed to change the location of the investigation. The Carrier is not required to list witnesses on the notice of investigation. Removal from service, provided for in Rule 40, does not result in prejudgment. The suspension was in accordance with the Policy on Employee Performance Accountability. If the claim is sustained, the Claimant is only due compensation for wages lost minus an offset for any outside earnings.

Organization Position:

The Carrier violated the requirement to immediately inform the Claimant of the reasons he was being withheld from service. Moreover, removal from service was improper because the alleged violation was not serious. The investigation was not fair and impartial because the charges did not specify an incident date. The Claimant did not violate rules on January 24, 2015 because Foreman Pitts, who should have been a witness, did not tell the Claimant about the switch at issue. The Claimant's employment history, provided by the Carrier, is meaningless because it contains erroneous entries.

Findings:

The incident under consideration herein resulted from the Claimant's alleged failure on January 23, 2015 to hold a proper briefing with Machine Operator Pitts, who "piggybacked" on the Claimant's track warrant in order to move a piece of equipment from one small Minnesota town to another via the main line. Ultimately, Mr. Pitts had to throw the switch that diverted traffic from the main line to the siding on which the equipment was parked. Machine Operator Pitts then contacted the Claimant to inform him that the equipment was parked and in the clear.

There is no dispute that Mr. Pitts failed to return the switch to its original and proper position with the result that a train ran through the switch, which sustained damage. And, there is no dispute that Mr. Pitts failed during his briefing with the Claimant to say explicitly that he had thrown the switch to access the siding. Neither did the Claimant explicitly question Mr. Pitts about switches.

Roadmaster Peterson explained that the Claimant was responsible for everything track related that occurred inside the Claimant's warrant. The Claimant acknowledged that he was responsible for everything under his track warrant "to the best of my ability . . . but I can only go

on what people do or do not tell me.” The Claimant believes that he followed the relevant rules, with the implication being that he cannot be expected to be a mind reader. The Board agrees that the Carrier cannot ask its employees to be mind readers, but does not see the failure in this case as an inability to read Mr. Pitts’ mind. During their final briefing, Machine Operator Pitts reported that he was in the clear, meaning he was off the main line. Logic should have dictated that there had been movement from the main line to a siding and that such movement would have involved a switch that would have been lined for main line travel and would have had to have been thrown for the equipment to move to a siding. The Board believes that the Claimant, approaching forty (40) years of railway experience, should have been expected to think through the sequence of events.

It is possible that the Claimant interpreted or assumed that Mr. Pitts’ report that he was parked and in the clear indicated that the switch had been properly realigned for the main line. But in an industry that is inherently dangerous, operating on unconfirmed assumptions or interpretations may serve to increase the possibilities for serious, if not life-threatening, accidents.

In addition, the Claimant held the track warrant and therefore was responsible for it. The Track Authority Form-MW required certain information to be placed on the form and included a block labeled Position of Switches/Derails. The Claimant should have been more thorough in his briefing in order to be sure that he had complete and correct information regarding switches/derails. At the end of the day, the track warrant was the Claimant’s responsibility. Clearly the oversight was not intentional, but it was serious and justified the removal of the Claimant from service pending the outcome of the investigation.

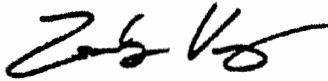
The Board finds no procedural defects that would justify setting aside the discipline. However, the discipline must be modified because the Carrier has misapplied its own Policy for Employee Performance Accountability (PEPA). The Claimant committed a Serious violation. Section II.A. Progression of PEPA states in relevant part: “The first Serious violation will result in a 30-day record suspension and a review period of 36 months.” The Policy goes on to note a possible exception for the length of the review period, but not for the record suspension itself. Under General Information it is stated that rather than a record suspension, “If warranted, an actual suspension can be imposed.” A reading of PEPA leads to the conclusion that a record suspension is very much the norm for a first serious violation. The Claimant had not received discipline since 1987 and thus had an excellent record. He did not act in bad faith or even gross disregard for his responsibilities. Therefore, the Carrier’s assessment of an actual 26-day suspension is viewed by the Board as a departure from and misapplication of the Carrier’s own policy. The departure resulted in excessive and arbitrary discipline which the Board feels compelled to modify. The 26-day actual suspension is to be replaced with a record suspension and the Claimant is to be made whole for wages lost, including overtime that likely would have been worked but for the actual suspension.

AWARD

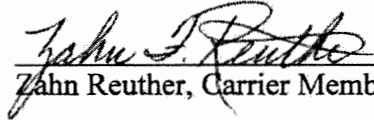
Claim sustained in part and denied in part.

Order:

The Board, after consideration of the dispute identified above, hereby orders an award favorable to the Claimant consistent with the Findings above be entered. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Zachary Voegel, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
August 15, 2017