

PUBLIC LAW BOARD NO. 7564

Case No. 65/Award No. 65
Carrier File No. 10-16-0057
Organization File No. C-16-D040-4
Claimant: Brian J. Couldry

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

Statement of Claim:

By letter dated October 9, 2015 Maintenance Welder Brian J. Couldry was given a Level S 30-Day Record Suspension and a One (1) Year Review Period for an alleged violation of EI 1.4 Fall Protection and MWSR 1.1 Job Safety Briefing. The November 17, 2015 claim from the Organization, George L. Loveland, Vice General Chairman, appealing the discipline, includes the request that the Claimant "be compensated for any time lost, made whole for any losses associated with the outcome of this investigation, any future losses that may arise as a result of this investigation being used for progressive discipline and that this discipline be removed from and no mention of this be placed on his personal record."

Facts:

By letter dated May 27, 2015 the Claimant was informed that "An investigation has been scheduled at 1000 hours, Thursday, June 4, 2015, at the West Quincy Yard Office, General Conference Room, 600 Depot Road, Taylor, MO, 63471, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear required fall protection while performing work at or near MP 134.58 on the Hannibal subdivision May 22, 2015. A Corrected Notice issued the following day added the words "and alleged failure to use job safety briefing format to identify all hazards before work began" after the date of May 22, 2015.

Due to five mutually agreed to postponements, the investigation ultimately was held on September 21, 2015 at the originally-stated time and location.

Carrier Position:

The Carrier insists that substantial evidence was obtained because the Claimant twice admitted not wearing fall protection. No safety briefing was mentioned despite the bridge on which the Claimant was working measuring 17'3" in height. The Board must accept the findings of the Conducting Officer. The record suspension was proper and in accordance with the Policy for Employee Performance Accountability (PEPA) Appendix A. The Organization now asks for leniency, which is the province of the Carrier, not the Board, which should not substitute its judgment for that of the Carrier. If the claim is sustained, the sole remedy is the removal of the discipline since the Claimant lost no wages. The Claimant was not prejudged and the Organization has not shown that alleged procedural defects prejudiced the Claimant.

Organization Position:

The Organization asserts that the Claimant did not receive a fair and impartial investigation because Conducting Officer Bautch required him to testify first over the Organization's objections. Thus, the burden of proof was stood on its head. The Claimant testified truthfully that there was a job briefing; therefore, there is no proof of that charge. The Claimant has not had fall protection training in four (4) years and there were only two (2) sets of fall protection gear for the five Maintenance of Way employees working on the bridge. Rules have not been consistently enforced. Conducting Officer Bautch and Roadmaster Hartz collaborated against the Claimant.

Findings:

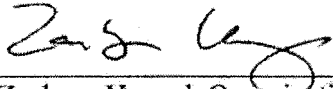
The Board has determined that this claim must be sustained because the Claimant did not receive a fair and impartial investigation. The Carrier has the burden of proof in this discipline case. While that burden may be satisfied if the Claimant admits to the violation(s), any admission should come only after the Claimant and his representative have heard the Carrier's case. The seemingly universal practice in the railroad industry as well as in other industries is that the moving party, which is the Carrier in discipline cases, will go first in the order of the proceedings. It is obvious from the hundreds of cases heard by members of this Board that both the industry in general and this Carrier have concluded that "fair and impartial" requires that the Carrier proceed first in the order of the investigation. The Board is at a loss to understand why the Conducting Officer felt it necessary to depart from the universal practice and issue what is taken as a veiled threat to the Claimant that if he did not testify first, he could not testify at all. The Conducting Officer has opened his impartiality to serious question and has violated the "fair and impartial" language of rule 40A. Therefore, the discipline cannot stand.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made and that the discipline be rescinded and expunged from the records. The Carrier is to make the Award effective on or before thirty (30) days after the Award is adopted.



Zachary Voegel, Organization Member



John Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
January 31, 2018