

PUBLIC LAW BOARD NO. 7564

Case No. 66/Award No. 66
Carrier File No. 11-16-0030
Organization File No. T-D-4767-E
Claimant: Timothy R. Even

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

Statement of Claim:

By letter dated September 1, 2015 Foreman Timothy R. Even was given a Level S 30-Day Record Suspension and a Three (3) year review period for an alleged violation of MWOR 1.1.1 Maintaining A Safe Course, MWOR 1.1.2 Alert and Attentive, MWSR 12.8.1 Backing Vehicles and MWSR 12.1.1 Operation of Motor Vehicles/General Requirements. The January 20, 2016 claim from the Organization, David L. Carroll, General Chairman, includes the request that the Claimant "be cleared of the charges. . .that the unwarranted discipline of a Level S Record suspension and Three (3) Year Review Period be removed from his record" and that "he be paid for the hours lost to attend the investigation."

Facts:

By letter dated July 21, 2015 the Claimant was informed that "An investigation has been scheduled at 0900 hours, Wednesday, July 29, 2015 at the BNSF Depot, 102 Railroad Avenue, SW, Aberdeen, SD, 57401, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure while operating surfacing gang truck 23027 while working on gang TSCX0272, resulting in a collision with parked loader X2400656 at approximately 1245 hours on July 17, 2015 on the Mobridge Subdivision, MP 768.5."

A letter dated July 28, 2015 noted the mutual agreement to postpone the investigation until August 12, 2015 at the same time and location.

Carrier Position:

The Carrier avers that substantial evidence exists to support the finding that the Claimant violated the above-noted rules, constituting a Serious violation. Therefore, the assessed discipline was in accordance with the Policy for Employee Performance and Accountability (PEPA). The

Claimant did not adequately check his surroundings and the accident could have resulted in serious injury. Estimated damages were \$5,614.03. The Claimant did not take responsibility for the accident, but instead blamed unsafe equipment. However, the mirrors and the backup camera were operable. The Claimant did not use all of the mirrors or an employee guide. The Organization asks for leniency, which is the province of the Carrier, not the Board, which should not substitute its judgment for that of the Carrier. The Notice of Investigation (NOI) provided sufficient detail with mention of the Rules allegedly violated not required. The Claimant received a fair and impartial investigation and the Organization provided no proof that any alleged due process shortcomings prejudiced the Claimant. The Claimant is a long-term employee with one other Serious violation on his record.

Organization Position:

The Organization asserts that the investigation was not fair and impartial because the NOI lacked specific charges. The Claimant is a long-term employee with a "remarkable record." He tried to correct a faulty mirror system and a deficient backing system. Both must be considered mitigating circumstances. Also mitigating is the fact that the Claimant's previous day involved fourteen (14) hours of work and he had an inadequate 8-9 hours between shifts. The Organization asks not for leniency, but for fundamental justice. PEPA is meaningless as the accident was not a Serious violation and the discipline was punitive, not corrective. Available information was sketchy as to the speed of the vehicle when the accident occurred. The Claimant was more harshly disciplined than others who have had vehicle accidents as records show seven (7) 5-day suspensions, one (1) formal reprimand, one (1) 10-day suspension and one (1) 30-day suspension for an employee who recently had been dismissed and reinstated.

Findings:

The Board finds that the Claimant was given a fair and impartial investigation. Rule 40C obligates the Carrier to provide a NOI that contains enough specificity so that the claimant and his representative are fully aware of the behavior of concern to the Carrier and thus the behavior that must be defended against. Rule 40C does not obligate the Carrier to issue a NOI that contains specific charges or specific MWORs and/or MWSRs allegedly violated. Moreover, the Board notes that very early in the investigation Roadmaster Brown read into the record and introduced as exhibits the MWORs and MWSRs allegedly violated. The claimant was given all the information required by Rule 40.

Substantial evidence establishes the accident as the Claimant's fault. His responsibility cannot be erased or mitigated by the fourteen (14) hours he worked the day before or any shortcomings that may have related to the right-side mirror or the backup camera. The Claimant owns the accident. As he testified, if he had looked over at the right-side mirror, he likely would have seen the loader. The Board does not consider excessive speed a factor since speculation about speed does not rise to substantial evidence.

While the Board finds the claimant at fault, it also finds the discipline to be arbitrary and capricious in this instance. Lives were not threatened. The Claimant does not have a perfect record, but he has a record the Board considers outstanding—one (1) previous 30-day record suspension in almost thirty-nine (39) years with the Carrier. The Claimant is not a habitually unsafe worker who needs major discipline to impress upon him the need to work safely. More critically, the Organization has shown that in the past there were seven (7) 5-day suspensions, one (1) 10-day suspension, one (1) formal warning and one (1) 30-day suspension for unsafe driving. The 30-day suspension can be distinguished from the claimant's case, as it was assessed against an employee who had recently been dismissed and reinstated.

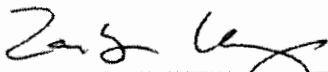
The claimant has been shown to have violated the above-noted MWORs and MWSRs, but the Carrier is obligated to discipline with consistency, with allowances for the similarity of the infractions, the tenure and prior record of the violator and other mitigating and extenuating circumstances. Therefore, the discipline levied against the Claimant is reduced to a 5-day record suspension and a twelve (12) month review period.


Award:

Claim sustained in part and denied in part.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award to the Claimant be made consistent with the Findings above. 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
January 31, 2018