

PUBLIC LAW BOARD NO. 7564

Case No. 72/Award No. 72
Carrier File No. 10-16-0090
Organization File No. C-16-D040-6
Claimant: Darrell F. Furar

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

Statement of Claim:

By letter dated November 3, 2015, Foreman Darrell F. Furar was given a Level S 30-Day Record Suspension and a Three (3) Year Review Period for an alleged violation of MWOR 6.3.1 Main Track Authorization. The December 8, 2015 claim from the Organization, George L. Loveland, Vice General Chairman, appealing the decision to discipline the Claimant, asks that the discipline be overturned and 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 August 20, 2015 the Claimant was informed that "An investigation has been scheduled at 1000 hours, Thursday, September 3, 2015, at the Mendota Depot, 603 8th Street, Mendota, IL, 61342, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to contact the Foreman in charge of Form B Restriction 2558 before throwing the switches within these limits and entering the main track on Thursday August 20th at 0555 at the Mendota Sub at MP139.6."

An August 31, 2015 letter noted the mutual agreement to postpone the investigation until October 7, 2015 at 0900 hours with the location unchanged.

Carrier Position:

Substantial proof of the allegation has been obtained because the Claimant admitted that he did not call the EIC before throwing the switch. The Claimant should have known to contact the EIC both from general experience and from previous work that week. As Foreman, the Claimant was responsible for checking for Form Bs at the start of his work day. The discipline

was proper as it was in accordance with the Policy for Employee Performance and Accountability (PEPA) and represents leniency because the Claimant, with a prior Record Suspension during the review period, could have been dismissed. The Organization now asks for additional leniency, which is the Carrier's prerogative, not the Board's. Moreover, the Board should not substitute its judgment for that of the Carrier. If the claim is sustained, because no wages were lost, the only remedy should be the removal of the discipline. The Organization's contention that MWOR 6.3.1 was not entered during the investigation was not made at the time and, therefore, should now be considered moot, as the objection has been waived. The Claimant was not prejudged and the investigation was fair and impartial. The Organization has asserted without supporting evidence that the Roadmaster simply watched the situation unfold and did nothing.

Organization Position:

The Organization contends that the Carrier has not met its burden of proof because it has provided no evidence. The discipline must be overturned because the Rule allegedly violated was not made a part of the investigation record. Roadmaster Parish contributed to the incident by not conducting a proper briefing and by not assisting the Claimant rather than standing by watching the incident so that he "set the claimant up to fail." Roadmaster Parish's actions and his untruthfulness are unacceptable. The discipline, issued by other than the Conducting Officer, was arbitrary and excessive. The Claimant was pre-punished because he was not paid to attend the investigation.

Findings:

The Board has determined that this case must be resolved on the basis of a fatal lapse of due process. The Carrier has the contractual responsibility set forth in Rule 40A to provide the Claimant with a fair and impartial investigation. A fair and impartial investigation includes due process. As part of due process, the Claimant has a right to know which Rule(s) allegedly has been violated. Rules need not be mentioned in the Notice of Investigation (NOI), but with rare exception the Rule(s) must be mentioned during the investigation and entered into the record so that the Claimant and his representative know with precision what they must defend against. Moreover, if discipline is assessed and the matter is progressed to a Board for final determination, the Board must know the Rule(s) allegedly violated because the Rule(s) becomes the standard against which the allegedly faulty behavior must be measured.

The responsibility here is the Carrier's and it remains the Carrier's even without an Organization prompt at the investigation in the form of a protest. Nor is the failing cured by the inclusion of the Rule(s) in the on-property correspondence once discipline is assessed and a claim results. Identification of the allegedly violated Rule at that point does the Claimant and the Organization no good whatsoever insofar as the investigation itself is concerned. This is a case where the Rule ultimately found relevant by the Carrier was neither mentioned and read into the

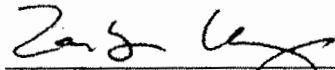
record nor attached to the record. This very significant due process failing requires the Board to sustain the claim. Because the Claimant lost no wages and because the Carrier was not obligated to pay the Claimant for time spent attending the investigation, the remedy simply involves expunging the discipline from the records.


Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders an Award be made favorable to the Claimant 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


John Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
January 31, 2018