

PUBLIC LAW BOARD NO. 7564

Case No. 82/Award No. 82
Carrier File No. 10-17-0195
Organization File No. C-17-D040-19
Claimant: Kevin P. Harper

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

Statement of Claim:

By letter dated April 21, 2017, Mr. Kevin P. Harper was issued a Standard 20 Day Record Suspension with a one-year review period for an alleged violation of MWOR 1.15 Duty—Reporting or Absence. The May 30, 2017 claim from the Organization, Randy S. Anderson, Vice General Chairman included the request that the Carrier “immediately take action necessary to remove the discipline assessed to Mr. Harper in accordance with Rule 40 of the Agreement.

Facts:

By letter dated March 15, 2017, Claimant Kevin Harper was informed that:

An investigation has been scheduled at 0900 hours, Friday, March 24, 2017, at the BNSF Railway Company, 3rd Floor Conference Room, Lincoln Station, 201 North 7th Street, Lincoln, NE 68508, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged being absent without leave (AWOL) and your alleged failure to establish on-track protection for region/system production tie gang, TP08, which resulted in a service interruption causing traffic to stop on March 10, 2017, at approximately 0600 hours at MP 187 near Firth, NE, while assigned as a Foreman of region/system production tie gang TTPX0008 on the Heartland Division.

Carrier Position:

The Carrier insists that the investigation was fair and impartial and that if procedural errors occurred, the Organization has not shown harmful error as a result. The necessary substantial evidence was obtained with the Claimant’s admission that he overslept, thus, the Carrier has shown violations of MWOR 1.15 Duty—Reporting or Absence and MWOR 1.6 Conduct. The Claimant’s

failure to report on time had a negative impact on both gang and train operations. The notice of discipline was issued on the 28th day after the investigation and therefore was timely, even though it was not received within thirty (30) days. The discipline was in accordance with PEPA. The Organization asks for leniency, which is the province of the Carrier, not the Board. Should the claim be sustained, the Order that follows should be in accordance with Rule 40.G.

Organization Position:

The Organization avers that the investigation was not fair and impartial. Because the Carrier reassigned the Claimant's assistant, he had to get up at 3:00 am rather than 4:45 am to set Form B flags, and after several days on this schedule, he inadvertently overslept. The Claimant called Roadmaster Kite at 6:30 am and could have come to work if allowed, so he should not be considered AWOL. The oversleeping was neither neglectful nor willful. The Claimant did not fail to provide on-track protection, as the gang was not working and not in danger when trains went through. Rule 40.D was violated because the Claimant did not receive the disciplinary notice until the 31st day after the investigation.

Findings:

While MWORs 1.15, 12.2 Adjacent Controlled Track Protection and 1.6 Conduct were submitted during the investigation, the Claimant's disciplinary notice includes only MWOR 1.15. The Carrier's mention of MWOR 1.6 during the on-property correspondence is considered gratuitous. We consider only MWOR 1.15.

The contention that Rule 40.D was violated is unpersuasive. The Rule requires that "A decision will be rendered within thirty (30) days following the investigation . . ." Random House Webster's College Dictionary, 1992 at p. 1140 gives primary definitions for "render" as "1. to cause to be or become; make. 2) to do; perform. 3. To furnish; provide . . ." The Carrier rendered a decision when the notice of discipline was placed in the mail—not when it was received. The Carrier complied with Rule 40.D. Moreover, the Board finds no due process violations that generated harmful error.

The Claimant's oversleeping is not viewed as intentional or willful. While his bulletined start time may have been 0700 hours, it is undisputed that when he had help from his Assistant Foreman, job requirements meant leaving the hotel at 0445 hours and when the Assistant Foreman was assigned to other duties, the Claimant had to leave the hotel at 0300 hours to have the form B flags set by 0600 hours as required. Therefore, the bulletined time is not the relevant benchmark. Rule 1.15 states in relevant part that "Employees must report for duty at the designated time and place with the necessary equipment to perform their duties." The Claimant admittedly overslept, waking only when called by the dispatcher, and would have appeared for work late if allowed, never having asked for permission to come late. The admission provides substantial evidence of a violation. The Claimant's Employee Transcript shows two Formal Reprimands within the

previous seven (7) months, so that the infraction considered herein came within the one (1) year review period. The Board finds no justification for setting aside the discipline.


Award:

Claim denied.

Order:

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.


Zachary Voegel, Organization Member


Zachary Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
January 21, 2019