

PUBLIC LAW BOARD NO. 7564

Case No. 83/Award No. 83
Carrier File No. 11-17-0247
Organization File No. S-P-2126-S
Claimant: Leland T. Hutchinson

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

Statement of Claim:

By letter dated April 13, 2017, Mr. Leland T. Hutchinson was dismissed for alleged violations of MWOR Altering Equipment, MWSR 1.4.2 Use As Intended and MWOR 1.6 Conduct. The May 17, 2017 claim from the Organization, Donn Sanford, Vice General Chairman, stated that the dismissal was “extreme” and should “be removed from Mr. Hutchinson’s record, that he immediately be returned to service and that he be made whole for all his losses including overtime and all benefits that may apply.”

Facts:

By letter dated March 7, 2017 the Claimant was informed that:

An investigation has been scheduled at 0900 hours, Wednesday, March 15, 2017, at the Holiday Inn Express, 9220 East Mission, Spokane, WA 99206, for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged attempt to block the view of the Drive Cam camera with a foreign object when driving company vehicle 22112 while working as a Traveling Mechanic near Bonners Ferry, ID on March 1, 2017 at 1818 hours. BNSF first knowledge of this incident was March 1, 2017.

Carrier Position:

The Carrier insists that the required substantial evidence of the charges exists in the form of the Drive Cam still shots and the Claimant’s admission. When questioned by Roadway Equipment Supervisor McKibbon on the day the notice of investigation (NOI) was issued, the Claimant dishonestly denied covering the Drive Cam. This was the second Level S violation

within a year and the Claimant had previously received leniency, which is the province of the Carrier, not the Board. That the unsigned dismissal letter was issued over the signature block of Manager Roadway Equipment Sprattler did not make the investigation unfair or partial.

Organization Position:

The Organization asserts that an “arbitrary and unwarranted” dismissal followed a “hasty rush to prejudgment” after an investigation that was not fair and impartial because there had been collusion between the Conducting Officer and the Carrier witness. Moreover, the unsigned dismissal letter was issued over the signature block of other than the Conducting Officer. The Carrier did not prove the charges and the Claimant was subjected to double jeopardy when he was disqualified from his position as a Traveling Equipment Mechanic. The Claimant was honest as to his mistake, which was made without ill intent.

Findings:

Relevant to the Board’s decision are MWOR 1.23 Altering Equipment, MWSR 1.4.2 Use as Intended and MWOR 1.6 Conduct. MWOR 1.23 states that “Without proper authority, employees must not alter, nullify, change the design of, or in any manner restrict or interfere with the normal function of any device or equipment on engines, cars, or other railroad property except in the case of emergency. . . .” MWSR 1.4.2 requires employees to “Use tools and equipment for the purposes intended.” MWOR 1.6 Conduct states in relevant part that “Employees must not be: 1. Careless of the safety of themselves or others . . . 4. Dishonest . . .”

The Claimant’s Employee Transcript shows a hiring date of February 6, 2012 and a relevant Level S 30-day record suspension with a 36-month review period issued on August 9, 2016. On March 1, 2017, while driving company vehicle 22112, the Claimant attempted to cover the Drive Cam installed in the vehicle. Drive Cam video, shown during the investigation but not in the record, and still shots that are in the record, as well as the Claimant’s admission during the investigation that he used his hat to try to cover the Drive Cam, provide more than substantial evidence of the violation. The Claimant explained that while he did nothing that needed to be hidden, he was worried that by picking up his nephew at school he was violating relevant Corporate Policy. During a March 7, 2017 meeting with Roadway Equipment Supervisor McKibbin, the Claimant had denied covering the Drive Cam.

The Organization has raised several procedural challenges. The contention that there was pre-investigation collusion between Conducting Officer Keys and Supervisor McKibbin is easily dismissed as an unsupported and unproven allegation. That the unsigned dismissal notice was issued over the signature block of Manager Roadway Equipment Sprattler and not the signature of the Conducting Officer does not make the investigation unfair and partial. As this Board has written many times and as the Carrier has acknowledged, the better practice is to have the Conducting Officer issue the discipline. In the instant case, there is no dispute over the facts and

no reason to find the investigation in violation of Rule 40.A. Whether the Claimant's guilt was prejudged or not is irrelevant given the overwhelming evidence that eliminated any possibility of a "not guilty" conclusion. The March 16, 2017 disqualification of the Claimant from his position of Rank B Traveling Mechanic was because he had "failed to demonstrate good welding skills . . . and . . . satisfactory cutting skills" There is no showing of a cause and effect relationship to the Drive Cam incident and thus no double jeopardy.

The Policy for Employee Performance Accountability (PEPA), IV Policy Requirements, C.2 states that "b. If an employee commits an additional Serious Violation within the Review Period, he or she may be subject to dismissal." The Claimant obviously violated MWOR 1.23 when he altered the Drive Cam view of the interior of company vehicle 22112. He violated MWSR 1.4.2 when he did not use the Drive Cam as intended. MWOR 1.6, 1. was violated because the Drive Cam is intended to contribute to safe driving for the benefit of employees and the public. While it is of little comfort to the Claimant, the Board does not find a violation of MWOR 1.6, 4. Dishonest. The Board presumes that the Claimant's original, dishonest denial to Supervisor McKibben came before the same-day issuance of the NOI and that if it did not, the NOI could have been amended to include dishonesty among the matters to be investigated. The NOI did not mention dishonesty and for that reason in a limited way did not comply with Rule 40.C, which requires that "The notice must specify the charges for which the investigation is being held." Therefore, the Board has not considered and does not sustain a charge of dishonesty.

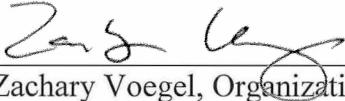
The proven charges constitute a Level S violation because the Claimant tampered with a safety device. This was the second Level S violation within a year, let alone within the 36-month review period assessed with the earlier Level S discipline, which was also for a safety violation. The Claimant's ultimate honesty during the investigation and the fact that he took responsibility for his mistake do not serve to mitigate a dismissal that the Board does not find "arbitrary and unwarranted."

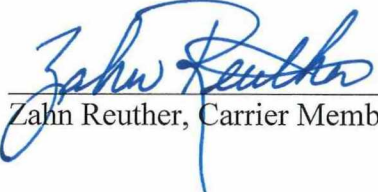
Award:

Claim denied.

Order:

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made other than there should be no indication that the Claimant was dishonest.


Zachary Voegel, Organization Member


Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
January 21, 2019