

PUBLIC LAW BOARD NO. 7564

Case No. 87/Award No. 87
Carrier File No. 10-18-0078
Organization File No. C-18-D070-5
Claimant: Travis Applebee

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

Statement of Claim:

By letter dated January 2, 2018, Foreman Travis Applebee was informed of his dismissal for having violated MWOR 6.3 Track Occupancy when he failed "to stay within track authority 427-8 at/or near Reno Jet on November 12, 2017, while assigned as a Foreman on Multi-District Gang TRGX0406." By letter dated February 2, 2018 the Organization, Randy S. Anderson, Vice General Chairman, appealed the dismissal on Foreman Applebee's behalf. The claim asks that the Claimant be reinstated:

to service with seniority unimpaired and for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost as a result of the Carrier's arbitrary, capricious and excessive discipline in dismissing claimant from service. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by this discipline. . . .

Facts:

By letter dated November 14, 2017, the Claimant was informed that:

An investigation has been scheduled at 0900 hours, Tuesday, November 21, 2017, at the Wyoben Conference Room, 106 North Gillette Avenue, Gillette, WY, 82716, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stay within track authority 427-8 at/or near Reno Jet on November 12, 2017, while assigned as a Foreman on Multi-District Gang TRGX0406.

By mutual agreement the investigation was postponed until December 5, 2017, when it was held at 0900 hours at the Lincoln Station, 3rd Floor Conference Room, 201 N. 7th ST, Lincoln, NE, 68508.

Carrier Position:

The Carrier insists that the Claimant received a fair and impartial investigation that respected his due process rights and that the notice of discipline that followed was timely issued twenty-eight (28) days after the investigation. The Carrier notes that the critical date is the date the disciplinary notice was mailed and not the date it was received. The required substantial evidence of a violation of MWOR 6.3.1 was obtained with the testimony and exhibits adduced during the investigation, including the Claimant's admission that the Grinder had exceeded the limits of authority 427-8. The Claimant was the Employee-in-Charge (EIC) on the Grinder and had obtained the authority. Not only was this a stand-alone violation, but even if it is considered only a serious violation, it is the third Level S violation within an ongoing review period and, therefore, is in accordance with the Policy on Employee Performance Accountability (PEPA). Should the claim be sustained, the Claimant should not receive damages because of his lack of diligence and any damages received should be reduced by an offset for outside earning. Moreover, he should not receive health-related benefits as they are not provided for in the Agreement.

Organization Position:

The Organization asserts that the dismissal must be set aside because the Carrier violated Rule 40.D when the disciplinary notice and the record of the investigation were not received within the required thirty (30) days by the Claimant's representative. Moreover, the Claimant's rights to a fair and impartial investigation and to due process were not honored. While the Grinder was, indeed, out of the limits of authority 427-8, the Claimant was not wholly responsible for the event. He was neither the Operator nor the Trainee, both being Loram employees with a Loram Supervisor on the Grinder—all expected to comply with BNSF rules. The Claimant had briefed the operators, who were aware of the limits of the authority. The Organization names the Claimant's superior, Assistant Roadmaster Jeremiah Wiley, also on the Grinder, as the actual EIC. The Claimant had many tasks to perform while on the mainline, and Assistant Roadmaster Wiley cannot be absolved of responsibility for being out of the limits of authority. He could not adequately explain all of the Carrier's evidence presented at the investigation. Clearly there are mitigating circumstances.

Findings:

The Board finds that the thirty (30) day limit established in Rule 40.D refers to a mailing date, over which the Carrier has control, but not to the date when the notice of discipline is received, which is not within the Carrier's control. The Carrier complied with Rule 40.D when it mailed the notice of discipline twenty-eight (28) days after the investigation took place.

The Carrier's contention that the investigation was not fair and impartial and that Foreman Applebee's due process rights were ignored, is unpersuasive. Moreover, the Organization's contention that Assistant Roadmaster Wiley, as the highest-ranking Carrier employee on the Grinder, was, in actuality, the EIC is factually incorrect. The Claimant had obtained the authority and was responsible for ensuring that the Grinder remained within the limits of that authority. The Operator and the Trainee, the latter being the Operator when the limits of the authority were breached, were Loram employees. While they were expected to comply with BNSF rules, the

ultimate responsibility for compliance rested with the Claimant. The Claimant admittedly knew that the Grinder was approaching the limits of track authority 427-8. While he may have had a number of tasks to perform, knowing that the Grinder was approaching the limits of the authority, priority should have been given to monitoring the line of travel so limits were not breached. The Claimant, as EIC, failed to "ensure that equipment and employees do not occupy or foul the track until authority is received," as set forth in MWOR 6.3 Track Occupancy, Section B. Whether the violation is considered a stand-alone dismissible offense or a Level S offense, the outcome is the same. The required substantial evidence is contained in the Claimant's admission at page 52 of the investigation transcript that he realized that a violation had occurred. That the limits of authority were breached during darkness does not serve as mitigation. On September 10, 2015 the Claimant had been assessed a Level S Record Suspension and a 36 Month Review Period. Eight months later, on May 24, 2016, he received a second Level S Record Suspension and a 36 Month Review Period. The violation of MWOR 6.3 considered herein, at a minimum, is his third Level S violation within the original 36 month review period. For reasons unknown and irrelevant, the Carrier elected not to dismiss the Claimant after the second Level S violation. The proven third violation, even if considered a Level S violation, leaves the Board no option.

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


Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
April 29, 2019