PUBLIC LAW BOARD NO. 7564

Case No. 94/Award No. 94
Carrier File No. 10-18-0113
Organization File No. C-18-D040-17
Claimant: Christopher Ryan Delano

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

Statement of Claim:

By letter dated January 12, 2018 Grinder Operator Christopher R. Delano was assessed a 30-day Level S Actual Suspension and a one-year review period for his "failure to protect men or equipment while working on the Omaha Welding Gang (TRWX1957) on Dec. 12th 2018 (sic) at appx. 1300 at Pacific Junction, IA near MP 0.9 on the Creston Subdivision." The letter further specified that the Claimant had violated MWOR 6.3.3 Track Occupancy. The February 20, 2018 claim from the Organization, Randy S. Anderson, Vice General Chairman, states that the discipline "is excessive and without merit" and includes the request that the Carrier "remove the discipline that was assessed to Mr. Delano from his personal record in accordance with Rule 40 of the current Agreement and that he is compensated for the lost wages that he suffered as a consequence of the Carrier's actions."

Facts:

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

> An investigation has been scheduled at 0900 hours, Thursday, December 21, 2017, at the BNSF Railway Depot, Conference Room, 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 failure to protect men or equipment while working on the Omaha Welding Gang (TRWX1957) on Dec. 12th 2018 (sic) at appx. 1300 at Pacific Junction, IA near MP 0.9 on the Creston Subdivision.

The letter also advised the Claimant that he was "being withheld from service pending the results of investigation.

Carrier Position:

The Carrier asserts that it has produced the required substantial evidence of a violation and that under the Policy for Employee Performance Accountability (PEPA) the Claimant could have been dismissed had the Carrier not shown leniency. The Board should not disturb discipline that was not "excessive, arbitrary or unwarranted." The alleged procedural defects were not shown to have been prejudicial to the Claimant, who received a fair and impartial hearing and who was not prejudged. The 2018 date in the Notice of Investigation (NOI) was a typo and the MP 0.9 was a clerical error.

Organization Position:

The Organization insists that the NOI was inaccurate because of the 2018 date and the MP 0.9 location and that these errors, involving a lack of due process, constituted a violation of Rule 40.A. The investigation was not fair and impartial as the Claimant was prejudged when removed from service pending investigation. The Carrier failed to produce substantial evidence of a violation. The Claimant was not the Employee in Charge and did not fill out the Statement of On-Track Safety. There was no violation of MWOR 6.3.3 Visual Detection of Trains as the required safety briefing took place, the Claimant was never in danger and there was no failure to protect him. The Engineering Instructions (Exhibit 5) and the Engineering Right-of-Way Fire Prevention Risk Assessment Form (Exhibit 6) should not have been made a part of the record.

Findings:

Before addressing the appropriateness of the discipline itself, the Board considers preliminary matters. The Carrier is admonished not only for showing the date of the alleged infraction as 2018 instead of 2017 and the incident location as MP 0.9, which was approximately 7/10s of a mile from the actual site, but also for repeating these two errors in the disciplinary notice after the errors were pointed out and challenged during the investigation by the Claimant's representative. Accuracy may be critical. Nevertheless, the Board finds that the above-noted errors did not prejudice the Claimant by hampering his defense. A careful reading of the investigation transcript convinces the Board that the Claimant and his representative were fully prepared to address the alleged "failure to protect men and equipment." In the case now under consideration, the Carrier's documentary carelessness does not justify an award in the Claimant's favor.

The Organization's prejudgment contention is singularly unpersuasive, as this Board has consistently ruled in prior cases. The Organization has agreed to Rule 40.B that allows the Carrier to withhold an employee from service pending an investigation of an allegedly serious infraction. The Organization cannot hope to nullify the agreed-upon language with continuous use of the prejudgment contention. Moreover, even when the violation of a safety rule results in a no harm, the Board considers the alleged violation a serious matter in view of the potential for catastrophic property damage, serious injury and even death.

The Board finds that the Carrier was justified in introducing Exhibits 5 and 6 as both relate to the protection of men and equipment, which the Claimant allegedly failed to do. However, the

January 12, 2018 disciplinary notice contains the Carrier's conclusion that the Claimant violated only MWOR 6.3. Exhibits 5 and 6 were not mentioned in the notice and since the Carrier has not based the assessed discipline on these two documents, the Board has no need to address them.

Within MWOR 6.3, the relevant language is contained in MWOR 6.3.3 Visual Detection of Trains, as it is this language that the Carrier relies on in its on-property responses to the claim filed on Mr. Delano's behalf. The only portions of MWOR 6.3 attached to the investigation transcript are MWOR 6.3.3 and MWOR 6.3.4 Train Coordination. MWOR 6.3.4 is never referred to by the Carrier and is deemed irrelevant by this Board. MWOR 6.3.3(A) concerns Lone Workers and is also irrelevant since the Claimant was not working alone on December 12, 2017. MWOR 6.3.3(B) concerns lookouts and states: "Lookouts must complete the form entitled 'Statement of On-Track Safety' before any member of the group fouls the track. The complete form must remain in the lookout's possession while a work group performs minor work or routine inspection and on-track safety is established using a lookout." Additional portions of MWOR 6.3.3.(B) concern Lookout Responsibilities and Conditions for Use.

The following facts are undisputed: 1) Mr. Christopher Snow was the Lookout and the Employee in Charge (EIC) and the Claimant was the Grinder Operator working on a frog; 2) there had been the required safety briefing; and 3) the Statement of On-Track Safety was never completed before the Claimant fouled the track. These undisputed facts are critical because there is a fatal weakness in the Carrier case. When all of MWOR 6.3.3 that is in the record is read carefully, we cannot find language that required the Claimant as Grinder Operator to complete a Statement of On-Track safety or even to question the Lookout to ensure that he had completed the form, although such questioning, in hindsight, would have been prudent. Simply put, the Carrier cannot discipline an employee for violating a rule that implicitly places no responsibility on that employee. MWOR 6.3.3(B) is explicit as to the Lookout's responsibility and is silent as to related actions that the Claimant was to have taken. Therefore, the Board must grant the claim as stated above.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made no later than thirty (30) days after the Award becomes effective.

Zachary Voegel, Organization Member

Zahn Reuther, Carrier Member

I. B. Helburn Neutral Referee

Austin, Texas
April 29, 2019