

PUBLIC LAW BOARD NO. 7564

Case No. 95/Award No. 95
Carrier File No. 11-19-0017
Organization File No. T-D-5646-M
Claimant: Nicholas L. Berchild

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

Statement of Claim:

By letter dated August 16, 2018 Machine Operator Nicholas L. Berchild was issued a Level S 30 Day Record Suspension and a one year review period for an alleged violation of MWOR 5.4.7 Display of Red Flag. The October 13, 2018 claim by the Organization, John A. Mozinski, Jr., Vice General Chairman and Secretary-Treasurer, appealing the discipline, ended as follows: "Therefore, due to this excessive and prejudged discipline, Mr. Berchild must be immediately paid for his lost time on the day he attended the investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay. We also request that Mr. Berchild be made whole for any and all benefits and his record cleared of any reference to any of the discipline set forth in the letter.

Facts:

By letter dated July 17, 2018 the Claimant was informed that "An investigation has been scheduled at 0900 hours, Monday, July 30, 2018 at the BNSF Conference room, 400 Pacific Avenue, Wilmar, MN, 56201, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stop short of red flag while operating machine X5600091 during a stop test on main track on Hanley Fall Sub near MP 7.2 on July 16, 2018 at 0900."

Carrier Position:

The Carrier contends that the Claimant was not prejudged and received a fair and impartial investigation during which he twice admitted his guilt, thus providing the required substantial evidence that he violated MWOR 5.4.7. Roadmaster Chris Jennings was not required to notify the EIC before he performed the stop test. The Claimant had stopped, then began to move again without permission and ran over the red flag. The discipline was appropriate and in accordance with the Policy on Employee Performance Accountability (PEPA). Leniency is the province of the Carrier, not the Board.

Organization Position:

The Organization insists that General Director, Labor Relations Joe R. Heenan provided improper, new evidence with his February 15, 2019 declination. Thus, the investigation was not fair and impartial. The discipline showed that the Claimant was prejudged as there is no proof of a violation because the Claimant complied with MWOR 5.4.7. The operations test was illegal because Roadmaster Jennings did not have permission of the EIC to perform the test. The discipline was issued by Joshua R. Fluck, Assistant Director, Maintenance Production, who was not the Conducting Officer of the Investigation.

Findings:

The discipline and claim arose from an incident on July 16, 2018 when the Claimant, while operating a Pup Tamper during a stop test, came to a complete stop at a crossing and then proceeded through the crossing and hit the red flag that had been placed for the stop test.

The complained of new evidence was a copy of the PEPA and a copy of the Employee Transcript. The Board has considered ninety-four (94) cases prior to this one and notes that the introduction of these two documents attached to the Carrier's final declination of a disciplinary appeal is standard operating procedure with these parties. Moreover, the PEPA is well known and can hardly be considered surprise or prejudicial. The Claimant's Transcript shows a twelve (12) year employee with no prior discipline—a record obviously in the Claimant's favor.

A careful review of the investigation transcript convinces the Board that the Claimant received a fair and impartial investigation and was not prejudged. The Organization alleges that the stop test was illegal because Roadmaster Jennings had not obtained permission from the EIC to conduct the test. The Board views the assertion as an affirmative defense that requires persuasive evidence, not simply an assertion without showing a requirement that permission was a necessary precursor to the test. The investigation contains no evidence of such a requirement; thus, the assertion fails.

As the Carrier has noted in prior cases before this Board, the better practice is to have the Conducting Officer also issue the discipline. In cases where the credibility of one or more witnesses is crucial to the outcome, separating the two roles might make a difference if the Board is left with no insight into how the credibility determination is made, but credibility is not an issue in this instance.

Turning to the incident itself, evidence establishes that the Claimant stopped at the crossing and then, without waiting for Roadmaster Jennings, proceeded through the crossing and ran into the red flag that had been placed as part of the stop test. MWOR 5.4.7 states in relevant part: "A red flag is displayed when on-track equipment or trains must stop. When approaching a red flag, the train or on-track equipment must stop short of the red flag and not proceed unless the employee in charge gives instructions . . ." For this test, Roadmaster Jennings was the employee in charge. The Claimant saw the flag and, while he might have been confused, MWOR 5.4.7 is clear and unambiguous in its directive. It does not allow the Claimant to throw caution to the winds. Safety must be paramount at all times in this inherently dangerous industry, and that is particularly so

when a main line is involved, as it was with this stop test. As a twelve (12) year employee, the Claimant should have known that any confusion must be cleared up before making a move and that running through a red flag would never be ignored or excused. The violation is obvious and shall not be set aside as the discipline was in accordance with PEPA and is not viewed as excessive.

Award:

Claim denied.

Order:

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

Zachary C Voegel
Zachary Voegel, Organization Member

Zahn Reuther
Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
Date 6-25-2020