

PUBLIC LAW BOARD NO. 7564

Case No. 97/Award No. 97
Carrier File Nos.10-19-0057/58
Organization File No. C-19-D040-2
Claimants: Casey D. Armstrong
Arthur J. Costello

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

Statement of Claim:

By almost identical letters dated December 19, 2018 First Class Carpenter Casey D. Armstrong and Structures Truck Driver Arthur J. Costello were assessed Level S 30 Day Record Suspensions and respectively a three year and a one year review period for alleged violations of EI 1.4 Fall Protection, specifically EI 1.4.9 Working on Railroad Bridges. The January 12, 2019 claim from the Organization, Randy S. Anderson, Vice General Chairman, focused solely on an alleged violation of Rule 40 because forty-four days after the investigation, neither the Claimants nor Mr. Anderson had received “a written discipline decision” or “a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.” The Organization thus asked that the charges be dismissed, that “mention of the investigation be removed from their personnel record immediately” and that “they be compensated for any lost pay that occurred while attending this investigation.”

Facts:

By essentially identical letters dated October 19, 2018 each Claimant was informed that “An investigation has been scheduled at 1000 hours, Wednesday, October 31, 2018, 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 wear proper fall protection in fall zone while working at or near Bridge 43.42 on the Bellwood Subdivision on October 17, 2018.” By mutual agreement the investigation was postponed until 0900 hours, November 29, 2018, location unchanged.

Carrier Position:

The Carrier contends that Rule 40.D was not violated because the written notice of discipline was issued within the required thirty (30) days and Rule 40.E does not contain a time limit for the provision of the investigation transcript, “including all statements, reports, and

information made a matter of record.” The Carrier has provided the required substantial evidence of a violation as the Claimants failed to use proper fall protection. Exceptions claimed by the Organization did not apply because the Claimants were working from a boom truck. The violations involved safety and were serious; therefore, the discipline was in accordance with the Policy on Employee Performance Accountability (PEPA).

Organization Position:

The Organization asserts that Rules 40.H and 42.A were violated because the written notice of discipline and the investigation transcript and exhibits were not timely received, requiring that the claim be sustained. The claim also ought to be sustained because the Carrier misidentified the bridge in question, referring incorrectly to Bridge 43.42 instead of Bridge 43.32. In his closing statement at the investigation, Mr. Anderson contended that the Claimants had never been instructed that work on the boom truck was an exception that required fall protection. However, the appeal of General Chairwoman Staci Moody-Gilbert did not address the alleged EI 1.4 Fall Protection and EI 1.4.9 Working on Railroad Bridges violations, but only the timing issue.

Findings:

The discipline and resulting claims arose from an incident on October 17, 2018 when the Claimants were using the boom to unload materials from a boom truck parked on the single set of rails on Bridge 43.32. The bridge was sixteen (16) feet high. The steps at the rear of the boom truck had hand rails and there were cables along the sides of the truck. The bridge had neither handrails nor sidewalks. The Claimants were observed climbing on and off the boom truck not wearing what the Carrier believes is required fall protection.

The Board does not find that the Carrier’s misidentification of Bridge 43.32 as Bridge 43.42 requires that the claims be sustained. Despite the misidentification, there is no confusion about the bridge involved and the aspect of the Claimants’ performance of concern to the Carrier. The Claimants were not prejudiced by what may have been simply a typographical error.

The more critical issue involves the timeliness of the Carrier’s rendering of the written notice of discipline and the investigation transcript and associated exhibits. The investigation occurred on November 29, 2018. An April 9, 2019 e-mail from Jessica Garcia to Chance W. Kirbie, both Carrier employees, states “I mailed both employees their discipline letter, exhibits and transcripts out certified along with the one I sent to Randy Anderson regular mail on December 19, 2018. Randy’s was mailed to the same address I have always sent his stuff to: . . .” The Board, based on the evidence before it will not speculate as to why these items apparently were not received. General Manager Smith’s February 21, 2019 declination letter mentions receipt of the January 12, 2019 claim from Vice General Chairman Anderson on January 15, 2019.

Two days before the issuance of General Manager Smith’s declination, General Chairwoman Staci Moody-Gilbert had written General Director, Labor Relations Joe R. Heenan that Mr. Anderson had not received the notice of discipline or the transcript and related exhibits and that Rules 40 and 42 had been violated so that the discipline should be set aside. On February 21, 2019 two packages were sent by the Carrier. They were delivered on February 25, 2019, but

USPS Tracking indicates only the zip code of the recipient and not the contents of the packages. The zip code for both packages appears to be that of Mr. Anderson. Director General Heenan's April 11, 2019 denial of the claim advanced by General Chairwoman Moody-Gilbert includes the following relevant offer: "In an act of good faith to ensure the Organization has a copy of the transcript, an additional one is enclosed with this letter. BNSF will not object to the Organization presenting new arguments derived from its reading of the transcript should it so desire, so long as they are sent to BNSF within 60 days from the date of this letter." The case file contains nothing more from the Organization other than the General Chairwoman's May 16, 2019 letter to General Director Heenan confirming the discipline conference held the day before, during which "there was no further documentation provided [by] either the Carrier or (sic) the Organization at conference . . ."

With the relevant chronology established, the Rules that must guide the analysis are set forth in relevant part below.

Rule 40.D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. . .

Rule 40.E. The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

Rule 40.H. The provisions of Rule 42 shall be applicable to the filing of claims and to appeals in discipline cases. [See Appendix JJ for alternative expedited arbitration procedures]

Rule 42.A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

The crux of the procedural issue that the Board is confronted with is not whether the transcript and exhibits were mailed within the required thirty (30) days but whether they were mailed at all. With all due respect to Ms. Garcia, while the Board does not doubt her belief that the transcript and exhibits were mailed via certified mail to the Claimants and regular mail to Mr. Anderson, the evidence does not allow the Board to concur. There is no evidence showing that these materials were sent to the Claimants via certified mail or were ever received by the Claimants. Nor has Mr. Anderson ever received the materials said to have been mailed on December 19, 2018. Because all three sets of transcripts and exhibits mailed on December 19, 2018 were never received, the Board finds that it is more likely than not that for unknown reasons,

these materials were never mailed, as opposed to any likelihood that they were mailed and never delivered.

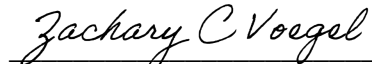
The two packages mailed to Mr. Anderson's zip code on February 21 and received on February 25, 2019 do not cure the original violation of Rules 40.D and 40.E. It is not necessary to address the Carrier's contention that Rule 40.E cannot be read to implicitly include the thirty (30) day mailing requirement because of the above-noted finding that the materials were never mailed. General Director Heenan's offer, noted by the Board, to extend the time limits for the Organization to submit an appeal addressing the merits of the claims, also does not cure the original failure to mail the materials within thirty (30) days. The Board will not rule in a way that might lead to a "second bite of the apple" for the Carrier in the extremely rare event when the thirty (30) day mailing requirement is violated. Rule 42.A requires that under the prevailing circumstances, "the claim or grievance shall be allowed as presented."

Award:

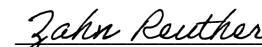
Claim sustained.

Order:

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Zachary Voegel, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
June 25, 2020