

PUBLIC LAW BOARD NO. 7564

Case No. 98/Award No. 98
Carrier File No.10-19-0055
Organization File No. C-19-D040-3
Claimant: Robert A. Swain

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

Statement of Claim:

By letter dated October 3, 2018 Foreman Robert A. Swain was assessed a Level S 30 Day Record Suspension and a three year review period for an alleged violation of MWOR 6.50 Movement of On-Track Equipment. The October 3, 2018 claim from the Organization, Jim L. Varner, Vice General Chairman, appealing the discipline, characterized as “excessive, unfounded and without merit,” asks that “this discipline be removed from [Claimant’s] records in accordance with Rule 40 of the current agreement.”

Facts:

By letter dated August 1, 2018 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Friday, August 10, 2018, at the BNSF Depot, 100 Clayton Street, Brush, CO, 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to maintain a safe course and failure to be alert and attentive while operating machine resulting in derailling machine on July 31, 2018. By mutual agreement the investigation was postponed until 1000 hours, September 6, 2018 and held at the Scottsbluff Engineering Conference Room, 2430 Avenue I, Scottsbluff, NE, 69361.

Carrier Position:

The Carrier contends that the Claimant was not prejudged and that he received a fair and impartial investigation. There is the required substantial evidence that MWOR 6.50 was violated. If procedural errors were made, there is no showing that the Claimant was prejudged. In fact, the Carrier showed leniency in applying discipline, as removal would have been justified under the Policy for Employee Performance Accountability (PEPA). Leniency is the province of the Carrier but not the Board. Rule 40.D was not violated because the written notice of discipline was issued within thirty (30) days of the investigation. The requirement to “render” the decision does not require receipt within thirty (30) days.

Organization Position:

The Organization contends that the Claimant received excessive and arbitrary discipline following an investigation that was not fair and impartial and that did not afford due process or provide substantial evidence of a violation. Despite the fact that the Claimant ultimately was charged only with violating MWOR 6.50, MWOR 1.1.1 Maintaining A Safe Course and MWOR 1.1.2 Alert and Attentive were also entered into evidence during the investigation. Roadmaster Augustine Sintas did not mention the damaged switch to the Claimant. The written notice of discipline was received thirty-three (33) days after the investigation rather than within thirty (30) days as required by Rule 40.D.

Findings:

The discipline and claim arose from a July 31, 2018 incident when the Claimant accompanied Roadmaster Augustine Sintas from Brush, CO to Sterling, CO after a report that nearby Maintenance of Way equipment tied up for the day close to a crossing, was activating the crossing alarm system. The Claimant moved the 6700 Tamper so that the gate crossing alarm was deactivated, but Roadmaster Sintas decided to tie up the 6700 Tamper and a Ballast Regulator on the rip track on the far side of the crossing. The Claimant, doing a facing move, went through the crossing and the 6700 Tamper derailed going through the switch onto the rip track. The derailment was caused by a gap switch point, although the switch had been properly aligned for the move onto the rip track. Roadmaster Sintas had been told earlier in the day that the surfacing gang had hit the switch and bent the switch rod, but there was no out-of-service tag on the switch and Roadmaster Sintas admittedly had forgotten to brief the Claimant about the damaged switch.

Careful consideration of the investigation transcript shows that the Claimant received a fair and impartial investigation in which his due process rights were honored. The Organization infers that the introduction of MWOR 1.1.1 Maintaining a Safe Course and MWOR 1.1.2 Alert and Attentive, entered into evidence during the investigation but not used as the basis for discipline, somehow was prejudicial to the Claimant. The inference misses the point of the investigation, which is to determine which, if any, rules were violated. For possible rules violations to be considered, those rules need to be in evidence. Because the rules noted above were not listed in the notice of discipline, the Board can only conclude that the Claimant maintained a safe course and was alert and attentive.

Rule 40.D was not violated. The written notice of discipline was issued on October 3, 2018, twenty-seven (27) days after the investigation. The requirement in Rule 40.D to “render” the decision within thirty (30) days means to issue the decision. If this is done, receipt of the notice after thirty (30) days does not violate the Rule.

Turning to the derailment, MWOR 6.50 Movement of On-Track Equipment states that “On-track equipment must move at a speed that will allow stopping within half the range of vision short of . . . Derail, movable point frog or switch lined improperly.” Roadmaster Sintas testified that the switch was properly aligned for the move into the rip track. He did not see the derailment occur and there is no testimony or other evidence that links the speed at which the 6700 Tamper was traveling with the derailment. What is known is that Roadmaster Sintas failed to brief the

Claimant about the damaged switch. Had the Claimant been armed with this critical piece of information, it is entirely possible that the derailment would not have occurred. In the final analysis, there is no evidence that the Claimant's performance of duties was responsible for the derailment. The discipline must be removed from his records.

Award:

Claim sustained.

Order:

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

Zachary C Voegel
Zachary Voegel, Organization Member

Zahn Reuther
Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
June 25, 2020