

**PUBLIC LAW BOARD NO. 7564**

Case No. 99/Award No. 99  
Carrier File No. 10-19-0056  
Organization File No. C-19-D040-4  
Claimant: Michael D. Roggenbuck

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BNSF RAILWAY COMPANY )  
 )  
 -and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION )  
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**Statement of Claim:**

By letter dated October 24, 2018, Machine Operator Michael D. Roggenbuck was issued a Formal Reprimand and a one year review period for an alleged violation of MSWR S-1.2.3 Alert and Attentive. The November 28, 2018 claim from the Organization, Jim L. Varner, Vice General Chairman, appealing the discipline, requests that the discipline, “excessive unfounded and without merit,” be removed from the Claimant’s records “in accordance with Rule 40 of the current agreement.”

**Facts:**

By letter dated July 30, 2018 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Wednesday, August 8, 2018, at the Conference Room, 1212 West 24<sup>th</sup> St., Cheyenne, WY, 82001, 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 derailing machine on July 26, 2018. After two mutually agreed to postponements the investigation was held on September 24, 2018 at the time and location first noted.

**Carrier Position:**

The Carrier asserts that the required substantive evidence proved the violation of MSWR S-1.2.3 and not only was the discipline proper and in accordance with the Policy on Employee Performance Accountability (PEPA) but also evidenced leniency on the Carrier’s part. The Claimant was not prejudged and received a fair and impartial investigation. Rule 40.D, requiring that “A decision be rendered within thirty (30) days following the investigation . . .” was complied with when the written notice was placed in the mail on the thirtieth day following the investigation. The requirement to “render” the decision, does not require receipt within thirty (30) days.

**Organization Position:**

The Organization insists that the Carrier has not proven a violation of MSWR S-1.2.3 as the Claimant is neither an unsafe nor a malicious employee. Thus, the discipline is excessive and arbitrary. It is known that the Regulator, which the Claimant was operating, often derails. Mitigation existed in the form of an improperly operating turntable, an inaccessible location where the derailment took place and ground made slippery by two storms, with at least one including hail. Moreover, it took more than thirty (30) days for the Claimant and Mr. Varner to receive notice of the discipline; thus, the claim should be sustained on that basis alone.

**Findings:**

The discipline and claim arose from an incident on July 26, 2018 when the Claimant, while operating a Ballast Regulator to add ballast to the track bed, had the Regulator derail. Under optimum conditions, using the built-in turntable, the Regulator may be rerailed in about fifteen (15) minutes. For various reasons, including a faulty derail switch that operated the turntable, it took 2 ½ - 2 ¾ hours to rerail the machine.

Having carefully reviewed the investigation transcript, the Board finds that the investigation was fair and impartial and the Claimant was not prejudged. While MWSR S-28.1.1 Maintaining a Safe Course was discussed and entered into evidence during the investigation, that safety rule was not listed as a basis for discipline. Therefore, there is no allegation before this Board that the Claimant acted unsafely. Moreover, the mitigating factors noted by the Organization appear to relate more to the length of time needed to rerail the Regulator than to the derailment itself.

Rule 40.D was not violated. The investigation was conducted on September 24, 2018 and the written notice of discipline was issued thirty (30) days later. The Board adopts the Carrier's assertion that "render" refers to the Carrier's responsibility to complete and issue the notice of discipline within thirty (30) days or less, but receipt of the notice within thirty (30) days is not required.

Turning to the derailment itself, the uncontradicted evidence is that Regulators frequently derail, that the derail switch that operated the turntable on the Regulator that the Claimant was operating had been reported as faulty and was taken out of service for repair after the incident, that neither Roadmaster Winkenweder nor Foreman Nelson were at the scene when the Regulator derailed. There is no evidence that the Claimant was operating at an unsafe speed or in an abnormal way. There is uncontested evidence that the Regulator is prone to derail when the wings are out, as they were on July 26, 2018. MWSR S-1.2.3 Alert and Attentive states "Assure that you are alert and attentive while performing duties." Foreman Nelson testified regarding MWSR S-1.2.3 that "it doesn't apply at all. I don't see don't see (sic) where that comes into play to be honest with you." (TR, p. 23, ll. 23-24). The Carrier, despite the absence of any supporting evidence and the presence of substantial evidence in the Claimant's favor, has nonetheless concluded that the derailment had to have been the Claimant's fault. The faulty conclusion requires that the discipline be removed from the Claimant's records.

**Award:**

Claim sustained.

**Order:**

The 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



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I. B. Helburn Neutral Referee

Austin, Texas  
June 25, 2020