

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 100**  
**Carrier File No.: 10-19-0274**  
**Organization File No.: C-19-D040-20**  
**Claimant: M. Ward**

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**BNSF RAILWAY COMPANY** )  
**(former Burlington Northern Railroad Company)** )  
 )  
-and- )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYEES DIVISION - IBT** )  
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**STATEMENT OF CLAIM:**

The Organization alleges BNSF violated the Agreement when Claimant was disciplined as a result of a formal investigation, for his violation of Maintenance of Way Operating Rule 1.1.2 "Alert and Attentive" when he failed to be alert and attentive when he powered his machine without pre-lifting unit unchained on the left lock up chain resulting in damage to the chain attach point ("d-ring") on May 14, 2019, while working on the Red River Division, Madill Subdivision.

**CARRIER POSITION:**

As a TLU Machine Operator, it was Claimant's responsibility to be sure that his machine's safety chains were removed before moving it. Instead, on the day in question, he put his machine into production mode without removing the safety chains, causing the left lock up chain to break through the D-ring. At the investigation hearing he admitted that he looked past the safety chains and that he received no verbal affirmation of readiness, but just assumed the machine was ready because employees were walking away.

In the Carrier's assessment, this is more than adequate evidence to justify the penalty of a 30-day Record Suspension with 36-month review period.

**ORGANIZATION POSITION:**

The Organization argues the hearing was quite unfair, with the Hearing Officer taking lines of questioning that were biased, evidencing prejudgment. Further, the Hearing Officer allowed into evidence statements of witnesses who were not present to testify.

In addition, the Organization points out that the Investigation was held on June 25, 2019, but the discipline was not issued until 34 days later, on July 29, 2019, in breach of the 30-day limit. In its view, these breaches are egregious, and warrant resolution of the grievance in its favor.

**DECISION:**

The tardiness of the discipline letter is not a lapse of due process that requires the grievance to be allowed as presented. When the parties agreed to such a result, they said so. Yet Rule 40(D), in addressing the situation of discipline more than 30 days after Investigation, mandates no such result. As a consequence, such a lapse of due process only results in allowance of the grievance when prejudice has resulted to the employee. None has been shown here.

Likewise, the Hearing Officer's questioning, though lacking in objectivity, does not constitute such flagrant denial of due process as to end proceedings in the Organization's favor.

The failure to provide witnesses to testify while offering their statements into evidence does not constitute improper conduct of the hearing. It is for the Carrier to determine the evidence upon which it wants to rely. Hearsay statements from witnesses who do not testify are far from the best evidence. In offering such evidence, the Carrier runs the risk that the Board will discount the statements, or not accept them for their truth. The Carrier's failure to provide the Claimant's statement, likewise, is not a fatal flaw. Claimant was present to provide testimony regarding the incident. As such, his statement is not needed unless he no longer recalls the events in question.

Claimant did recall the events of concern and acknowledged that he failed to remove the safety chains or confirm their removal by another employee. The result was that the left lock up chain broke through the D-ring. There is no question of fact or credibility in this case. The record establishes that Claimant was not alert and attentive when he neglected the duty of removing the safety chains before movement.

Claimant was assessed a Level S Record Suspension with a three-year review period for this incident. He has worked for the Company since 1990, a period of service that, if unblemished, would constitute a powerful mitigating circumstance. However, his disciplinary record prior to this incident is pocked with various penalties over the years: 2005: Record Suspension, 2011: Record Suspension and Formal Reprimand, 2018: Formal Reprimand; 2019 Formal Reprimand. Because of the previous disciplinary

actions which have afforded Claimant the opportunity to learn from his mistakes, it cannot be said that the Carrier has exceeded the bounds of reasonableness in its choice of penalty in this case.

**AWARD:**

The claim is denied.

Dated: November 25, 2020



Patricia T. Bittel, Neutral Member

***Zachary C. Voegel***

Zachary Voegel, Labor Member



Samantha Rogers, Carrier Member