PUBLIC LAW BOARD NO. 7585

Case No. /Award No. 78
Carrier File No.: 10-18-0013
Organization File No.: C-18-D040-1
Claimant: B.D. Deuel

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization alleges that BNSF violated the Agreement when Claimant was disciplined for violating MWOR 1.2.7 "Furnishing Information" for his failure to furnish information related to the event on May 12, 2017, at approximately 0805 hours at/or near MP 446.4 on the Butte Subdivision while assigned as a Group 2 machine operator on Regional System Gang TUCX0001.

CARRIER POSITION:

On May 12, 2017, Claimant suffered an injury and was transported to the hospital to receive emergency medical treatment. Assistant Roadmaster Ernest Parker went to the hospital and attempted to get a statement about the incident from Claimant. Claimant failed to provide Parker (or any other BNSF representative) the information requested. Four days later Claimant obtained legal counsel and continued in his failure to provide BNSF any information or statement about the incident until his investigation. He was issued a Record Suspension with a 36-month review period.

BNSF insists it is entitled to immediately investigate personal injury claims. Companies are exposed to significant liability from personal injury claims; employes who fail to make timely reports seriously limit the Company's ability to defend itself against potentially falsified personal injury claims. Dismissal has been upheld at arbitration for this same offense by long term employes. Since the Carrier has already been lenient by not dismissing Claimant Deuel, the Carrier contends Claimant’s discipline was warranted.

ORGANIZATION POSITION:

In the Organization's view, there are fatal procedural errors in this case. The Carrier's Notice of Investigation dated May 24, 2017 was not timely served and does not provide the Claimant at least five days' notice prior to the investigation as required in the parties' Agreement. The Organization notes the investigation was scheduled for May 30, but the Notice of Investigation was not delivered to Claimant until May 27. The Organization further maintains that the Notice of Investigation was too vague to give any notice because it simply referred to "the incident of May 12."

Rule 40D states in pertinent part, "A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative." In this instant case, the notice was received after the thirty (30) day time limit: the investigation was conducted on July 25, 2017, the discipline letter was dated August 23, 2017 and that letter was not received until August 25, 2017. The Organization also objects to the conduct of the investigation while Claimant was on medical leave.

Engineering Officer John Bainter testified that he was on site immediately following the incident on May 12; he took photographs. Production Assistant Roadmaster Ernest Parker said he went to the hospital on May 12, but Claimant was receiving treatment and he was unable to get a statement. As of the day of the Investigation, he had not spoken with Claimant.

Claimant testified that he believed his attorney had been in contact with BNSF and had provided the necessary information. Claimant further stated his attorney had advised him not to provide a statement to BNSF.

DECISION:

Though the language of Rule 40D is mandatory, it does not expressly mandate forfeiture of the Carrier's defenses in cases where the decision is made within 30 days yet the notification requirement exceeds that timeline. It is a familiar maxim that the law abhors forfeiture. "If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture."[1] This concept was explained by Arbitrator George Cheney: "A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation

[1] ABA Section on Labor & Employment Law, HOW ARBITRATION WORKS, 6th Ed., (BNA Books, 2003) 500.

is reasonably possible. Since forfeitures are not favored either in law or in equity, courts are reluctant to declare and enforce forfeiture if by reasonable interpretation it can be avoided."[2]

As we read Rule 40 D, the forfeiture of the Carrier's defenses is not required when the decision is made within 30 days but the notification is minimally late. The requirement to advise the Organization and Claimant of the decision on the claim is separated from the timeline by the word "and." 'And' means 'also' or 'in addition to.' Hence, the decision on a claim must be made within 30 days. Additionally, the Organization and Claimant have a right to notification. Though the implication is that the notification must also occur within 30 days, this is an implication and is not directly expressed by the language of the provision. There is no express language requiring that the claim be allowed in the event notification is slightly late and there is no prejudice.

As we interpret Rule 40D, without either prejudice or express language requiring the Carrier to forfeit its rights to defend the claim, it would be an improper interpretation for us to mandate a forfeiture.

As to the merits, the applicable rules states as follows:

> 1.2.5 Reporting
> All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.
>
> A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.
>
> If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.
>
> * * *
> 1.2.7 Furnishing Information
> Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.

Claimant was severely injured on May 12, 2017 when he stumbled underneath a Ballast Pick-up Unit while holding a needle bar. The bar was drawn into the conveyor belt pulling in Claimant's right hand with it. An Investigation was initially set for May 26, then the parties mutually agreed to postpone until July 25. When the parties agreed to postpone the investigation, any objection to the untimeliness of that Investigation was

[2] *Mode O'Day Corp.*, 1 LA 490, 494 (1946), as cited in Elkouri & Elkouri, *Id. Accord*, THE COMMON LAW OF THE WORKPLACE, St. Antoine, Ed., (BNA Books, 1998) 75.

waived. Likewise, at hearing Claimant stated he was not on narcotic medication and wanted to go forward with the investigation. This constituted waiver of any objection to the timing of the investigation or its conduct while Claimant was on medical leave.

Though the rule calls for an immediate report, it would not be reasonable to expect Claimant to give a report to the Carrier during either medical treatment or while on narcotic medication. The record does not reveal the point in time when Claimant might reasonably have been able to provide a report of the incident to the Carrier. On the question of the responsibility to follow up regarding the report, Parker testified as follows:

> DANIEL HYATT: Thank you, Mr. Parker. So if Mr. Deuel had not
> 20 been able to provide a statement on May 12th, 2017, that would be
> 21 understandable. Uh but who's responsibility would it be going
> 22 forward if he were able to do that at a later date, to make sure
> 23 that happens?
> 24 ERNEST PARKER: Um that that would be um I take some of the
> 25 responsibility and also some of it is his responsibility, too, as
> 26 well. [TR 44]

The applicable rule required Claimant to immediately provide information. Though this was not possible, the express language of the rule unambiguously conveys the immediacy of the requirement. Claimant was required to provide information to the Carrier as soon as he was physically able. Clearly, he failed in this obligation.

That said, there are two sides to this coin. If indeed, speed of receipt was important to the Carrier, then there would be evidence in the record of the Carrier's efforts to assess his capacity to give a statement and to obtain it. Instead, there is no indication of any interest whatsoever on the part of the Carrier until the day of Investigation when Claimant is suddenly deemed to have violated the rule. This neglect of inquiry is a serious mitigating circumstance which was completely ignored in the Carrier's assessment of the offense. In view of the foregoing, we find the discipline taken to have been excessive and unreasonable.

AWARD:

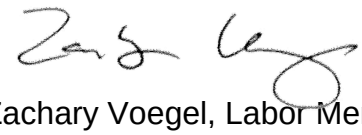
The claim is granted in part. The Level S 30-day record suspension with a 3-year review period shall be removed from Claimant's record, and shall be replaced with a Standard Formal Reprimand with a 1-year review period.

ORDER:

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

May 1, 2019

Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member

James Rhodes, Carrier Member