

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 11-13-0316
Organization File No. B-M-2689-E

Claimant — Bruce W. Garrett

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 6, 2013, when it dismissed Claimant, Bruce W. Garrett, for violation of MWOR 6.05 Movement of On-Track Equipment, in connection with his failure to stop within half the range of vision short of a train when his BNSF Hyrail 25673 struck the rear end of Train G-SRAKAL9-27M at MP 25.3 on the Great Falls Subdivision.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

BACKGROUND:

The Claimant entered service with the Carrier on August 22, 1994. At the time of the incident that resulted in his dismissal, he was working as a Track Inspector based in Great Falls, Montana.

On Friday, August 31, 2012, Claimant was inspecting track on the Great Falls Subdivision in a Hyrail vehicle, following behind a grain train. The record includes both dispatch information as well as a transcript of the radio contact between Claimant and the crew of the grain train (identified in the transcript as BNSF 5055) in which they traded

information about their location as they moved down the track. Claimant had a track warrant to MP 26, which is to say he was cleared to travel to Mile Post 26 and there should not have been any other vehicle or train on the track. In addition, the transcript of the radio conversation between Claimant and the UP crew indicates that at 12:57 p.m. Central Time/11:57 a.m. Mountain Time the 5055 crew radioed the Claimant "Well, we're on the move again, Mr. Garrett. Don't forget to get another warrant at 26." Unfortunately, BNSF had not started to move, the HLCS warning system on Claimant's Hyrail failed to alert him to the fact, and his Hyrail ran into the rear of BNSF 5055 at MP 25.3, well within Claimant's track authority. Claimant suffered serious injuries in the accident, and the estimate to repair the Hyrail was in excess of \$40,000.

The Carrier has policies governing on-track operations and the safe movement of on-track equipment. Claimant was sent a Notice of Investigation dated September 4, 2012, indicating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stop within half the range of vision short of a train when your BNSF Hyrail 25673 struck the rear end of Train G-SRAKAL9-27M at MP 25.2 near Power, MT at approximately 1156 hours on Friday, August 31, 2012 while track inspecting on the Great Falls Subdivision. The Claimant began a medical leave of absence that same date due to his injuries. Pursuant to mutually agreed postponements, the hearing ultimately took place July 10, 2013. Claimant was still on medical leave. At the hearing, a number of witnesses testified for the Carrier. Mr. Garrett testified but had limited recall of what had happened.

Claimant remained on medical leave until August 5, 2013. By letter dated August 6, 2013, the Carrier notified Claimant that he had been found in violation of MOWOR 6.50 Movement of On-Track Equipment. The discipline assessed was dismissal, effective immediately.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

In its appeal, the Organization raised a number of objections to the conduct of the hearing and to the Carrier's decision to terminate the Claimant. The Board will address first the most serious of those charges. Investigatory hearings are conducted pursuant to Rule 40 of the parties' collective bargaining agreement, Investigation and Appeals. Paragraph A of

Rule 40 states, in relevant part: “An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held...” Despite the fact that Carrier officials act as the Hearing Officers and also render decisions based on the evidence submitted at an investigatory hearing, the goal of the process is to be as “*fair and impartial*” as possible. No adjudicatory forum can have any validity unless it both *is* and *is perceived to be* fair to those who are bound by its decisions.

The Carrier has developed a process for processing charges against employees facing discipline because of alleged misconduct. During the charging phase, management officials send out notices of upcoming investigations specifying the charges, make hearing arrangements, pull together information to present at the hearing, arrange for witnesses to attend, answer questions from the Organization and employee, and so on. At the hearing itself, a Carrier official acts as the Hearing Officer. The Carrier presents evidence and witnesses to support its position that the employee engaged in wrongdoing. The Organization, on behalf of the accused employee, has an opportunity to present its own evidence and witnesses. Typically the Organization challenges either the facts presented by the Carrier to substantiate the allegations of misconduct or the conclusions the Carrier has drawn from the facts (*i.e.*, whether there was any violation of rules and/or policies). At the end of the investigation, another Carrier official reviews the record. First, he makes determinations of fact: what really happened? Next he makes a decision whether the facts established at the hearing constitute a violation of any Carrier policy. If so, he makes a decision about the appropriate level of discipline to be assessed.

It is essential to the fairness of the investigatory process that there be some separation between the different roles played by Carrier officials: a process in which a single person can act as the charging official, as the hearing officer, as a material witness and finally as the deciding official is one that is inherently biased, unfair and in violation of Rule 40. Arbitrators are loathe to overturn cases strictly on procedural grounds, unless the violations of specific provisions in the parties’ Agreement or the fundamental principles of due process are sufficiently serious to warrant such dismissal. This Board has sustained claims in the past where the Carrier’s procedural violations call into question the fairness and impartiality of the investigatory process.

This case is one of those rare occasions where the violations of Claimant’s due process rights during the investigation have so undermined the integrity of the investigation that the charges against him must be dismissed. During the hearing, the Carrier presented testimony from Seth Ogan, Roadmaster in Great Falls, Montana, and from Darin Carpenter and Randal Hardenbrook, also Track Inspectors in the Great Falls area. The three men were all working in the area on August 31, 2012, and testified regarding their first-hand

knowledge of the accident. The Carrier's fourth witness was Keith Samples, a Division Engineer in Billings, Montana. Mr. Samples was not present at the scene of the accident and had no immediate knowledge of the events of August 31, 2012. Instead, Samples' testimony focused on the Carrier's safety policies for on-track vehicles and in particular on why he thought the Claimant was in violation of those policies. His opinion was based on his review of the information that was gathered at the time of the accident. Samples acknowledged that Claimant had obtained the proper track warrant and had engaged in the proper radio contact with the crew of BNSF 5055. However, regarding MOWOR Rule 6.50, Samples testified, "Mr. Garrett did not comply with this rule because he came in contact with the rear of 5055 grain train." (Tr. 136) Samples then delineated other rules that, in his opinion, Claimant had violated: MOWOR 6.50.1, MOWOR 6.2.1, and Rule 6.51.

The Carrier is certainly entitled to have witnesses testify regarding management's conclusions that an employee has violated the rules and how they were violated. *But fundamental principles of due process require that the person who testifies during the hearing about the Claimant's guilt not be the same person to make the final decision regarding that same guilt at the end of the investigation.* And that is exactly what happened in this case. During the hearing, Mr. Samples testified extensively about the rules and how Claimant's actions had violated those rules. Mr. Samples then made the decision post-investigation that Claimant was guilty of violating the Carrier's rules and that dismissal was the appropriate level of discipline—his is the name at the bottom on the August 6, 2013, letter of dismissal to Mr. Garrett. The fundamental bias inherent in such an arrangement should not require any explication. Mr. Samples was also the contact person on all of the notices of investigation that were issued in this case. With a single individual acting as point person in the run-up to the investigation, as primary witness for the Carrier regarding Claimant's violations of Company rules and as the final decision-maker, the conclusion that the investigation is not fair and impartial is inescapable. If the process is to be fair, the chief accuser cannot also be the final decision-maker; it strains credulity to believe that he might render judgment contrary to his previously expressed opinion. His review of a record that includes his own testimony cannot be impartial and objective—which is what the investigative process is supposed to provide employees accused of misconduct.

For the reasons set forth above, the charges against the Claimant must be dismissed, and the Claim sustained. Because of this conclusion, it is not necessary for the Board to address the other issues raised in the appeal. Claimant shall be restored to his former position with all lost pay and benefits restored, and the matter expunged from his record.

AWARD

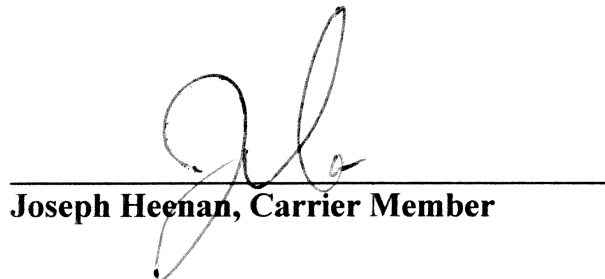
Claim sustained.

ORDER

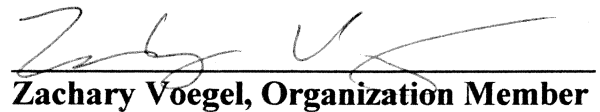
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Joseph Heenan, Carrier Member



Zachary Voegel, Organization Member

5/25/2016

Date