

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 63

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF 10-16-0346
BMWE C-16-Do40-16
Claimant R. Darrow, et al.

STATEMENT OF CLAIM

The Organization appeals the Standard Form Reprimand discipline issued to Jay Herzog and Rick Darrow as a result of investigation held on Wednesday, June 22, 2016 at 1000 hours at Conference Room, 3700 Globeville Road, Denver, CO, 80216.

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimants received letters advising them of an investigation:

[H]as been scheduled at 1000 hours Wednesday, June 22nd, 2016 at the conference room, 3700 Globeville Road, Denver, Colorado 80216, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly supervise movement/operate equipment resulting in collision on June 9th, 2016.

Following continuances, an investigation was held. Claimants were sent a letter dated July 21, 2016, which provided:

As a result of investigation held on Wednesday, June 22, 2016 at 1000 hours at Conference Room, 3700 Globeville Road, Denver, CO, 80216 you are hereby assessed a Standard Formal Reprimand for your failure to properly

supervise movement/operate equipment resulting in movement over derail in the derailling position on June 9, 2016.

In addition, you are being assessed a One (1) Year Review Period that commences on July 21, 2016. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 8.20 Derail Location and Position.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative. This letter will be placed in your personnel record.

The Carrier argues that MWOR 8.20 Derail Location and Position is clear in its requirement that Claimants know the location of derails. Claimant Darrow was the driver and therefore responsible for noting the location and stopping short of striking the derail. His failure to observe the derail caused his tamper to derail and be damaged. The Carrier further argues that claimant Herzog was the foreman and therefore responsible for knowing the location of the derail and ensuring proper equipment movement. The investigation was fair, the Organization's procedural arguments unpersuasive, and the discipline appropriate to the violation.

The Organization responds with a number of alleged procedural errors. On the Merits, the Organization reminds the Board of the rule requirements for the placement, color, and signage for a derail. There was no way that Claimant Darrow could have seen it from his location in the cab due to the improper placement, non-compliant color, and lacking marker. Further, it was impossible for Claimant Herzog to see the derail from his position sitting behind Claimant Darrow. All he could see was the back of his coworker's head.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimants. If the question is decided in the affirmative, we are not

warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Claimant Herzog testified:

Claimant Herzog: Yes. What we were not prepared for was traveling into an unsigned, improperly marked derail per BNSF's standards. A derail that like all the other derails in our territory are marked with the proper signage. Because, as you can see from our Exhibit Number 5, instead of a sign and the one foot opposed to sign post that stands five and a half feet above the ground, and a large one foot circle with a big D on it, all we have is something that's only two inches above the rail to indicate that there's a derail there.

Claimant Darrow had the following colloquy with the conducting officer wherein the conducting officer appeared to agree that the derail was improperly marked.

JAMES O'BRIEN: Okay, I want to hear it one more time, please. Mr. Darrow, 6.50, we've gone over it, do you understand it?

RICK DARROW: Yes, I do.

JAMES O'BRIEN: Did, did you, were you in compliance with that rule June 9th, 2016?

RICK DARROW: Yes, I was.

JAMES O'BRIEN: Did you stop short of that derail?

RICK DARROW: No, I did not.

JAMES O'BRIEN: No, you didn't.

JAMES L VARNER: Is that an accusation on your point, Mr. Conducting Officer?

JAMES O'BRIEN: It's not an accusation. That's a fact that he did not stop short of that derail.

RICK DARROW: But I can argue the fact that that derail was improperly marked and poorly painted.

JAMES O'BRIEN: That derail was not within the standard, but 6.50, 6.50 is what we're talking about. Are you in compliance with 6.50?

RICK DARROW: Yes, I am.

JAMES O'BRIEN: So if you're in compliance-

JAMES L VARNER: It's been answered, Mr. O'Brien.

JAMES O'BRIEN: If you're in compliance with 6.50 how did you derail?

RICK DARROW: By striking an improperly, poorly marked derail.

JAMES O'BRIEN: Okay.

RICK DARROW: That was not up to track standards.

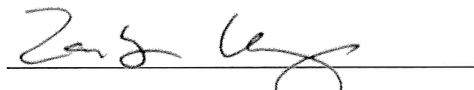
JAMES O'BRIEN: Okay. I have no more further questions

This Board finds that there are no procedural violations which void the discipline. On the merits, this Board finds that there is not substantial evidence in the record to support the discipline issued to either Claimant. The evidence establishes Claimant Darrow was operating at a slow speed prepared to stop for an upcoming switch when he struck the derail. Claimant Herzog was in a blind position behind him. The evidence also shows that the derail was not properly painted Omaha Orange and did not have a proper signage. Claimants cannot be found to violate the cited rule by not seeing a derail when the derail was not visible for them to see.

Claim sustained Claimant Darrow. Claim sustained Claimant Herzog.



Carrier Member



Organization Member



Neutral Member

Dated: 02-04-2019