

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 77

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0064

BMWE FILE NO. C-18-Do40-7

Claimant: S. Brennemann

STATEMENT OF CLAIM

I am appealing to you the decision of Powder River Division General Manager Leif Smith in his letter dated January 26, 2018, to uphold the discipline assessed to Mr. Steve Brennemann as appealed in letter from Vice General Chairman Jim Varner dated December 2, 2017, when Mr. Brennemann, hereinafter referred to as Claimant, was assessed a Standard 20 Day Record Suspension and a one (1) year review period for alleged violation of FRA 213.123(b) Tie Plates.

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, Claimant received a letter advising him to attend a formal Investigation:

An investigation has been scheduled at 1500 hours, Wednesday, August 30, 2017, at the BNSF Depot, 100 Clayton Street, Brush, CO, 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly protect known defect in accordance with FRA Compliance Manual on August 16, 2017, resulting in three FRA violations.

Following postponements, a hearing was held. Following the investigation, Claimant received a letter advising him:

As a result of investigation held on Wednesday, September 20, 2017 at 1500 hours at BNSF Depot, 100 Clayton Street, Brush, CO, 80723 you are hereby assessed a Standard 20 Day Record Suspension for your failure to properly protect known defect in accordance with FRA Compliance Manual on August 16, 2017, resulting in FRA violation.

In addition, you are being assessed a One (1) Year Review Period that commences on October 16, 2017. 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 FRA 213.123(b) Tie Plates.

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.

The Carrier maintains that Claimant violated the cited rules when he failed to report the defects at MP 469.2 on the Brush Subdivision during his regular inspection. The two defects were later found during an FRA inspection on August 16, 2017, despite Claimant reporting them as repaired a day earlier. The Carrier further argues that the notice was not unduly vague because the Organization was aware of the locations two weeks before the hearing. The Carrier also argues that separate investigations were proper because there were three separate locations where Claimant did not notice defects. Moreover, the FRA Manual was not introduced because Claimant was not charged with an FRA violation.

The Organization contends that the Carrier committed errors in the investigation notice that should serve as a procedural bar. The notice was far too vague for the Organization to prepare a defense. Claimant inspects a lot of track and there was no way for the Organization to ascertain where the complained of defects were located. On the merits, the Organization asserts a lack of substantial evidence of the violation. Further the Carrier cites no rule violations and relies upon an FRA violation in the notice.

On the merits, the Organization argues that Claimant performed his inspection on August 14, 2017. The Carrier witness agreed that Claimant's inspection was within the proper timeframe for investigations. However, there is not substantial evidence that Claimant failed to note the defect.

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 Claimant. 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.

The Board notes that the instant matter is one of three cases in which Claimant received a notice of investigation for the same date. Like this notice, none contained a location for the alleged infraction on August 16, 2017. The Organization raises valid issues about the notice of investigation. The notice is devoid of any location within the territory in which Claimant performs his Track Inspector duties. Absent that some idea of location in the notice, it would be impossible for the Organization to prepare a coherent defense to the three investigations.

The Carrier states that it notified the Organization about the location of each investigation prior to the hearing and that it was sufficient notice to apprise the Organization. A review of the record shows that the Carrier notified that the alleged site of the infraction was on the Brush Subdivision. The Brush Subdivision is over 85 miles – not counting the Sterling Main Line. At the hearing the Carrier was able to pinpoint the alleged violation to MP 469.2 – a 1/10th of a mile degree of certainty. The Carrier was aware of where the alleged infraction occurred, but did not share that information with the Organization despite having it readily available. Moreover, the Carrier scheduled three cases in succession and put the Organization at a distinct disadvantage for each of those hearings. The Organization was forced to guess what the Carrier was investigating.

This Board finds that the Carrier did not apprise the Organization of the alleged violation with sufficient specificity that a defense could be formed.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made:



Carrier Member



Organization Member



Neutral Member

Dated: July 9, 2019