

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 81

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0065

BMWE FILE NO. C-18-Do40-8

Claimant: T. Fisher

STATEMENT OF CLAIM

Appealing the decision of Powder River Division General Manager Leif Smith in his letter dated February 7, 2018, to uphold the discipline assessed to Mr. Ty Fisher as appealed in letter from Vice General Chairman Jim Varner dated December 10, 2017, when Mr. Fisher, hereinafter referred to as Claimant, was assessed a Standard Formal Reprimand, and a one (1) year review period for alleged violation of Maintenance of Way Safety Rules (MWSR) 1.2.3 Alert and Attentive and 12.1.1 General Requirements, Carrier File: PWR-MOW-2017-01054.

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 1000 hours, Wednesday, September 6, 2017 at the BNSF Depot, 300 North Railway Street, Brush, CO 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to remain alert and attentive and properly operate company vehicle in a safe and careful manner on August 24, 2017, resulting in damage to company vehicle.

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

As a result of investigation held on Tuesday, September 19, 2017 at 0900 hours at BNSF Depot 100 Clayton Street, Brush, CO, 80723 you are hereby assessed a Standard Formal Reprimand for your failure to remain alert and attentive and properly operate company vehicle in a safe and careful manner on August 24, 2017, resulting in damage to company vehicle.

In addition, you are being assessed a One (1) Year Review Period that commences on October 17, 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 MWSR 1.2.3 Alert and Attentive and MWSR 12.1.1 General Requirements.

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 there is substantial evidence in the record of Claimant's rules violation. Claimant was not alert and attentive and did not operate the Carrier vehicle in a safe manner. He struck a pole stump when not paying attention. The Carrier also maintains that the discipline was commensurate with the misconduct. The Carrier did not abuse its discretion when it imposed discipline.

The Organization argues that Claimant could not have seen the stumps underneath the grass. The grass had not been mowed and Claimant and his co-workers were not notified of the stumps in the area. There is no substantial evidence in the record that Claimant was operating the Carrier vehicle in an unsafe manner.

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.


This Board has reviewed the evidence in the instant matter and finds that there is no substantial evidence in the record. The evidence shows that there was no way for Claimant to know of the sawed-off telephone pole stumps in the grass. He was not told of their existence. Further, inspection of the photographs corroborates that the grass was not recently mowed. There was no way that Claimant could have seen the stumps from the cab of the Carrier truck.

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