

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 89

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF 10-18-0361  
BMWED C-18-D040-31  
Claimant: R. Asche

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STATEMENT OF CLAIM

The Organization requests that the discipline of Mr. Rick Asche be overturned, no reference to this discipline be placed in Mr. Asche's personnel record and he be made whole.

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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 of an investigation for the purpose of:

[A]scertaining the facts and determining your responsibility, if any, in connection with your alleged failure for installing and not properly protecting known FRA Defects, while installing panel at railroad grade crossing 9th street in Oakland, NE MP 60.6 on the Sioux City Sub on May 16th, 2018. The date BNSF received first knowledge of this alleged violation is May 23, 2018.

Following a continuance, an investigation was held. Claimant was sent a letter which provided:

As a result of investigation held on Wednesday, July 11, 2018 at 0900 hours at BNSF Railway Depot, 212 South Main Street, Fremont, NE, 68025 you are hereby assessed a Level S 30 Day Record Suspension for your failure for

installing and not properly protecting known FRA Defects, while installing panel at railroad grade crossing 9th street in Oakland, NE MP 60.6 on the Sioux City Sub on May 16th, 2018.

In addition, you are being assessed a One (1) Year Review Period that commences on August 10, 2018. Any rules violation during this review period could result in further disciplinary action. Effective close of shift on August 10, 2018 your foreman seniority date will be forfeited with restriction from bidding or bumping to foreman for a period of 1 year.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of EI 23.1.3 Assistant Foremans Roles, Responsibilities, and Expectations.

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).

The Carrier maintains testimony and evidence presented at the formal investigation, prove Claimant violated the rules as charged, and the assessed discipline is consistent with BNSF's discipline policy, the Policy for Employee Performance Accountability (PEPA). The Carrier's position was summarized in an appeal letter which provides, in pertinent part:

When an FRA-qualified employee finds conditions that make the track unsafe for the trains moving at authorized speed, or finds deviations greater than those permitted by the BNSF Engineering Instructions and/or FRA Track Safety Standards, the employee has the authority and is required to do one or more of the following:

- Make Repairs.
- Place temporary speed restrictions.
- Remove track from service.
- Complete all required FRA reports correctly and on time.

On the date in question, BNSF System Welding Supervisor Billie Shipp and Manger Track Welding Don Hiatt were traveling over the area where the defect rail was located. They found through their inspections that the rail was well out of BNSF and FRA compliance when it came to the tolerance levels of the rail. It was determined prior to the investigation that both Claimants had been involved in rehabbing the crossing where the defects were later found.

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The date BNSF received first knowledge of this alleged violation is May 23, 2018.... It was not until System Welding Supervisor and Manager Track Welding were out performing audit inspections before they found the issues. It was determined through research that the issue was caused on May 16, 2018 and that was when Claimants performed the work.

The Organization counters that Claimant was denied not only his right to a fair and impartial hearing, but also his right to due process. The Organization argues that Carrier has improperly removed the Claimant's foreman seniority and improperly restricted him from bidding and bumping to foreman positions. The Organization contends that the Carrier's claimed date of May 23, 2018 as the date when it received first knowledge of this alleged violation is incorrect. The Organization points out that the testimony during the investigation shows that Carrier official, Roadmaster Michael Idhe, knew about this alleged FRA defect as early as Wednesday, May 16 and as late as Friday, May 18, yet took no exception to it. Therefore, the May 23 date was inaccurate. Accordingly, the initial investigation date of June 6 exceeded the 15-day time limits as required under Rule 40A.

The Organization contends further that the date the decision was issued violated Rule 40 of the Agreement between the parties. Rule 40D states:

A decision will be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative.

The Organization asserts that the decision was delivered to Claimant on August 14, 2018 which is four (4) days late.

On the merits, the Organization contends that the Carrier did not provide any evidence, let alone substantial evidence, that the charged employee was guilty of violation under Engineering Instruction (EI) 23.1.3. In fact, the Carrier never entered the Rule into the hearing transcript nor was there any discussion during the hearing concerning this EI. The Claimant had no notice or opportunity to defend himself on the charges that he violated EI 23.1.3.

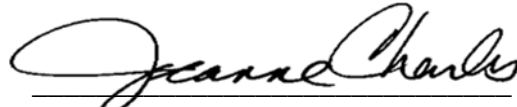
In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. The Board's role is an appellate function. It must be determined whether substantial evidence to


sustain a finding of guilt exists. If such evidence is in the record, the Board may not disturb the discipline imposed unless it can be said that the penalty was arbitrary, capricious or an abuse of the Carrier's discretion. A careful review of the record convinces the Board that the Carrier failed to provide sufficient evidence to prove the charge.

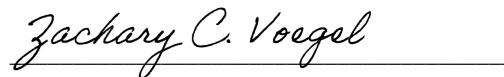
Accordingly, the relief sought by the Organization is sustained. The 30-day suspension shall not remain on Claimant's personal record and he shall be made whole. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

**AWARD**

Claim sustained in accordance with the findings above.

  
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Jeanne Charles  
Neutral Member

  
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Carrier Member  
Dated: September 23, 2020

  
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Labor Member  
Dated: 9-23-2020