

PUBLIC LAW BOARD NO. 7585

**Case No. 10/Award No. 10
Carrier File No.: 11-12-0031
Organization File No.: S-P-1622-G
Claimant: J. Jacobson**

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

FACTS:

On Aug. 3, 2011, Claimant James Jacobson was the Employee In Charge with track authority which included switch 1425 East at milepost 90.3 on the Yakima Valley Sub. Michael Holland, working under his warrant, threw a switch to unload a truck and forgot to return it to the normal position. He did not indicate this in the paperwork he filed. The next day Conductor Aaron Thompson ran his train over the switch, stopped and closed it then called Jacobson to let him know the switch had been open.

Jacobson did not report the incident and things remained quiet until 1600-0700 on Aug.8 when Manager of Maintenance Planning Paul J. Farley, Sr. received an email from General Director Line Maintenance Michael Theret regarding an anonymous phone call reporting the incident. At that point, Farley inquired and learned of the open switch and of Jacobson's failure to report.

Jacobson was issued notice of an investigation "in connection with your alleged careless conduct regarding the safety of others when you allegedly failed to properly secure or ensure that the main line switch was lined for normal movement prior to releasing track authority, allegedly failed to record information properly on the prescribed form, and allegedly failed to properly report or furnish information regarding a condition that threatened the safety of the employees and trains while you were working as Foreman...." Following investigation, Jacobson was dismissed by letter stating: "[Y]ou are hereby dismissed ... for careless conduct regarding the safety of others when you failed to properly report or furnish information regarding a condition that threatened the safety of the employees and trains It has been determined ... that you were in violation of MOWOR 1.2.7 Furnishing Information, MOWOR 1.4 Carrying Out Rules and Reporting Violations, and MOWOR 1.6 Conduct."

CARRIER POSITION:

The investigation fell within the 15-day contractual limit of Farley being on notice of a potential infraction. None of the other alleged procedural flaws in the case resulted in any prejudice to Jacobson's case. Claimant was dismissed for failing to report one of the most serious rule violations in the industry, and then failing to be truthful to a supervisor about it. He clearly admitted his guilt and acknowledged noncompliance with Rules 1.2.7 and 1.6. As a 37-year employee, Claimant as much as anyone surely understood the possible consequences of his actions.

ORGANIZATION POSITION:

Carrier officers were made aware of the incident well before the asserted date of Aug. 8, 2011. The statement of the Conductor is clearly dated Aug. 4, 2011, meaning management was on notice of the open switch since that date. As a result, the investigation was untimely and under Rule 40.J of the collective bargaining agreement "the charges against the employee shall be considered as having been dismissed."

The Organization further maintains a fair and impartial investigation was denied since management undertook to investigate the case prior to the scheduled investigatory hearing, and interviewed the employee without offering representation.

The Carrier failed to give notice of the charges Claimant faced during the investigatory hearing. Rule 40A of the collective bargaining agreement requires a fair and impartial investigation, and Rule 40C states "The notice must specify the charges for which investigation is being held." The Organization concedes Claimant was charged with carelessness regarding safety issues. However, it contends he was not properly charged with dishonesty, though when he was dismissed it was for alleged dishonesty under Rule 1.6. It argues the Carrier is prohibited from dismissing an employee for violations he has not been charged with.

Finally the Organization contends the discipline is grossly excessive in view of Claimant's exemplary record of 37 years' service without any discipline whatsoever.

DECISION:

Conductor Thompson's statement is dated Aug. 4, 2011. However, there is no evidence that management had it in hand until Aug. 8 when Farley met with the conductor and interviewed him. He testified that this was when he received the statement. When Farley spoke with Division Trainmaster Ward Angelos on August 8, Angelos had already spoken with the train crew, indicating he was already aware of the switch issue. Nothing more is in the record. Theret's email was extremely early on the morning of Aug. 8. There is nothing in the record to indicate that an official of BNSF was on notice of the open switch before Aug. 7 at the earliest. This would give management until Aug. 22 to conduct the investigatory hearing.

It is certainly possible that management knew about the situation prior to Aug. 7. Clearly there was a path of information going to and through Theret that is not recorded in terms of time. We don't know when Angelos spoke to the train crew. Conductor Thompson was not asked when he wrote his statement or how it was shared. There is no proof that management knew of the possible violation before Aug. 7. Hence, the Arbitrator lacks a factual basis on which to find a timeliness problem.

It is clear from the record that management interviewed Jacobson prior to the investigatory hearing without offering representation. However, a representative would likely counsel him to be truthful and he was. No prejudice is evident from this interview.

The Organization protests that Claimant Jacobson cannot be disciplined for violation of MOWOR 1.6 because it was not cited during the hearing. According to the notice of investigation, the focus of the hearing would be careless conduct regarding the safety of others. During the investigation, facts showed that Claimant Jacobson at no time took any action which placed others at risk. By the time he found out about the open switch, it had been placed back in the normal position and the danger had passed. His falsehoods and hiding of information did not place others at risk; the risk had passed. The Carrier is right that Claimant Jacobson was guilty of dishonesty and he admitted as much during the hearing. The problem is he was never properly charged with dishonesty under Rule 1.6.

Rule 40C is quite explicit and clear; employees are to be given notice of the violations they are charged with prior to an investigation. The purpose of the investigation is not to dig up new allegations but to determine whether the existing charges are well founded. A fair and impartial investigation is not properly used to stick new charges without notice. It follows that Claimant Jacobson is not properly charged with dishonesty.

He clearly stands in violation of MOWOR 1.2.7 Furnishing Information. This violation is not adequate to support a dismissal, particularly in view of his 37 years of service without a single disciplinary action. This is an employee who should be deemed capable of learning from his mistakes and continuing to serve the Carrier after receipt of progressive discipline.


AWARD:

The claim is sustained in part. The penalty shall be reduced to a one week actual suspension with one year review.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

March 18, 2013; Cleveland, OH


Patricia T. Bittel, Neutral Member

 March 26, 2013
Gary Hart, Labor Member


D. J. Merrell, Carrier Member