

Special Board of Adjustment No. 1112

Parties to Dispute

Brotherhood of Maintenance of Way)
Employees' Division/IBT)
)
vs.)
)
Burlington Northern Santa Fe)
Railway Company)

Case 92/Award 93

Statement of Claim

Appeal of discipline of a formal reprimand assessed Claimant Terry D. Kesler on April 18, 2005.

Background

On March 8, 2005 the Claimant to this case, Terry D. Kesler was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged failure to work in a safe manner as a truck driver. An incident involving the Claimant, which happened on February 22, 2005 while he was working near M.P. 100.5 on the Carrier's Devils' Lake Subdivision, led to his being charged by the Carrier.¹

An investigation of the incident was held at the Carrier's Section Headquarters at

¹The first notice of investigation that was sent to the Claimant on February 24, 2005 mistakenly states that the charges against the Claimant involved an incident that took place on March 24, 2005. This was corrected by a notice of investigation sent to the Claimant on March 8, 2005 which stated that the alleged incident took place on February 22, 2005. The Organization's objection to the change in the content of the notice of investigation is noted by the Board which will not dismiss the charges on that basis alone albeit there are other serious issues with the transcript of investigation as will be observed later by the Board in this Award. Obviously, there was a typographical error in the first notice since the Claimant could not have been accused of violation of Carrier's rules on February 24, 2005 over an incident that allegedly took place a month later than that date.

Church's Ferry, North Dakota on March 22, 2005. On April 18, 2005 the Claimant was advised that he had been found guilty of violating the Maintenance of Way Safety Rules S-1.1 and S-1.4.7 and he was assessed a formal letter of reprimand.

The discipline was appealed by the Claimant in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization that created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been granted final and binding powers to issue an Award on this case based on the criteria outlined by the parties in Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

Discussion & Findings

Rule 40 of the parties' labor agreement is incorporated into this Award by reference and in toto.

Rules S-1.1 and S-1.4.7 of the BNSF Safety Rule book are also incorporated into this Award by reference in pertinent part.

According to testimony by the road master at Minot, North Dakota who was the supervisor of what is known as the Carrier's Church's Ferry section, there is a track crossing at grade at Milepost 100.5. This crossing was a minimum grade crossing. It was not maintained during the winter months. As far as can be determined from this witness'

testimony, the track inspector reported to him prior to February 22, 2005 that the crossing at that point was not good and it was being closed to vehicular traffic. The crossing planks had to be repaired and repairs were done on February 22, 2005. Some time later, on February 25, 2005 this road master went to inspect the 100.5 repairs with a number of other Carrier supervisors. As far as can be determined, from testimony by this witness, the repairs had not been done to his satisfaction. He states that the repairs should have been made by apparently pouring alcohol on one of the planks at the crossing to thaw it out.

There were attempts by the hearing officer to interrogate a number of other witnesses at the investigation. For various reasons as will be noted below the testimony by these witnesses provided no useful information for the Board whereby it could frame a ruling in this case on merits.

A review of the full transcript of investigation in this case warrants the following conclusions. The Board has great concerns about the quality of the evidence found in the investigative record from the hearing held on March 22, 2005.

First of all, the incident which led to the assessment of discipline for the Claimant was supposed to have taken place on the date of February 22, 2005. The main witness at the investigation, the road master, was not present at the location where the alleged unsafe work was done and, at most, could testify about a date some three days later. The other witnesses at the investigation simply refused to answer questions posed to them by the hearing officer about February 22, 2005. They stated that they were at the

investigation to answer only questions about the date of March 24, 2005.

Secondly, assuming that the substance of the hearing was logically coherent, which in many places it was not, the technical quality of the recording of the hearing, and its subsequent transcription, leaves the Board with a transcript replete with "inaudibles" instead of answers to questions asked of witnesses. Some important questions of fact are posed to the road master, for example, and his answers to those question provide no information to the Board since they were not picked up by the recording device and thus were transcribed as inaudibles. In some thirty years, now, of reading transcripts of investigations in this industry, and in using them to render rulings, the neutral member o this Board cannot remember coming across a transcript of poorer quality than the one appended to this case. Its level of quality is disrespectful to both due process and arbitral procedures.

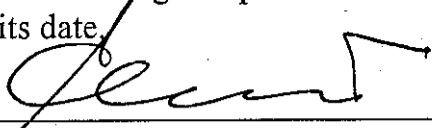
Finally, and of great concern to the Board, is that the transcript fails to provide next to no substantive information with respect to the merits of the case. The Claimant to this case is accused to failure to work in a safe manner as a truck driver. There is insufficient information of record to provide basis of rulings on why he was accused of such infraction in the first place.

This Board can only reasonably frame its rulings on basis of evidence of record. Since this is a discipline case the Carrier as moving party bears the burden of proof that the evidence provided the Board is comprehensible. In the instant case that test has not been reasonably met.

For reasons outlined in the foregoing the Board will sustain the claim. The formal reprimand assessed Claimant Terry D. Kesler on April 18, 2005 shall be removed from his file.

Award

The claim is sustained in accordance with the Findings. Implementation of this Award shall be within thirty (30) days of its date.



Edward L. Suntrup, Chair &
Neutral Member

Date: September 27, 2005