

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37263
Docket No. MW-37376
04-3-02-3-412**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S suspension of twenty (20) days and probation period of one (1) year] imposed upon Mr. B. Kile and upon Mr. C. Pashek for alleged violation of Rules S-1.3.1, S-21.1, 6.3.1, 6.3.3 and 6.3.4 while working at or near Mile Post 468.1 on August 23, 1999 was unwarranted, disparate, excessive and in violation of the Agreement [System File C-00-S090-1/10-00-0055 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. B. Kile and Mr. C. Pashek shall now each ‘... be made whole for all losses suffered account of this discipline. I also request that any mention of this case be removed from both of the principles personal record.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant B. D. Kile established and holds seniority as a Welder, with seven years of service. Claimant C. W. Pashek established and holds seniority as a Grinder, with 25 years of service. On August 23, 1999, they had track authority and were working on Main Track No. 1 at Milepost 468.1.

Upon completion of their work, the Claimants "set-off" or cleared Main 1 by removing the hy-rail truck from the track, and made preparations to return to the depot. Preparations included ensuring that scrap rail and other supplies were properly fastened, and removing personal protective equipment, such as hardhats. It was during this time that Claimant Kile observed a plug rail in Main Track No. 2 ("Main 2") that needed to be replaced. However, before that rail could be replaced, a measurement was required in order to determine the proper length of the replacement rail.

The Claimants decided to measure the plug rail before returning to the depot, and to do so, proceeded to foul Main 2 at Milepost 468.1 without obtaining track and time, and without wearing their hardhats. The Claimants admitted to said violations at the Investigation.

By letters dated August 26, 1999, the Claimants were directed to "Arrange to attend investigation in the Burlington Northern Santa Fe Railroad Section House, Red Oak, Iowa, at 1000 hours, Friday, September 3, 1999, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear proper PPE safety equipment and your failure to provide proper protection while fouling the main line on August 23, 1999, at or near MP 468.1 at approximately 1220 hours." The Investigation was held on September 3, 1999.

In letters to both Claimants dated September 28, 1999, Division Engineer W. J. Seeger notified them as follows:

“This letter will confirm that as a result of our formal investigation on September 3, 1999, concerning your failure to wear proper PPE safety equipment and your failure to provide proper protection while fouling the main line on August 23, 1999, at or near MP 468.1 at approximately 1220 hours, you are issued a Level S suspension of 20 days for violation of Rules S-1.3.1, S-21.1, 6.3.1, 6.3.3 and 6.3.4. Additionally, you have been assigned a probation period of one year. If you commit another serious rule violation during the tenure of this probation period, you will be subject to dismissal.”

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. While the Organization concedes that the Claimants did engage in the alleged violations, it claims that the punishment instituted was overly harsh. According to the Organization, the Carrier should now be required to clear the Claimants' records of any mention of the incident, to compensate them for all lost wages, including lost overtime and to make them whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. According to the Carrier, it is clear that the Claimants clearly violated numerous Rules when they did not request track protection and when they did not wear their hardhats. The Carrier considers the Claimants guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimants violated the applicable Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it

appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

In the instant case, the Claimants are charged with violations of Rules S-1.3.1, S-21.1, 6.3.1, 6.3.3 and 6.3.4 when they did not obtain track protection and did not wear their hardhats. The Rules provide as follows:

"S-1.3.1 Requirements

Be familiar with and wear personal protective equipment and clothing as required by your job. Any changes made in the recommended use or design of personal protective equipment or clothing must be approved by the manufacturer.

S-21.1 Personal Protective Equipment Requirements

All BNSF employees, contractors, and their agents, visitors and vendors must wear the following equipment while on BNSF property:

- * Hard hats with minimum six-point suspension.

6.3.1 Track Occupancy

Except as provided for below in Minor Work and Routine Inspection or in Rule 6.19.7 . . . MW employees must apply one of the following types of authority or protection when on-track off-track equipment is used on or foul of the track or when work is performed on or foul of the track.

* * *

Minor Work and Routine Inspection

Lone workers or employees protected by a lookout may perform minor work or a routine inspection without authority or protection when they meet all of the following conditions:

On main tracks controlled sidings and any track where a blocked signal system is in effect:

- * The work will not affect the movement of trains.**
- * The lone worker or lookout is able to visually detect the approach of a train moving at maximum authorized timetable speed and position themselves in a predetermined place of safety at least 15 seconds prior to the arrival of the train as indicated on the Statement of On-Track Safety.**
- * Power-operated tools or roadway maintenance machines are not in use within hearing distance.**
- * The ability to hear and see approaching trains and other on-track equipment is not impaired by background noise, lights, precipitation, fog, passing train or other physical condition.**
- * Except when protected by a designated lookout, the work is performed outside the limits of a control point. . . .**

6.3.3 Visual Detection of Trains

Employees assigned to work as a lookout, and lone workers using individual train detection, must complete form entitled, 'Statement of On-Track Safety' prior to fouling a track. The completed form

must be in the employee's possession while the work is being performed.

6.3.4 Lookouts

Lookouts must adhere to the following:

- * Be trained and rules qualified.**
- * Identify a place of safety where they and employees they are protecting can go when a train approaches.**
- * Communicate the place of safety to the other employees prior to the track being fouled.**
- * Devote their full attention to detecting the approach of trains and warning employees."**

After a review of the evidence, the Board finds that there was substantial evidence in the record to sustain the Carrier's position that the Claimants did not act appropriately when they did not obtain protection and when they did not wear their hardhats, as the Claimants so admitted during the Investigation. The Organization was unable to rebut this evidence. We note that the Organization contends that the Claimants' work falls within the "Minor Work" exception in Rule 6.3.1. However, the Organization was unable to substantiate such claim.

Based on this determination, the Board believes that the discipline imposed on the Claimants was reasonable and will not disturb it.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 5th day of November 2004.