

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39473
Docket No. MW-39978
08-3-NRAB-00003-070186
(07-3-186)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. T. Sibley under letter dated February 23, 2006 for alleged violation of Maintenance of Way Operating Rules 6.51 and 6.50.3 on charges of alleged failure to maintain a safe braking distance while assigned as a machine operator on RPI0 when Spiker BNX 4400346 struck Spiker BNX 4400351 on the No. 5 receiving and departure track at Galesburg, Illinois on November 9, 2005 was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File C-06-D070-2/10-06-0143(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. T. Sibley shall now receive the remedy prescribed by the parties in Rule 40G."

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.

The Claimant established and held more than 16 years of seniority in various classifications within the Maintenance of Way and Structures Department. On November 9, 2005, the Claimant was assigned and working as a Group 3 Machine Operator within the Roadway Equipment Sub-Department operating an on-track spiker on Production Rail Gang RP 10. On November 11, 2005, the Claimant was notified to attend an Investigation into his “. . . alleged failure to operate Spiker BNX 4400346 safely which resulted in work heads striking the ties, at approximately 1430 hours and [his] alleged failure to maintain a safe braking distance at approximately 1445 hours, when Spiker BNX 4400346 struck Spiker BNX 4400351 which resulted in approximately \$8000.00 damage . . .” on November 9, 2005. After a Hearing, the Carrier found the Claimant guilty of the charges, and dismissed him for violating Operating Rules 6.51, Maintaining a Safe Braking Distance, and 6.50.3, Equipment Components Clear. The discipline letter specifically noted that the Claimant’s prior record had been taken into consideration.

The Organization contends that the Carrier failed to meet its burden of proof, relied on assumption, speculation, and unproven allegations, and imposed discipline that was excessive, capricious, and improper.

The essence of the Organization’s position is that the Hearing Officer and the Carrier made mistakes in evaluating the facts of the two incidents. Rule 6.50.3 requires that the employee be sure all equipment components will clear before passing over crossings, switches, derails, and frogs. Although the Claimant testified that he followed standard procedure in preparing his machine for on-track travel, and had reported to Mechanics a previous problem with heads bleeding down on his machine, he admitted that he had not gotten down to inspect his machine prior to movement to see if the heads were all the way up. The Carrier concluded that the Claimant failed to properly lock the spiker’s work heads, based on the evidence of the Work Equipment Supervisor who interviewed the Mechanics who had inspected and worked on the machine immediately

following this incident. According to the Mechanics, the heads had been locked for traveling before they had risen to the proper height, which caused them to “bleed” down to the point of impact. While the Organization complains that the Carrier is relying on nothing other than “speculation, assumption, or conjecture,” its conclusions are a reasonable evaluation of the nature of the equipment and the circumstances of the accident. As in Third Division Award 32758:

“With respect to the merits of the claim, this case appears to present a classic illustration of circumstances that are within the scope of the familiar doctrine of *res ipsa loquitur*. That well established principle in rough summary provides that where conduct causes an accident of a type that does not happen in the ordinary course of events if due care is exercised, and the instrument of harm is shown to have been under control of one party, a case of negligence is made out in the absence of any explanation tending to show that it was not due to his want of care.”

Here, the Hearing Officer was entitled to assess the credibility of the Claimant’s accounts and explanations as to how the accidents happened, and that assessment is not within our power to set aside. The Claimant had not inspected the heads after locking them, so his own suggestion that there had been a mechanical failure was itself speculative. Accordingly, it was within management’s discretion to discredit that theory and credit the Mechanics’ explanation that the first accident was the result of the Claimant’s negligent failure to lock the heads properly.

The Organization asserts that the Claimant should not have been found responsible for the second incident because the Mechanics’ failure to properly secure the damaged assembly, in their rush to get the machines moved, caused it to shift, which in turn distracted him and interfered with his ability to apply the brakes, resulting in the collision with the machine ahead of his. However, the Board cannot find unreasonable the Carrier’s conclusion that because the Claimant failed to brake in time to prevent the collision, he necessarily failed to maintain a safe distance between the two traveling machines, in violation of Operating Rule 6.51. The distraction of the slipping assembly does not excuse him from responsibility to operate his equipment safely.

Finally, the Organization contends that the penalty of dismissal of the Claimant was excessive in light of the nature of the offense and his 16 years of service. Under the Carrier’s Policy for Employee Performance Accountability, two serious Rule offenses

within a three-year period will result in dismissal. The Claimant had served a Level S record suspension of 30 days and was on a three-year probation for sleeping on duty on August 29, 2003. (See Third Division Award 38957, upholding that discipline.) Thus the November 9 events were the second Level S violation within three years.

Once an offense is proved, we are not warranted in disturbing the penalty unless it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of management's discretion. See Third Division Awards 16166 and 37426. In this case, the record supports the Carrier's conclusion that the Claimant violated Operating Rules 6.50.3 and 6.51 on November 9, 2005, his second Level S offense within three years. These were significant failures to follow Rules intended to protect the safety of employees and property. In light of the Claimant's record and the nature of the offenses, the Board cannot say that the dismissal was excessive, unjust, unreasonable, or arbitrary, and we will not overturn it.

AWARD

Claim denied.

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 29th day of December 2008.