

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S Record Suspension of thirty (30) day suspension – fifteen (15) days actual suspension and fifteen (15) days record suspension] imposed, under date of February 15, 2001, upon Mr. R. N. Hardin for alleged violation of Maintenance of Way Operating Rule S-1.0 (Core Safety Rules) in connection with alleged failure to be alert and attentive when BNSF Vehicle #15803 was backing up and struck him, resulting in his personal injury, at approximately 1530 hours on November 16, 2000 at or near Mile Post 7.8 on the Orin Subdivision, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-01-S090-4/10-01-0214-D (MW) BNR)].**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. R. N. Hardin shall now receive the remedy prescribed by the parties in Rule 40(G).”**

****CORRECTED****

**Form 1
Page 2**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

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.

At the time of the November 16, 2000 incident at Mile Post 7.8 on the Orin Subdivision in Wyoming from which this claim arose, the Claimant had service dating from August 1974 in the Track Sub-Department.

The Claimant was assigned as an Assistant Foreman on mechanized Rail Gang RP05. He was standing in the road next to the right-of-way observing machines operating on the track 20 feet in front of him. An earlier job briefing warned employees regarding weather conditions including 18 degree temperatures and high winds. The Claimant wore ear plugs and three layers of hoods to cover his head and ears.

The gang had Traveling Mechanics who drove trucks along the road in case machines had problems or needed fuel. Unable to turn his truck around, Truck Driver/Mechanic A. C. Bradfield began backing up to his next work assignment. He looked behind his vehicle, but failed to see the Claimant. Bradfield did not have anyone clear the area behind him, but acknowledged that he should have gotten out of the truck and cleared it himself. Another employee tried to radio a warning about the Claimant being on the road to Bradfield while he was backing up, but he had not changed the speaker back from sounding outside the truck to sounding inside the truck.

****CORRECTED****

**Form 1
Page 3**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

The Claimant testified that he was walking on the right-of-way road observing the Mechanics who were working on the rail heater. He noticed a machine that had broken down and a spiker machine ahead of it that was running, but without either an Operator or Feeder present. The Claimant stopped to look for the Feeder and Operator and tried to discover why these two men were not operating their machine when the truck hit him. The Claimant testified that in addition to wearing three hoods and ear plugs, the spiker machine and the other machine were both running next to him and consequently he was unable to hear the truck's back up beeper. He testified that, before being hit by the truck, he looked to the right and the left along the road and did not see the truck moving.

Bradfield's vehicle struck and injured the Claimant.

The Claimant testified that he was standing on the right-of-way road looking at a machine and was trying to locate its missing Operator when he was hit by the bumper of the truck.

The Truck Driver/Mechanic acknowledged that he did not comply with applicable safety procedures, including not having another employee assist him while backing up, although an employee was available. The Truck Driver/Mechanic also acknowledged that he did not comply with relevant Safety Rules and could have avoided this accident if he had used more care. Neither of the two carrier witnesses (Claimant's Foreman and his Roadmaster) was present at nor had first-hand knowledge of the incident. Their knowledge of the incident consisted of what the Claimant and Bradfield reported to them.

By letter dated November 20, 2000, the Carrier directed both the Truck Driver/Mechanic and the Claimant to attend an Investigation to ascertain the facts and assess responsibility, if any, "in connection with your alleged failure to be alert and attentive" during the incident. After a postponement, the Hearing was conducted on January 16, 2001 by Roadmaster J. A. Powers. The Carrier's transcript is the official record of the Hearing. The foregoing facts were adduced at the Hearing.

****CORRECTED****

**Form 1
Page 4**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

Following the Hearing and by letter dated February 15, 2001, the Carrier issued the Claimant a Level S 30-day suspension – 15 days of actual suspension and 15 days of record suspension for violating BNSF Maintenance of Way Safety Rule S-1.0 by failing to be alert and attentive when performing his duties.

The Carrier points to Rules 1.1 and 1.1.2, entitled “Safety” and “Alert and Attentive,” respectively, which state, in pertinent part:

“Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

*** * ***

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.”

Core Safety Rules S-1.0 and S-1.2.7 respectively state, in pertinent part:

“These Rules provide a core of safety work practices for BNSF people. The rules apply every day and in every job we do. They will guide and direct us in maintaining a safe work environment.

*** * ***

Do not perform a task alone that can always safely be performed by two or more people.”

The Organization protested the discipline issued to the Claimant. The dispute was progressed on the property in the usual manner, but without resolution.

The Carrier argues that the Claimant admitted that the daily job briefing reviewed hazards of bundling up against the cold weather, one of which was reduced visibility. It points to the Claimant’s testimony that he was standing in the

****CORRECTED****

**Form 1
Page 5**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

road, wearing three hoods and ear protection and that he was focused on where his Machine Operator and Spiker had gone. It points out that on November 20, four days after the incident, the truck's back-up beeper was checked and found to be operating correctly. Because of these details and the fact that, if working properly, the back-up alarm sounds at 120 decibels, the Carrier urges that the Claimant would have had to enter the road after the Truck Driver/Mechanic began backing up or else the Claimant would have seen and heard the truck, had he been attentive.

The Carrier asserts that substantial evidence in the record indicates that the Claimant violated Carrier Safety Rules as alleged and received discipline in accordance with its stated discipline policy. In response to the Organization's complaint, the Carrier argues that the Claimant failed to show that the discipline imposed was harsh, unwarranted, inappropriate, arbitrary, capricious or in violation of the Agreement.

The Carrier asserts that the fact that the Claimant was struck is evidence of his unsafe conduct. It relies for authority on the doctrine of res ipsa loquitur as summarized and applied in Third Division Award 32758:

“ . . . 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.”

The Carrier contends that there is no other plausible explanation as to the proximate cause of this accident than the Claimant's lack of attentiveness. The Organization counters that the record indicates that the cause was the Truck Driver/Mechanic backing up in the truck without asking for a lookout or other assistance.

The Carrier argues that this incident involves a “Serious” violation of the Maintenance of Way Rules as stated in Section 7 of Appendix B of PEPA and that the Carrier is permitted but not required to allow alternative handling. It calls the

****CORRECTED****

**Form 1
Page 6**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

Board's attention to the following PEPA language under the heading "Serious Rule Violations:"

"b. An employee involved in a first-time serious incident will be given a 30-day record suspension and may be offered training to help correct the behavior that gave rise to this discipline. If an employee declines training, an actual suspension may be imposed. . . ."

The Carrier contends that the Claimant was not alert and attentive when standing in the road and that when the truck struck him, he could have been seriously injured or killed. Therefore, it contends, the discipline was appropriate and not arbitrary or capricious.

The Carrier points out that it is not the function of the Board to substitute its judgment for the Carrier's as to the level of discipline issued and cited the following language in Third Division Award 30124:

"The Board has well-defined role in evaluating the penalty assessed in such disciplinary situations. As the Second Division held in Award 1323, 'it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the Carrier's in disciplinary matters, unless the Carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion.'"

The Carrier cites on-property Third Division Award 33778 wherein the Board noted the claimant's past record of serious back problems and found substantial evidence to support the carrier's letter of censure for the claimant's failure to follow proper technique as he bent to lift a heavy tool box on a dark and rainy morning without moving the equipment that lay in his path.

The Carrier also relies for authority on Special Board of Adjustment No. 923, Award 15, which considered the dismissal of an employee following two Investigations. One involved the employee's testimony that, although he was at fault, "accidents will happen" after the spike puller vehicle he was piloting on the

****CORRECTED****

**Form 1
Page 7**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

tracks rear-ended a spike cleaning machine traveling in the same direction ahead of him on the tracks while his attention was diverted during the period when he was looking for a cigarette in his jacket pocket. The Carrier points to Third Division Award 37460 upholding a 30-day suspension of a claimant found cutting a galvanized fence post with a portable band saw while wearing neither his hard hat nor his safety glasses as required.

The Carrier also cites on-property Public Law Board No. 6204, Award 21 which upheld a 20-day suspension and other discipline of a claimant who failed to obtain authority to occupy a main track and his failure to notify another Foreman that he was going to run on the Foreman's Track and Time Permit while assigned as Foreman on a tie gang.

The Carrier urges that it proved the Claimant to have been at fault in the incident, in violation of the cited Rules, and that the penalty imposed was not arbitrary or excessive.

The Organization argues that the Carrier did not meet its burden of proving by substantial evidence considered in the record as a whole that the Claimant was guilty of the charges against him and that the discipline imposed was not harsh, unwarranted, inappropriate, arbitrary, or capricious. It asserts that the Carrier is essentially claiming that merely because the Claimant was injured, he must have violated some Rule and that discipline against him is, therefore, appropriate. The Organization argues that this does not indicate that the Claimant was not working safely or that he violated any Safety or other Rule. The Organization asserts that no evidence indicates that the Claimant violated the Agreement or any Safety Rule. In addition, the Organization points out, the Truck Driver/Mechanic was found to be at fault and was disciplined by the Carrier.

The Organization points to the Claimant's testimony during the Investigation that he participated in the safety briefing on the day of the incident and was wearing foam ear plugs in his ears, as he was required to do, as well as three hoods. It asserts that, as a Supervisor, the Claimant was simply doing his job when he was struck from behind.

****CORRECTED****

**Form 1
Page 8**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

The Organization emphasizes the Claimant's testimony that he had been trained on the Safety Rules and at the time of the incident was obeying Core Safety Rule 1.0. The Claimant asserted that he was alert and attentive while performing his duties.

The Organization reminds that the Board that Bradfield, who was present at the incident, acknowledged that he did not comply with Safety Rule 1.1 or Rule S-1.2.7 and that another Mechanic was working with him up the track whom he could have asked to help him back up his truck. It pointed out that the Truck Driver/Mechanic testified that he did not ask anyone to help guide him while backing his vehicle. In contrast to the eyewitnesses, who established the Claimant's alertness and the Truck Driver/Mechanic's negligence, the Organization argues that Carrier employees provided only assumptions and conclusions about what they deduced or assumed occurred, but offered no testimony based directly on their observing the incident.

Because both the Claimant and the Truck Driver/Mechanic were charged in the same Investigation, the Organization also contends that the Claimant cannot tell what he was charged with (as opposed to what the Truck Driver/Mechanic was charged with) so that he could not properly defend himself.

The Organization argues that the discipline imposed was, in any event, harsh, unwarranted, inappropriate, arbitrary, and capricious. It cites Carrier Rule 40, entitled "Investigations and Appeals" which states, in pertinent part:

"A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held.

* * *

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record."

The Organization urges that the claim be sustained and the discipline rescinded.

****CORRECTED****

**Form 1
Page 9**

**Award No. 40470
Docket No. MW-39979
10-3-NRAB-00003-070187
(07-3-187)**

It was the Carrier's burden to establish by substantial evidence considered in the record as a whole that the Claimant was guilty of the charges against him and that the penalty was not harsh, unwarranted, inappropriate, arbitrary, or capricious.

It is not disputed that the Claimant was struck from behind by the truck while he was performing his duties and that the Truck Driver/Mechanic failed to comply with several Safety Rules which would have likely prevented the accident. The Board notes, as a mitigating factor, the extreme weather conditions under which the employees were operating. However, the Claimant was not being alert and attentive when he stood on the road and failed to pay attention to the moving vehicles around him. The fact that he was struck from behind while on the road is proof of his failure to pay attention. The fact that the Truck Driver/Mechanic was disciplined and/or that the Carrier witnesses lacked first-hand knowledge of the incident is not fatal to the Carrier's case.

Based on a review of the parties' Submissions and the Hearing transcript, the Board is persuaded that the Carrier demonstrated by substantial evidence considered in the record as a whole that the Claimant violated Carrier Safety Rules and that the penalty imposed was not arbitrary or excessive. Accordingly, the instant claim is denied.

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 14th day of May 2010.