

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41388  
Docket No. SG-41363  
12-3-NRAB-00003-100262**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Railroad Signalmen  
(BNSF Railway Company)

**STATEMENT OF CLAIM:**

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of T. H. Brown and R. L. Christensen, for their record to be cleared of any mention of the discipline issued in a letter dated February 17, 2009, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the excessive discipline of a 30-day Level S record suspension without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on January 21, 2009. Carrier compounded this violation by failing to charge the Claimants within the 15-day time limit provisions of Rule 54. Carrier’s File No. 35-09-0007. General Chairman’s File No. 09-011-BNSF-33-K. BRS File Case No. 14360-BNSF.”

**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.

This case arose out of the allegedly improper burial of batteries along the Carrier's right-of-way, in violation of Maintenance of Way Operating Rules 1.4 and 1.6, by a crew of employees supervised by the Claimants. Rule 1.4 requires employees to cooperate and assist in carrying out Rules and Instructions, to report violations, and to report misconduct, negligence, and any conditions that might threaten safe operations. Rule 1.6 admonishes employees not to be negligent or careless. As the Foreman and Lead Signaller, the Claimants had a duty to effectively supervise the employees working under them. According to the Carrier, they failed in that duty and their failure resulted in potential harm to the environment. They were assessed a Level S 30-day record suspension.

In November 2007, the Claimants were supervising a crew that was charged with dismantling existing signal locations and installing new signals on the Emporia Subdivision. The Carrier established protocols for safely disposing of old batteries. Signal Instruction 10.1 states:

"Exhausted primary air cell battery, lead acid battery and nickel cadmium batteries must be brought to the Signal Maintainer's headquarters or other site designated by the Signal Supervisor. Batteries must be placed in containers provided for disposal purposes. Different types of batteries must not be disposed of or shipped in the same containers. Refer to the 'Universal Waste Guidelines' issued by the BNSF's Environmental Engineering Department for additional information."

On November 10, 2007, the Carrier received an anonymous call on BNSF's Hot Line, alleging that signal employees working under a certain Construction Supervisor were burying batteries from old signals instead of properly disposing of them pursuant to Signal Instruction 10.1. BNSF's preliminary investigation, which was completed November 21, 2007, did not confirm the allegations. All of the gang members and the Claimant submitted written statement to the effect that they had not buried any batteries, they had not been ordered to do so, and they had not witnessed anyone burying batteries. The Manager of Signal had crews excavate the nine locations that had been identified, but they found no batteries. The summary in the Client Call Back section dated November 21, 2007 on the Hot Line report concluded:

**“The summation of this investigation shows no evidence that any batteries have ever been buried . . . Follow-up: The Manager of Environmental Operations reviewed a good portion of the signal project that was the basis for the safety call and found the Manager of Signal’s report accurate and complete. Thinking of some of the inaccuracies of the call itself . . . we expanded our environmental investigation to a larger ring beyond the signal project’s disturbed earth to assure nothing was missed.”**

**The Carrier nonetheless decided to investigate more fully and hired an outside environmental contractor, Environmental Works, to excavate at each location that was part of the signal replacement project. In May and again in September and October 2008, Environmental Works examined 17 different signal location sites, some of them twice. It discovered batteries or battery pieces at four sites. From photographs in the record, the batteries at issue appear to be the size of a large automobile battery. For the most part, the batteries found were contained in the debris that was created when entire structures were razed, then buried. Some of the excavation sites were quite large (e.g., 40 feet long by 8 feet wide by 5 feet deep). One battery was visible in the roots of a fallen tree at MP 57.5. A piece of a battery was found at Signal 651-652, and two batteries and a battery box were excavated at MP 84.4. By far the largest discovery was found in the debris of a signal house at the location identified as Signal 781-784:**

**“EWI excavated and removed debris associated with a former signal house (concrete, wood, metal, and cable). Four large bridge foundations were excavated but were returned to the excavation pit to add stability to the rail bed slope. . . . A total of 16 batteries (8 broken and 8 intact) were excavated from the location . . . .”**

**Environmental Works submitted its report to the Carrier on December 9, 2008. Based on the report, BNSF issued a Notice of Investigation to all Signal forces that had been involved in the project, including the Claimants, to determine their responsibility for the violations of Carrier policy.**

**The investigatory Hearing was held January 21, 2009. At the conclusion of the Investigation, the Carrier concluded that the Claimants were negligent in fulfilling their supervisory duties and had failed to ensure that BNSF environmental policies were complied with, in violation of MOW Rules 1.4 and 1.6. It assessed them Level S**

(Serious) 30-day record suspensions with 36-month probation periods. The Organization filed this claim on March 2, 2009, alleging that the Carrier failed to meet its burden of proof and violated Rule 54 of the Agreement when it failed to schedule the Investigation within 15 days of when it first had knowledge of the alleged Rule violation, in May 2008, when EWI found the first battery.

According to the Carrier, the evidence establishes the Claimants' violation of its policies. It exceeds the limits of credulity to suppose that signal employees who reported to the Claimants would have buried batteries on multiple occasions and in multiple locations without direction from, or at least the knowledge of, the Claimants, who supervised them. Where toxic materials are being removed and disposed of, Crew Foremen have the express obligation to ensure that the batteries are not buried (or to report their burial, as the anonymous caller to the Hot Line did). Foremen are expected to ensure that the individuals working under them have properly performed their work, including disposing of batteries. At a minimum, the Claimants were negligent in their supervision of the signal renewal project, in violation of Rule 1.6. The fact that batteries were buried at several different locations suggests a pattern of conduct, and it is strong circumstantial evidence that the Claimants were negligent in performing their supervisory duties. There is no evidence to support the Organization's suggestion that outside contractors buried the batteries. The Claimants' denial of any knowledge puts their credibility at issue, particularly Claimant Brown. He was arrested shortly after the Investigation for the felony theft of various materials from BNSF and reneged on a plea bargain that he made with the Distract Attorney. The Carrier met its burden of proof by amassing substantial evidence of a violation of a Rule or Policy. The only circumstance under which the Board should set aside the level of discipline imposed is if it finds BNSF's actions to have been unreasonable, arbitrary, or capricious. The Organization's argument that the discipline was excessive is not supported by any evidence. Finally, the Investigation was scheduled in a timely fashion. The environmental contractor needed to finish its investigation before the Carrier could determine the facts and the scope of the problem. Environmental Works' report was filed on December 9, 2008. Before that date, the Carrier lacked sufficient knowledge of wrongdoing, and the time limits should be based on the date a responsible Carrier Officer acquired that knowledge. The evidence against the Claimants may be circumstantial, but it is probative and convincing. Accordingly, the claim should be denied.

The Organization contends that the Investigation was not initiated until December 2008, substantially more than 15 days after the Carrier's first knowledge of

buried batteries in August 2008. Nor has the Carrier established through substantial evidence that the Claimants ordered, participated in or had knowledge of anyone else burying batteries at any of the old signal locations. There were other Carrier forces as well as numerous contractors working on the signal replacement project. In particular, the backhoe that the signal crews used on the project could not dig a hole eight feet deep, which is the depth at which the batteries were found, but the track hoe the contractor used could easily dig that deep and deeper. The Carrier has the burden of proof in discipline cases. Here, it offered no proof and acknowledged that it had no real knowledge of how or who may have been involved, or if it was even intentional. Nor could the Carrier prove that the Claimants had been negligent in their supervision of the employees working under them. In fact, neither Claimant was working in the two areas where batteries were found buried. The Carrier's decision to issue a Level S suspension to the Claimants was not supported by substantial evidence and must be overturned.

Arbitral Boards have limited authority to overturn a carrier's disciplinary decisions. As stated by Referee Stallworth in Third Division Award 30124:

“[I]t is well settled that, in reviewing discipline cases, the Board must determine whether there is ‘substantial evidence in support of Carrier's action . . . . When the factual determinations are supported by substantial evidence in the record, the Board will not substitute its judgment for that of the Carrier.’”

In this case, the Board reviewed the evidence in the record and concluded that it does not support the Carrier's decision that the Claimants were guilty of significant violations of MOW Rules 1.4 and 1.6.

It is simply impossible to conclude from the facts in the record that the Claimants authorized or directed their gangs to bury batteries at the old signal locations, or that they had any knowledge that such activity was taking place. All of the employees engaged in the signal replacement denied any knowledge of anyone burying batteries. No one actually saw any batteries being buried. Numerous different crews and outside contractors worked at the various sites. Batteries were found at four sites, but under circumstances that do not establish or even really suggest a pattern. For one thing, 17 sites were excavated, and batteries, or pieces of batteries, were found in only four locations. At one location, a single battery was tangled in the roots of a fallen tree. At another location, only a piece of a battery was

found; in a third location, two batteries and a case. Given the amount of debris that was razed at the various locations, these random bits and pieces do not suggest an ongoing pattern of intentional misconduct. Occasional negligence perhaps; deliberate environmental misconduct, no. At only one location, where an entire signal house had been razed and buried, were there a significant number of batteries, 16 in total. The depth at which the batteries were found – eight feet – raises substantial questions about whether the Carrier's forces could have buried the batteries, because it is not at all clear that their equipment could dig that deep. Speculation and conjecture simply do not meet the standard of "substantial evidence" that the Carrier must meet. The state of the record in this case simply does not support the conclusion that the Claimants deliberately ignored the Carrier's battery disposal policy and ordered them buried.

That being said, as Supervisors, the Claimants did have a responsibility to make reasonable efforts to ensure that the battery disposal policy was being followed by their subordinates, and also by checking the various work locations to make sure that batteries had been removed and safely disposed of before outside contractors came in to dismantle, raze and bury old equipment and construction (or destruction, actually) debris. The fact that a substantial number of batteries were found at one location indicates that the Claimants may not have been quite as diligent as they should have been and were somewhat negligent in the execution of their supervisory duties – but they were not grossly negligent.

The Carrier assessed the Claimants with a "Serious Rule Violation" under Appendix B of the Policy for Employee Performance Accountability (PEPA). The violations listed under Appendix B encompass deliberate and intentional misconduct, not negligence.<sup>1</sup> A Level S suspension was not appropriate for the low-level negligence that the Claimants demonstrated. It should have been treated as a Non-Serious Rule Violation under PEPA, subject to alternative handling or other discipline as set forth in PEPA for Non-Serious Rule Violations. The Level S suspensions shall be removed from the Claimants' personal records, and lesser discipline appropriate for simple negligence substituted.

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<sup>1</sup> Nor were the Claimants guilty of gross negligence warranting immediate dismissal under PEPA's Appendix C.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 25th day of July 2012.