

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41452
Docket No. SG-41716
12-3-NRAB-00003-110290

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall 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 A. Blanco and D. M. Reed, for any mention of this matter to be removed from their personal records, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a 10 day record suspension with a 12 month review period against the Claimants, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on December 15, 2009. Carrier’s File No. 35-10-0007. General Chairman’s File No. 10-005-BNSF-20-C. BRS File Case No. 14509-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 involves two employees who were unloading 150-pound bundles of heating ducts from a storage container underneath a highway overpass. During the course of unloading, one of the employees slipped and fell, causing his end of the bundle to fall on his knee, resulting in an injury.

Both employees were charged with failing to be alert and attentive, in addition to being careless of the safety of themselves or others in the performance of the task. An Investigation was held, after which both employees were assessed 10-day record suspensions for violating the following Maintenance of Way Operating Rules:

“1.1.2 Alert and Attentive

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.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent”

The Organization’s preliminary objection alleges that the Carrier failed to provide the required five-day notice of the disciplinary Investigation to the local Organization representative. This is a requirement of Rule 54 of the Collective Bargaining Agreement. This objection was raised during the Investigation, by the Local Chairman, who was present. The Carrier officer who was conducting the Investigation immediately offered to recess the Investigation so as to afford the Organization adequate time to prepare the Claimant’s defense. In fact, the officer offered an hour, two hours, a day, or five days as options. The Organization declined this offer. The Conducting Officer, at another time during the Investigation, offered a further recess or postponement to enable the Organization to prepare its case. The subsequent offer was, again, refused. The stated reason by the Organization representative at the Investigation for the objection was to give the Organization time to prepare a fair account of the Claimant's actions. Indeed, the Rule itself states that the reason for the five-day notice is to allow the employee ample time to arrange for

representation by a duly authorized representative and for the presence of necessary witnesses he may desire.

While the Board does not take violations of procedural Rules lightly, in the circumstances of this case, the Board holds that the initial failure by the Carrier to give the five-day notice, as required by the Collective Bargaining Agreement, was cured by the actions of the Hearing Officer and the subsequent refusal by the Local Chairman during the proceedings.

The Organization further argued that the Carrier's only witness in the case persuaded injured Claimant Blanco to fill out an accident report form stating that the injury was preventable, even though he had not been to the site, nor had he witnessed the reenactment. The Organization contends that this action constituted predetermination of the Claimant's guilt, in violation of the Carrier's duty to conduct a fair and impartial Hearing.

Conversely, the Carrier asserts that this witness merely provided his view of the happenings.

The Board finds that the view of the Carrier witness was simply that - his view. The Claimants were free to complete the form in any way they so chose.

We therefore turn to the merits of the case.

There is no dispute in evidence before the Board that Claimant Blanco was injured on the worksite when he slipped on an object on the ground and fell, with the pipes hitting his knee. There is also no dispute that the site was poorly lit and had uneven ground. However, the Carrier asserts that employees are often required to perform their work with little or no supervision. It contends that any inadequacies in the safety environment of the worksite should have caused the employees to contact their supervisor, who could then have an opportunity to remedy the situation. It is common ground that no such conversation took place. In response, the Organization contends that the mere fact of an injury does not prove a Rule violation. It provided many Awards to this effect.

The Board agrees that the mere fact of an injury does not prove a Rule violation. However, in this case, when weighing the evidence, the Board faces a difficult call. In considering all the evidence, and the excellent arguments made by

both parties, in this instance, the Board finds that the Carrier met its burden of proof. These employees, working with some degree of independence, had a duty to check the area and ensure that it was safe to work there. In the end, the Board concludes that the Claimants were not sufficiently alert and attentive. With respect to Claimant Reed, however, the Board finds that his culpability is less than that of Claimant Blanco. Claimant Reed was not in as good a position as the injured employee to witness the footing in question. Therefore, the discipline assessed Claimant Reed is reduced from a 10-day record suspension to a five-day record suspension.

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 16th day of October 2012.